IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: NAVY CHAPLAINCY	)	Case No. 1: 07-mc-269 (RMU)
CHAPLAINCY OF FULL GOSPEL CHURCHES,	)	
v.	)	Case No. 1: 99-cv-02945 (RMU)
THE HON. DONALD C. WINTER, et al.	)	

PLAINTIFF CFGC'S REPLY MEMORANDUM IN SUPPORT OF ITS RULE 54(b) MOTION TO ALTER OR AMEND THE COURT'S AUGUST 2000 INTERLOCUTORY DECISION OR IN THE ALTERNATIVE FOR AN ORDER DIRECTING ENTRY OF A FINAL JUDGMENT

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INTRODUCTION

Plaintiff Chaplaincy of Full Gospel Churches ("CFGC") has moved under Fed. R. Civ. P. 54(b) ("Rule 54(b)") to amend the Court's 2000 decision in *CFGC v. Danzig* (original defendant) (the "MTA"). The Court's 2000 Memorandum (the "2000 Mem.") at 10 held CFGC had no standing "in its own right" because "Defendants' alleged activity [*i.e.*, its prejudicial practices and policies toward CFGC] ... is not at 'loggerheads' with the group's mission and does not constitute injury in fact." The MTA cites new Department of Defense ("DOD") regulations defining more clearly CFGC's endorser role and organizational interests, and new evidence demonstrating Defendants' actions, including using denominational favorite hierarchies to award benefits, deny CFGC chaplain applicants chaplain appointments at statistically significantly higher rates than Catholic, Liturgical Protestant, and other Non-liturgical faith group applicants. Defendants apply the same prejudice in accessions to CFGC's promotion candidates. *See* Dr. Leuba's Features Declaration, Tables 2.1, 3, and Figure 5, MTA Exhibit 2. The MTA cited *Chaplaincy of Full Gospel Churches v. England* ("*Chaplaincy*"), 454 F.3d 290 (D.C. Cir. 2006) as new precedent because it defined CFGC's Establishment Clause interest, the harm produced by Defendants' denominational preferences and found Defendants' Establishment Clause violations, if true, produced irreparable harm.

CFGC's unrefuted new evidence of Defendants' preferences for a selected group of favored denominations, the resulting prejudice against CFGC, and *Chaplaincy*'s holdings applied to the new evidence show Defendants' actions are at loggerheads with and harm CFGC's organizational interests, producing injury in fact and standing. The application of controlling organizational standing precedent to the new evidence and circuit law of the case should result in a decision different from the Court's 2000 decision. In the alternative, CFGC asks for a Rule

54(b) certification since the issue of CFGC's standing is a final order and there is no just reason to delay appellate review.

CFGC's MTA explained how the 2000 Mem. shows the Court misunderstood CFGC's organizational mission and purpose. The new evidence clearly shows Defendants' challenged actions are, in fact, at loggerheads with CFGC's organizational mission to place and support Charismatic clergy representing CFGC churches as chaplains in the Navy.

Defendants' opposition (the "Opp.") wrongly claims CFGC's Rule 54 motion is meritless, *id.* at 5-13, and the Court should deny CFGC's request for entry of final judgment, *id.* at 13-16. Defendants' arguments ignore both the facts and the law. Analysis of Defendants' own arguments and admissions shows the Court misunderstood CFGC's mission and the new evidence, DOD's endorsement regulations, and law of the circuit require a different result.

Defendants' arguments in support of their flawed reasoning attempt to mislead the Court both as to the availability of the "new" evidence and the MTA's timeliness. Because these allegations could divert the Court's attention from the real issues at hand, CFGC will first address Defendants' mischaracterizations and false statements.

I. CFGC'S MOTION IS TIMELY AND ITS EVIDENCE IS NEW AND RELEVANT

"[T]he discovery of new evidence not previously available" and new precedent are two criteria under rule 54(b) for altering or amending an order or decision. *Keystone Tobacco, Inc. v. United States Tobacco Co.*, 217 F.R.D. 235, 237 (D.D.C. 2003) (listing criteria for granting a Rule 54(b) motion). CFGC's MTA presents evidence not available when the District Court made its 2000 decision holding CFGC had not suffered injury in fact and had no standing in its own right. This new evidence, in the light of DOD's 2004 new regulatory explanation and definition of "endorsement", would produce a different result under controlling precedent. *See*

MTA at 4, 12-38. CFGC's new evidence shows among other things: (1) Defendants have used a set of favorite denominations to make decisions rejecting CFGC chaplain applicants; (2) CFGC's chaplain applicant acceptance rate is statistically significantly below that of Catholics, liturgical Protestants, and many Non-liturgical faith groups; (3) Defendants' favorite denominations - which do not include CFGC - have statistically significantly higher rates of acceptance than CFGC and other Non-liturgical faith groups; and (4) the same pattern of preference for Defendants' favorite denominations and prejudice against CFGC is evident in promotions.

Faced with this data, Defendants do not show CFGC's statistics are incorrect, its percentages are wrong, or the computation of statistical significance is incorrect. Instead, Defendants attempt to mislead the Court and color its examination of CFGC's MTA with a consistent theme suggesting or falsely claiming CFGCs evidence is not new and CFGC improperly or unreasonably waited eight and a half years to bring its MTA. Opp. at 2 ("purported new evidence"), 5 (Plaintiffs claimed new evidence), 10 ("data long in Plaintiffs' possession"), 15 ("But as we have already explained, what Plaintiffs characterized as 'new evidence' is indeed neither new nor evidence."). Defendants never explain exactly when CFGC should have brought its MTA, how and when CFGC could have anticipated the result of *Chaplaincy,* decided in July 2006, or exactly when the "new" evidence was available, making it "old". Defendants' false claims of old data and delay fail for two reasons. First, Defendants obstructed and delayed producing evidence in discovery necessary for Dr. Leuba's resulting statistical studies and analysis which clearly show Defendants' denominational hierarchy and prejudice. Second, Defendants cannot show CFGC sat on the data and did not file in a timely manner. Defendants' claims are misleading at best or deliberately false.

There are three questions relevant to this issue: (1) when did Defendant's produce the

documents necessary to reach the findings and conclusions in CFGC's expert reports, (2) is it relevant to the matters at hand, and (3) did CFGC unreasonably delay in bringing its MTA? The answers to these questions show Defendants' arguments have no validity and are merely an effort to distract the Court's attention by wrongly and falsely discrediting CFGC. CFGC addresses them first lest Defendants' false assertions color the Court's review of the other issues.

A. Defendants Failed to Provide Critical Accessions Information Until July 2006

Defendants misleadingly argue CFGC's new evidence is not new and CFGC has had it for 81/2 years. Opp. at 2, 5, 10, 15. CFGC's new evidence shows a nexus between the faith group identification of Defendants' Chaplain Accession and Recall Evaluation ("CARE") board members, the frequency of denominational board memberships on such boards, and the results following their review of chaplain applicant records, including CFGC's.[1] Analysis of Defendants' CARE Board records and memoranda shows Defendants used a favorite set of denominations for board memberships and chaplain applicants from those denominations did statistically significantly better than CFGC and other Non-liturgical faith groups. Among those favored board memberships or faith groups who routinely make decisions rejecting CFGC's applicants are denominations historically, doctrinally opposed to CFGC's worship practices and theology. The statistical evidence further shows a similar nexus between the faith group identification of chaplain board members making decisions awarding or denying government

[1] A CARE Board reviews every chaplain applicant's application package and makes recommendations to the Chief of Chaplains (the Chief). CARE board membership was made up exclusively of chaplains until some time after this litigation was filed when one non-chaplain was added unofficially to the Board's membership. There is no record of the Chief ever disagreeing with a Board recommendation concerning a CFGC applicant. In effect, the Board's rejection was final. Defendants' records show few reasons for applicant rejections, e.g., a moral problem or problem with DOD's criteria. These reasons do not apply to CFGC applicants.

benefits for other chaplains, including CFGC chaplains, *e.g.*, promotion and retention decisions, the frequency of their appearance on such boards, and the results of their decisions. In all cases the data shows the denominations favored in board memberships did statistically significantly better than denominations or faith groups who did not have board members or whose board members were not among the favorites, *e.g.*, CFGC.

The facts show Defendants sat on the critical data establishing the above nexus for years, improperly denying timely production. Defendants conveniently forget the information Dr. Leuba, Plaintiffs' expert, used to first establish the above cited nexus between denomination of board members, frequency of appearance, and results on Defendants' CARE boards was not produced until July 14 and 27, 2006, at his deposition in *Larsen v. U.S. Navy*, No. 02cv2005. As Dr. Leuba recounts in his September 27, 2006, *Declaration Withdrawal and Correction* ("W&C"), Exhibit 17 to Plaintiffs' Rule 54(b) Motion, Doc. No. 21 (incorporated by reference), withdrawing and amending his 2005 *Larsen* accessions declaration: "On July 14 [at his deposition] and 27, 2006, I was provided with copies of paper records and electronic files produced by the Navy which I had not seen before." W&C ¶ 2. These records had been given to Defendants' expert, Dr. Siskin, many months before for his use in preparing his report, but had not been produced to the *Larsen* plaintiffs, despite repeated requests, until Dr. Leuba's deposition. *Id*. at 4 n.2.

Examining the records, Dr. Leuba found both he and Defendants' expert "were mislead, misdirected, by the records that the Navy chose to produce and we both treated the data as though (i.e. assumed that) they *represented* the accession process" which they did not. W&C ¶ 5. When he prepared his 2005 Declaration addressing what he thought were accessions (some portions of which he withdrew in his 2006 W&C), "the only data I had been given was an incomplete set of

CARE work sheets. I had been given no CARE Decision Memoranda and no context." W&C ¶ 29c. Dr. Leauba's W&C identifies both the data which gave him context and Defendants' Counsel's questions about specific programs which the prior incomplete records had concealed. "With a sufficient body of data at hand, I was able to see that the Work Sheets dealt with "acdu"[active duty] only, and with further research I was able to unravel/decipher the accession process and its relationship to acdu changes." W&C ¶ 29e. The CARE Board memoranda produced in 2006 identified for the first time the faith group of CARE board members. This identification was critical to establishing Defendants' use of a favored set of denominations for CARE Board memberships and establishing a correlation between these memberships and the resulting bias in the results.

Defendants have ignored the fact it was the 2006 attack by their expert, Dr. Siskin, on Dr. Leuba's analysis, which led Dr. Leuba to publish "The Siskin Conjecture," establishing the Defendants' preferred hierarchy of denominational decision makers and its resulting bias in the benefit decision process. Prior to this time, the research had focused on differences in treatment between faith group categories (FGC). The inclusion of Southern Baptists, a major faith group in the Non-liturgical FGC but one of Defendants' favored denominations, had skewed the FGC statistics, hiding or masking Defendants' prejudice toward non-Baptist Non-liturgical faith groups like CFGC, and allowing Defendants to argue there was no statistical significance in faith group comparisons.

The Rule 54(b) Motion by all chaplain plaintiffs, *In re Navy Chaplaincy*, Doc. No. 21, pp. 16-20 (incorporated by reference) describes Dr. Leuba's sequence of discovery efforts and subsequent results as the data became available. The new data opened up new analyses of the various ways Defendants' prejudice corrupted its chaplain benefit decision process.

Defendants also conveniently forget their recalcitrance and obstruction in providing meaningful discovery material in promotions and retentions. Defendants initially redacted the names of candidates for promotions, active duty continuation (after 3 years), and selective early retirement. *See* Exhibits 1 (promotions) & 2 (SER). Obviously, without the names and denominations of both those considered and those selected, there can be no meaningful analysis. The dispute continued until chaplains' counsel went to San Diego, CA, and obtained copies of the promotion and SER precepts Defendants produced in *Sturm v. Danzig*, 99-cv-2272 (S.D. Cal.). Defendants changed their tactics after the Plaintiffs' counsel explained to Defendants' counsel their conduct was bad faith in light of their previous discovery production.

CFGC regrets using the Court's time to detail Defendants' recalcitrant conduct, but Defendants' irresponsible allegations with the obvious purpose to discredit CFGC's MTA could not reasonably or responsibly be ignored.

B. CFGC's New Material is Relevant

Defendants' theme in opposing CFGC's MTA is the new material, *i.e.,* statistical evidence, DOD regulations, and *Chaplaincy's* holding on irreparable harm, is not relevant. Opp. at 2, (" Plaintiffs' purported new evidence - in general, the opinion testimony of the proffered expert witness - is irrelevant"); 10 ("none of that opinion testimony - even assuming arguendo that it is admissible as the product of proper statistical analysis - is remotely relevant to whether the Court's opinion of August 17, 2000, should be altered"); 14 (cited DOD Directives are not relevant). Like Defendants' other assertions, this has no basis in fact or law. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. In every case, the new evidence is relevant: the

material tends to make the existence of facts showing harm to CFGC, *i.e.*, injury in fact, more probable. This is of consequence to the determination whether the Court should amend or alter its 2000 decision.

CFGC's new statistical evidence supports its allegations Defendants' religious prejudice was the reason for denying CFGC its opportunity and right to represent its member churches to the Navy, subverting CFGC's organizational goals. Defendants' attack this new evidence as "opinion testimony", Opp. at 2 &10, but fail to address two facts. First, it is now incorporated into CFGC's 4th Amended Complaint, hereafter the "4th AC", and presumed to be true unless shown otherwise. Second, Defendants have failed to show Dr. Leuba's statistics, based on the numbers of candidates reviewed and rejected by the various boards, the board membership numbers of the various faith groups derived from Defendants' records, and the resulting percentages in various statistical categories are wrong. The Court was previously impressed with the chaplain Plaintiffs' presentation of "hard statistics" to support their claims. *See Adair v. England*, 183 F.Supp.2d 31, 56 (D.D.C. 2002) ("In support of their claim, the plaintiffs provide hard statistics"). "In this case the court determines that the statistics the plaintiffs cite are indeed well-pled factual allegations." *Id.* Defendants provide no authority or rationale for reaching a different conclusion. As shown below, these "well-pled factual allegations," applied to CFGC's fundamental organizational mission and programmatic concerns, show Defendants' adverse actions are at loggerheads with CFGC's organizational mission and have injured in fact CFGC.

The 2004 DOD regulations are relevant to whether the Court in 2000 properly understood the full scope, meaning and implications of DOD Instruction (DODI) 1309.28's clear definition of "endorsement." As II.A explains below, endorsement is more than filling out a form. Endorsement is the process of representing a church, faith group or religious organization to the

Navy and other military services when a candidate applies for appointment and after he/she is appointed as a chaplain. This is relevant to the question whether that definition, applied to the evidence or the presumption CFGC's allegations are true, would lead to a finding Defendants' actions, designed to keep CFGC from representing its churches before the Navy, was in "direct conflict with [CFGC's] fundamental purpose," *see* Opp. at 12 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982)). DOD's new regulations show Defendants' actions were and are in direct conflict with CFGC's "fundamental purpose" and mission, to represent its member churches to the Navy.

Defendants' attack on the relevancy and importance of *Chaplaincy's* finding, Opp. at 10-11, ignores the fact irreparable harm is injury in fact. The standard for irreparable harm is higher than the injury necessary for standing. *See Assoc. of Gen Contractors of Cal., Inc. v. Coal for Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991), *cert denied,* 503 U.S. 385 (1992). Defendants ignore the fact *Chaplaincy* also defines the injury resulting from Defendants' unconstitutional denominational preference in CARE and promotion board memberships. The harm is the message Defendants communicate to CFGC, the target of Defendants' living messages of preference and prejudice. *Chaplaincy*, 454 F.3d at 302. Defendants' harmful actions are directed at CFGC, whose worship practices and theology offends and is contrary to the CARE and promotion board members. *See* 4th AC ¶ 102 ("Many Baptists strongly or violently disagree with CFGC members' charismatic worship practices and theology."). *Chaplaincy,* 454 F.3d at 302, is relevant precedent because it defines the harm Defendants' message and actions inflict on CFGC.

C. CFGC's Motion to Amend and New Material Are Timely

Defendants incorrectly suggest throughout their Opposition CFGC's Motion is untimely, that it should have been brought years earlier. Opp. at 2, 8, 15. Defendants fail to address

exactly when CFGC should have brought its motion and presented its new material. DOD published its new regulations at the end of 2004. As shown in A above, Defendants have forgotten or ignored the fact they did not provide critical CARE Board and accessions material until July 2006, allowing Dr. Leuba to establish toward the end of 2006 and 2007 both a hierarchy of Defendants' favorite denominations and the results in terms of favoritism and prejudice flowing from Defendants' use of denominational favorites as decision makers.

Chaplaincy was decided in mid-2006, but because the issue involved an injunction and irreparable harm, the parties devoted their attention to that issue. In June 2007, the Court consolidated *CFGC* and *Adair* with *Gibson v. U.S. Navy* into the present case, further delaying the *Chaplaincy* injunction issue. The Associated Gospel Churches ("AGC"), a *Gibson* plaintiff, like CFGC attacks Defendants' use of chaplains on boards awarding or denying benefits because (1) Defendants have used a favorite set of faith groups as board members, and (2) the delegation of discretionary civic power to persons defined by their denominational identity fuses civic and religious power, contrary to the Establishment Clause. *Compare* 4th AC ¶¶ 157-162, and *Gibson* AC, ¶¶ 3.b (AGC) and 36 (addressing CARE Boards). The *CFGC* and *Adair* Plaintiffs have moved to alter or amend the Court's *Adair* 2002 decision, 183 F.Supp.2d at 60-61, on two issues addressing chaplains' nature when serving on selection boards. Defendants have subsequently attacked AGC's (and CFGC's) ability to challenge such delegation. *CFGC* and *Adair* plaintiffs subsequently moved to amend their complaints to align them with *Gibson* and its new evidence, incorporating the new statistical evidence therein. The Court approved those amendments.

In opposing Defendants' subsequent Motion for Judgment on the Pleadings, CFGC's counsel stated CFGC would move to alter or amend the Court's 2000 decision, the logical result following the Court's approval of CFGC's 4th AC. MTA at 2-3 (explaining basis for motion).

In denying Defendants' opposition to CFGC's 4th AC, the Court followed well-established precedent holding there is no time limit on such amendments, provided such amendment does not prejudice defendants or the delay is unreasonable. The burden to show both prejudice and unreasonable delay rests with Defendants; they show nothing here. Accordingly, the Court should ignore Defendants' baseless allegations and empty rhetoric.

II. CFGC'S PETITION MEETS RULE54(b) REQUIREMENT AND AMENDING IT IS IN THE INTEREST OF JUSTICE

Defendants agree "to confer standing on an organization, an injury-in-fact must represent the product of an activity in direct conflict with the organization's fundamental purpose." Opp. at 11-12 (citing *Havens Realty*, 453 U.S. at 378). Analysis of the 2000 decision, especially as interpreted by Defendants, shows the Court misunderstood CFGC's organizational purpose, to place Christian charismatic clergy in the Navy chaplaincy and support them throughout their careers as Navy chaplains so Christian charismatic Navy personnel would be able to worship in accord with their faith group practices and beliefs. The undisputed evidence shows the defendants' activities are and have been "in direct conflict with [CFGC's] fundamental purpose."

A. The District Court's Decision Shows it Misunderstood CFGC's Mission and Organizational Objectives if it Accepted CFGC's Allegations as True

Defendants' first argument is the District Court accepted CFGC's allegations as true, Opp. at 6-9. However, the specific items Defendants cite, *id.* at 7, show either the District Court in 2000 misunderstood CFGC's mission and organizational objectives or it did not accept CFGC's allegations as true. Defendants' citation to the District Court's characterization of CFGC's mission and organizational purpose illustrates and exemplifies the District Court's misunderstanding: "CFGC was founded and exists for the purposes of identifying and endorsing 'Low Church' clergy to meet Department of Defense standards for commission as chaplains."

Id. (citing 2000 Mem. at 4). Defendants' and the Court's alleged description of CFGC's mission highlights the District Court's lack of understanding of the complete role, definition, process and requirement of "endorsing." The District Court's decision in the light of the facts it allegedly accepted as true, shows it understood "endorsement" as merely the process of filling out DOD Form 2088, DOD's official endorsement form. Absent from the Court's apparent understanding, as reflected in its decision, is (1) filling out the DOD Form 2088 is only one necessary step in the process, (2) endorsement is more than "sponsorship" as the defendants describe it, Opp. at 8, and (3) the unique worship practices of CFGC churches, 4th AC ¶¶ 2, 6, 17.b, 21, 22, 33.g, 39.b, 66.f, 67, 102, 110, which gives special meaning to the phrase "to represent."

Endorsement is both a constitutional concept and requirement not only for appointment as a chaplain but for a continued career as one; it is a unique Establishment Clause requirement for the military. The new regulations CFGC cites define endorsement as the authority to represent specific faith groups, including their worship practices and beliefs, to the military services. Merely filling out the form does not satisfy CFGC's organizational purpose to endorse chaplains, meaning to put charismatic clergy in the Navy as chaplains and thereby "represent" CFGC's independent charismatic churches to the Navy. Nothing in the District Court's 2000 decision indicates it understood endorsement as a critical and integral part of "representing" a unique faith perspective to the Navy, CFGC's core purpose and mission as stated in the Complaint, which Defendants' prejudicial actions prevent.

1. Endorsement is the ability to represent a faith group to the military

"CFGC was founded to endorse as chaplains those clergy who meet the Department of Defense ("DOD") requirements for chaplains and whose religious beliefs reflect those of CFGC member churches." 4th AC, ¶ 3; 2d and 3d Amended Complaint ("2 & 3d AC") ¶

13 (same language). CFGC stated its mission in a manner consistent with its purpose for being formed: "CFGC is an organization formed *to represent* the American citizen members of independent, non-denominational charismatic or 'Full Gospel' churches and fellowships before the Armed Forces Chaplains Board and the military chaplain corps." 4thAC at ¶ 6 (emphasis added); same language in 2d & 3d AC, ¶ 6. Its mission, to represent its member churches before and in the Navy, is fully consistent with and an integral part of DOD's definition of both the function and role of an endorsing agency and DOD's endorsement process and procedures. Simply stated, endorsement is the process that allows clergy to be appointed as chaplains for the purpose of and in order to represent their faith groups or endorsing bodies such as CFGC to the Navy as Navy chaplains, as shown below.

This representation is necessary for DOD to fulfill its constitutional duty "to provide for the free exercise of religion in the context of military service," DOD Directive ("DODD") 1304.19, ¶ 4. DOD has clearly stated its policy concerning the purpose and function of chaplains and the respective chaplain corps: "Chaplaincies of the military departments: Are established to advise and assist commanders in the discharge of their responsibilities to provide for the free exercise of religion in the context of military service as guaranteed by the Constitution...." *Id.* and ¶ 4.1. DODI 1304.28 implements DODD 1304.19 "identif[ying] the educational and ecclesiastical requirements for appointment of military chaplains," ¶ 1.3, and explaining and defining DOD's endorsement requirement and criteria. "To be considered for appointment to serve as a chaplain, an RMP [religious ministry professional] shall receive an endorsement from a qualified Religious Organization verifying "[DOD's] requirements for RMPs are met", ¶ 6.1.

DOD defines RMP as: "An individual endorsed *to represent* a religious organization and to conduct its religious observances or ceremonies." *Id.* at ¶ 2.1.9 (emphasis added). DOD

defines endorsement as: "The internal process that Religious Organizations use when designating RMPs *to represent* their Religious Organizations to the Military Departments and confirm the ability of their RMPs to conduct religious observances or ceremonies in a military context." *Id.* at ¶ E2.1.7 (emphasis added). The consistent, key word and essential concept expressed in DOD's regulations, and key to its endorsement scheme is "represent." Chaplains are RMPs or qualified clergy appointed as chaplains to represent their faith groups and/or religious organizations. As CFGC and the other plaintiffs have alleged, chaplains are clergy appointed as faith group representatives on loan from their faith communities to the military services. *See* ¶ 2, Declaration of AFCB Executive Director, Chaplain (COL) Cecil Richardson, USAF, for the DOD defendants, including the Navy, in *Rigdon v. Perry*, 962 F.Supp. 150 (D.D.C. 1997) (Exhibit 3). A Catholic chaplain represents the Catholic Church to the Navy, just as a Southern Baptist chaplain represents the churches of the Southern Baptist Convention and a CFGC chaplain represents CFGC's member independent charismatic churches to the Navy.

Chaplains or RMPs are "on loan" to the respective Armed Forces because the term "loan" indicates the "ownership" of the chaplain resides in the chaplain's endorser or faith group, not the military. All other military officers are effectively "owned" by the military services. The Navy recognizes the unique status of chaplains as denominational representatives because the Navy excuses chaplains from the duties associated with exercise of the sovereign's will given to all other officers. Secretary of Navy Instruction ("SECNAVINST") 1730.7B, Subj: Religious Ministry Support Within the Department of the Navy, ¶ 4, specifically states:

> In accordance with Article 1063 of [Navy Regulations, 1990], chaplains shall be detailed or permitted to perform only such duties as are related to ministry support. Chaplains shall not bear arms. Chaplains shall not be assigned collateral duties which violate the religious practices of the chaplain's faith group, require services as director, solicitor, or treasurer of funds other than administrator of a Religious

> Offering Fund, serve on a court-martial or stand watches other than that of duty chaplain.

All other officers bear arms and serve as duty officers, but "Chaplains shall not be assigned collateral duties which violate the religious practices of the chaplain's faith group."

10 U.S.C. § 643 (Separation of chaplain for loss of professional qualifications) statutorily emphasizes and establishes the nature of the chaplain's role as a faith group's representative on loan to the military. If a Religious Organization or endorsing agency determines one of its chaplain representatives to the military no longer accurately represents the endorsing organization and withdraws its endorsement, § 643 requires the Navy to separate the chaplain from the Chaplain Corps.[2] The Navy must follow certain procedures and protocols to separate a naval officer depending on whether the officer is a Regular or Reservist, but as shown above, a chaplain *must* be separated if his or her endorser withdraws its approval to allow the chaplain to represent the endorsing faith group or body.

DODI 1304.28, ¶ 6.5, "Administrative separation of chaplains upon loss of professional qualification", implementing § 643, explains the process and illustrates and reinforces the purpose and nature of chaplain appointments, to represent their endorsing body. It defines "loss of professional qualification" as "a chaplain [who] loses ecclesiastical authority to function as an RMP or has ecclesiastical endorsement to serve as a chaplain withdrawn," *id*., meaning the RMP/chaplain's religious organization has determined the chaplain no longer represents it appropriately or adequately. The Religious Organization's endorsement, in this case CFGC, is a certification the RMP is authorized to represent CFGC and its churches to the Navy. Although

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[2] *Klingenschmitt v. Winter*, 375 Fed. Appx. 12 (D.C.Cir. 2008), an unpublished decision, upheld the mandatory nature of a Navy chaplain's discharge after losing his endorsement. It is cited as an example Defendants' representation of § 643's mandatory nature, not for authority.

CFGC's endorsement is recorded on a DOD Form 2088, filing a 2088 is not the objective of CFGC because the 2088 means nothing and CFGC's mission is incomplete unless the Navy accepts CFGC's chaplain candidate.

"Endorsement" has no utility or function outside of the chaplain appointment process and chaplaincy context. The Navy's rejection of a CFGC chaplain applicant is, in fact, a rejection of CFGCs endorsement and therefor a rejection of CFGC's attempt to represent its churches to the Navy. Likewise, failure to promote a CFGC chaplain based on religious prejudice and separation therefor, is the Navy's rejection of CFGC's representation before the Navy.

2. The Constitution requires the Navy to provide a chaplaincy

Congress has provided for chaplains almost from the Navy's beginning. *Katcoff v. Marsh*, 755 F.2d 223, 231-34 (2d Cir. 1985), found a military chaplaincy was a constitutional requirement and must comply with the Constitution. *Katcoff* rejected a constitutional challenge that Congress's funding the Army Chaplain Corps impermissibly entangled the government and religion. The court noted that military service realities restricted soldiers' ability to exercise their First Amendment Free Exercise rights, *id.* at 228 ("mobile, deployable nature of our armed forces"), causing conflict with the Establishment Clause's neutrality mandate that the government neither hinder nor establish a religion. "[I]f the Army prevented soldiers 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 (emphasis added). *Katcoff* then held the Army chaplaincy was a constitutional necessity, Congress's necessary and required accommodation of competing Constitutional commands, in order to allow soldiers to exercise their Free Exercise Clause right to practice their freely chosen religion regardless of

where the Army might send them.

> It is readily apparent that [the Free Exercise] Clause, like the Establishment Clause, obligates Congress, upon creating an Army, to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them. Otherwise the effect of compulsory military service[3] could be to violate their rights under both Religious Clauses of the First Amendment. Unless the Army provided a chaplaincy it would deprive the soldier of his right under the Establishment Clause not to have his religion inhibited and of his right under the Free Exercise Clause to practice his freely chosen religion.

Id. at 234. *See also id*. at 237 (citing congressional hearings on necessity for military chaplains and, "[t]he purpose and effect of the [chaplaincy] is to make religion ... available to military personnel under circumstances where the practice of religion would otherwise be denied as a practical matter to all or a substantial number.").

3. The concept that endorsement allows a chaplain *to represent* his faith group or religious body is unique to the military but required by the Constitution

The phrase "to represent their Religious Organizations to the Military Departments" in DOD's definition of endorsement has special meaning here. Representation is a unique but necessary constitutional concept for the Chaplain Corps. A Navy attorney or doctor does not represent his bar or medical association to the Navy. A line officer does not represent his college, university, home town or any other organization or body. But chaplains are endorsed to represent their endorsing bodies' religious beliefs and practices to the Navy, a requirement the Constitution mandates.

[3] "Compulsory military service" in the context of the decision and discussion refers to orders to deploy or relocate which are compulsory. The draft, which made military service compulsory, ended in 1972, years before *Katcoff* was filed. The Court's discussion cannot be affected by whether military service is compelled or voluntary since government employment cannot be conditioned on the surrender of a constitutional right.

A CFGC chaplain must represent CFGC and its member churches to the Navy, *i.e.*, to Navy personnel, not only because the chaplain is by definition a CFGC representative, but because the Navy, as a government organization, may not actively involve itself "in religious activity." *See Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987). Although the Navy may provide facilities, the time, and pay the chaplain in order to accommodate the religious practices of its personnel, *see id.* and 2 above, it is not the Navy which is providing the religious service, but the faith group representative appointed as a chaplain to represent his church to the Navy. That is why DOD is very careful to define a chaplain as a faith group representative who represents the chaplain's endorser/faith community to the Armed Services for the purpose of providing religious services and ministry. A CFGC chaplain is CFGC's representative to the Navy. CFGC's mission, stated in its complaint, is to find, qualify and provide clergy from its charismatic churches to represent its member churches to the Navy, enabling charismatic naval personnel to freely exercise their religion as guaranteed by the Free Exercise Clause. CFGC's purpose parallels and supports DODD 1304.19's policy and performs a service which DOD itself cannot provide.

DOD's requirement to provide chaplains suitable for military personnel to freely practice their individual religions raises another constitutional dilemma for DOD. That is who determines which religious persons/clergy are suitable or appropriate to minister to the variety of faith groups, denominations, and religious organizations reflected in the Armed Forces. Determining who is suitable to conduct a faith group's services, teach, or otherwise provide religious ministry for a faith group's military members would impermissibly entangle government in purely religious activities and doctrinal issues. The Establishment Clause prohibits the government from making this determination, as several court decisions discussed below have found.

DOD established the concept and practice of endorsement to avoid entanglement in religious matters in two aspects. First, endorsement leaves the question of who is qualified to represent religious groups to the military to the respective religious groups themselves. Second, endorsement defines the role and function of chaplains as faith group representatives who represent their faith group to the military. This avoids the appearance of entanglement when chaplains, who are also military officers, conduct religious services. *See Rigdon,* 962 F.Supp. at 159 ("The content of [chaplains'] services and counseling bears the imprimatur of the religious ministries to which they belong."), *id.* at 159-60 ("regulations contemplate chaplains act as representatives of their religions when conducting services or performing rituals"). As indicated above, the ability of endorsers to withdraw their endorsement at any time for any reason is a necessary condition of keeping the government neutral on the question of who represents a faith group. The endorsement process and concept has survived several constitutional challenges.

Turner v. Parsons, 620 F. Supp. 138 (E.D. Pa. 1985), rejected an unsuccessful Veteran Administration (the "VA") chaplain applicant's challenge to the VA's endorsement process, similar to and modeled on DOD's. The plaintiff Catholic priest's religious society supervisor approved his application to be a VA chaplain but "the Military Vicariate, a central [endorsing] agency of the Catholic Church, did not grant its endorsement." *Id*. at 139. He challenged the VA's deference to the Military Vicariate, arguing "the government's requirement of prior church approval of chaplaincy candidates permits excessive entanglement between church and state relations", violating the third test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *Id*. at 141. The court adopted and applied the logic of *Katcoff* to the VA's chaplain system while distinguishing *Larkin v. Grendel's Den Inc*., 459 U.S. 116 (1982). It found *Larkin* involved the Court's "refusing to allow a church to control matters which are primarily secular." *Id*. at 142.

The case before the court involved religious matters: "In the matter before me, there is a requirement that a church endorse a person who will represent the church to servicemen and servicewomen." *Id*. (emphasis added).

> For this court to decide who may or may not represent a certain religion would be for this court to go to the heart of religious organizations and their beliefs and impermissibly interfere in their operations. I cannot conceive of any greater interference or entanglement a government could launch than to dictate who may or may not represent their religious faith to its flock. Moreover, if this were to be done, it would change or interfere with the expectations the followers of a certain religious faith may have, as the government would be the party which would determine who will lead the flock.

Id. The court concluded "I hold, as a matter of law, that for the government to determine who is qualified from the various religious faiths to lead the flock of Catholicism would be for the government to impermissibly interfere or entangle itself in religion." *Id.* at 143. *See also, Murphy v. Derwinski*, 776 F.Supp. 1466, 1471-72 (D.Col. 1991) (rejecting Establishment Clause challenge to VA's endorsement system by female applicant rejected for position of Roman Catholic chaplain at a VA hospital).

4. CFGC's allegations, if taken as true, show it has been injured because Defendants' activities are at loggerheads with CFGC's organizational goals and programmatic concerns

If the District Court understood DOD's definition of endorsement as faith group representation to the Navy and accepted as true CFGC's allegations, the District Court in 2000 would have had to conclude Defendants' activities were at loggerheads with CFGC's mission and organizational goal to represent its churches to the Navy. CFGC's goal can only be realized when the Navy appoints CFGC's applicants as chaplains, *i.e.*, the Navy accepts CFGC's endorsement and appoints CFGC RMPs as chaplains. CFGC alleges the Navy unlawfully rejects CFGC's endorsement because of the worship practices of CFGC's member churches. The new evidence

supports that allegation and defendants provide no neutral, secular reason for the large number of CFGC rejections, evidence of the effect of Defendants' hostile actions.

Defendants correctly acknowledge that injury in fact requires "more than a conflict - or a mere setback - discrete and programmatic concerns must be directly affected by the defendant's conduct." Opp. at 8 (citing 2000 Mem. at 8-9). The Defendants state: "the Court concluded that the alleged discrimination in this case did not go to the heart of CFGC's fundamental purpose as an organization." *Id.* at 9, *see also id.* at 11 n.2 ("the acts of discrimination alleged by [CFGC] even if accepted as true do not directly conflict with the core purpose of CFGC."). Defendants' explanation and argument proves CFGC's position. Defendants' actions, as established by the data, are designed to keep, and have kept, CFGC applicants from representing CFGC and its churches to the Navy. Their unlawful rejections subvert and attack the heart of CFGC's core purpose, representing CFGC churches to the Navy as the DOD Regulations explain. The objective of the *Havens Realty* organizational plaintiff was to put people in homes; CFGC's purpose it to put its clergy in the Navy to represent CFGC churches.

The following Defendants' statement shows their confusion about the 2000 Decision: "unlike the organizational plaintiffs in *Havens Realty*, CFGC is not at its core structured to ensure equal protection for Non-liturgical chaplains or chaplain candidates; rather, any efforts CFGC has expended to offset or mitigate the effects of alleged discrimination against the chaplains or chaplain candidates are 'tangential' to its core function: the sponsorship of clergy for service as military chaplains." *Id.* at 8 (citing 2000 Mem. at 9-10). The 2000 Mem. at 15-17 (not at 9-10) dismissed CFGC's "Race and Gender" issues. This is not related to the Court's denial of standing. Equal opportunity is a constitutional right, which CFGC was not accorded when presenting its chaplain candidates. The new evidence shows CFGC was injured by Defendants'

failure to treat it in a neutral and equal manner when evaluating its candidates for appointment. Rejection of CFGC applicants is not tangential to its mission.

Defendants' argument about "zone of interest", Opp. at 11 n.2, misses the mark. *Chaplaincy* defined the "interest" the Establishment Clause protects, 454 F.3d at 302. Defendants' actions have invaded that interest. The Establishment Clause zone of protected interest extends to accessions and other challenged actions. *See Adair v. England*, 217 F.R.D. 7, 14-15 (D.D.C. 2002) (Court will apply strict scrutiny); *Adair*, 183 F.Supp.2d at 52-53 (same).

B. The New Material Shows Defendants' Actions are at Loggerheads with CFGC's Concerns and Core Purpose

While the District Court's misunderstanding of CFGC's organizational purpose may be gleaned from its words denying CFGC standing and the facts it allegedly accepted, the issue before the Court is whether the new material and precedent would lead to a different result.

Most of CFGC's new evidence is now in its 4th AC. If this is taken as true, CFGC has been injured, as shown above in A. DOD defines endorsement as to represent a religious organization, *i.e.*, CFGC, to the Navy. CFGC's new evidence shows Defendants' challenged practices keep CFGC chaplain applicants out of the Navy so CFGC cannot represent its churches to the Navy. This puts Defendants actions at loggerheads with CFGC's core purpose, to put CFGC clergy in the Navy, causing CFGC to incur financial losses, *e.g,* its recruiting and processing costs are lost due to Defendants' illegal actions. *See* 4th AC ¶ 39. *Chaplaincy*'s definition of Establishment Clause injury flowing from Defendants' religious preferences, and the resulting prejudice to CFGC, further establishes CFGC has been injured in fact.

C. Amending the 2000 Decision Is in the Interests of Justice

This action is now in its 10th year. The evidence shows Defendants have established

denominational preferences to award or deny chaplain appointments, a government benefit, and those preferences have harmed CFGC. This Court has already held it will apply strict scrutiny to such preferences. *Adair*, 217 F.R.D. at 14-15. The issue of Defendants' CARE Board procedures is readily addressed by summary judgment, which would resolve a major issue in this litigation, advancing the case. It would also remove a major obstacle to CFGC's mission of providing qualified CFGC charismatic clergy to the Navy, a function DOD has delegated to CFGC.

III. IN THE ALTERNATIVE, A RULE 54 (b) FINAL JUDGMENT IS APPROPRIATE

CFGC, in the alternative, has requested a "final judgment as to the standing of CFGC to bring suit on its own behalf, allowing Plaintiffs[4] [sic - CFGC] to immediately appeal that ruling to the D.C. Circuit." Opp. at 13. Although Defendants object to this, Opp. at 13-16, and cite the proper authority and criteria for such a ruling, *id.* at 13-14, they provide no substantive reason why the Court should not grant CFGC's motion, and why there is just reason for delay. Defendants do not contest the fact that if the Court denies CFGC's MTA, the CFGC standing issue would be a final judgment. The whole thrust of Defendants' argument, Opp. at 5-12, is the Court should deny CFGC's MTA, because the Court's 2000 decision should was proper.

As to the equities why "there is no just reason for delay," *see Cooper v. First Government Mortgage & Investors Corp.,* 216 F.R.D. 126, 127 (D.D.C. 2002) (quoting Rule 54(b) and citing *Curtis-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8 (1980)), Defendants incorrectly suggest "there is no harm of Plaintiffs [sic] by delay until all the claims are decided," Opp. at 14; CFGC has not brought its MTA "in a timely fashion," *id.* at 15; CFGC's new evidence "is neither 'new' nor 'evidence,'" *id.*; and without explanation, there would be overlap "between the question

[4] Defendants frequently refer to "Plaintiffs" in the plural. The motion addresses CFGC as an organization and no other plaintiff.

of CFGC's direct organizational standing and the remaining claims of all Plaintiffs," *id.* at 16. Defendants provide no support for their baseless assertions.

The Janus-like nature of Defendants' argument is evident in their previous argument that chaplains, including CFGC chaplains, cannot challenge Defendants' accession system and CARE boards and their prejudicial results because the chaplains can show no injury since a CARE Board approved them. Defendants argue the other plaintiffs cannot bring this claim. According to Defendants, only CFGC, whose endorsement Defendants rejected or the individual rejected applicants can show harm from the CARE Boards' prejudice. Thus, whether CFGC suffered harm from Defendants' CARE Board prejudice addresses a major claim. This argument shows Defendants "overlap" assertion, Opp. at 16, has no basis or support; Defendants provide no other examples of overlap and present no example or show how or why the Court of Appeals would have to address CFGC's standing issue at a subsequent date.

Defendants have failed to address how the interests of justice are served and furthered by continued delay in addressing their irreparable harm to CFGC and its chaplain applicants which, according to *Chaplaincy*, 454 F.3d at 302, flows from Defendants' message of prejudice from their denominational preferences to CFGC. Defendants have not contested Dr. Leuba's showing a tiered hierarchy or the prejudicial results shown in Features, Tables 2.1, 3, and Figure 5. Granting CFGC's MTA makes the Court an instrument furthering the fundamental purpose of the Federal Rules, "the just, speedy and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. The "first of the Federal Rules of Civil Procedure mandates construing the rest" in a manner to accomplish Rule 1's touchstones. *Wood v. GCC Bend, LLC*, 442 F.3d 873, 882-83 (9th Cir. 2005); *see also Brown Shoe Co. v. United States*, 370 U.S. 299, 306 (1962) (citing the federal procedure "touchstones").

CFGC is on record as not recommending its clergy consider serving as Navy chaplains because of Defendants' prejudice toward CFGC demonstrated in the statistical evidence. 4th AC, ¶¶ 39.a, 114a, 151. Defendants' continued prejudice in the CARE Board process is a barrier to CFGC's core mission, to place clergy representing its churches in the Navy. It is in the interest of justice to resolve the standing issue so CFGC can proceed with its legitimate and important role of doing what DOD and the Navy cannot do, supply chaplains to the Navy to meet the free exercise rights of charismatic Navy personnel. CFGC filed its action in 1999; it will soon be 10 years since CFGC challenged Defendants' prejudice so amply documented in the statistics. This cannot be justice nor in accord with Rule 1.

Defendants' "unreasonable eight year delay" and "old evidence" arguments, Opp. at 15, are answered in I.A & C above. Any delay in analysis is due to Defendants' delay in producing the relevant discovery material until 2006.

CONCLUSION

Defendants Opposition has failed to provide any substantive reason for not granting CFGC's Rule 54(b) Motion to Amend or Alter. CFGC has shown it is in the interests of justice to amend the 2000 decision. Accordingly, the Court should grant the MTA and direct the parties to develop a briefing schedule on the issues appropriate for summary judgment following the Court's amendment to its 2000 decision.

Respectfully submitted,

March 9, 2009 /S/ Arthur A. Schulcz, Sr.

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EXHIBIT LIST

Exhibit	Description of Exhibit
1	Portion of FY 2002 List of Officers in the Competitive Category of Chaplain Corps on the Active-duty List of the Navy in the Grade of Commander Eligible for Consideration for Promotion to the Permanent Grade of Captain
2	30 November 1995 list entitled: Officers in the Competitive Category of Chaplain Corps on the Active-duty List of the Navy in the Grade of Commander Eligible for Consideration for Selective Early
3	Declaration of Armed Forces Chaplain Board Executive Director, Chaplain (COL) Cecil Richardson, USAF, for the DOD defendants, including the Navy, in *Rigdon v. Perry*, 962 F.Supp. 150 (D.D.C. 1997)
4	Declaration of Arthur A. Schulcz, Sr.

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2009, I electronically filed the foregoing **Plaintiff CFGC's Reply to Defendants Opposition to CFGC's Rule 54(b) Motion to Alter or Amend The Court's August 17, 2000 Interlocutory Decision** 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.
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22 JANUARY 2001

OFFICERS IN THE COMPETITIVE CATEGORY OF CHAPLAIN CORPS ON THE ACTIVE-DUTY LIST OF THE NAVY IN THE GRADE OF COMMANDER ELIGIBLE FOR CONSIDERATION FOR PROMOTI0N TO THE PERMANENT GRADE OF CAPTAIN

CONSEC	NAME	SSN	DESIG
0001			4105
0002			4100
0003			4100
0004			4100
0005			4100
0006			4100
0007	Redacted		4100
0008			4100
0009			4100
0010			4100
0011			4100
0012			4100
0013			4100
0014			4100
001$			4100
0016			4300
0017			4100
0018			4100
0019			4105
0020			4100
0021		Redacted	4100
0022			4100
0023	Redacted		4100
0024			4100
0025			4300
0026			4100
0027			4103
0028			4100
0029			4100
0030			4100
0031			4100
0032.			4100
0033		Redacted	4105
0034			4100
0035			4100
0036			4105
0037			4100
0038			4105
0039		Redacted	4100
0040			4100
0041	Redacted		4105
0042			4100
0043			4100
0044			

REDACTED

DEFA4112

Enclosure (1)

In Re Navy Chaplaincy
07-mc-269 (RMU)
Exhibit 1

22 JANUARY 2001

OFFICERS IN THE COMPETITIVE CATEGORY OF CHAPLAIN CORPS ON THE ACTIVE-DUTY LIST OF THE NAVY IN THE GRADE OF COMMANDER ELIGIBLE FOR CONSIDERATION FOR PROMOTION TO THE PERMANENT GRADE OF CAPTAIN

CONSEC		SSN	DESIG
	IN ZONE		
	BELOW ZONE		
0083			4105
0084			4100
0095			4100
0086			4100
0087			4100
0088			4100
0089			4100
0090			4100
0091			4100
0092			4100
0093			4105
0094			4100
0095			4100
0096			4100
0097			4100
0098			4100
0099			4100
0100			4100
0101			4100
0102			4100
0103			4100
0104			4100
0105			4100
0106			4100
0107			4105
0108			4105
0109			4100
0110			4105
0111			4100
0112			4100
0013			4100
0114			4100
0115			4105
0116	GWALTNEY PHILLIP EDWIN		4100
0117			4100
0118			4100
0119			4100
0120			4100
0121			4100
0122			4100

REDACTED

DEF A 4114

In Re Navy Chaplaincy
07-mc-269 (RMU)
Exhibit 1

30 NOV 1995

OFFICERS IN THE COMPETITIVE CATEGORY OF CHAPLAIN CORPS ON THE ACTIVE DUTY LIST OF THE NAVY IN THE GRADE OF COMMANDER ELIGIBLE FOR CONSIDERATION FOR SELECTIVE EARLY RETIREMENT

CONSEC	DESIG
0001	4100
0002	4100
0003	4100
0004	4100
0005	4100
0006	4100
0007	4100
0008	4)00
0009	4100
0010	4100
00)1	4300
0012	4100
0013	4105
0014	4100
REDACTED- 0015	4100
0016	4100
0017	4100
0018	4100
0019	4100
0020	4100
0021	4100
0022	4100
0023	4100
0024	4100

Enclosure (I)

DEF A 02727

In Re Navy Chaplaincy
07-mc-269 (RMU)
Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Father Vincent Rigdon, et al.	)	
	)	
Plaintiffs,	)	Case Number 1:96CV02092
	)	
v.	)	Judge: Charles R. Richey
	)	
Dr. William J. Perry, et al.	)	Deck Type: Civil General
	)	
Defendants.	)	

DECLARATION OF CHAPLAIN CECIL R. RICHARDSON

1. I am Chaplain, Colonel, Cecil R. Richardson, USAF. I serve in the Office of the Secretary of Defense, in the Department of Defense ("DoD"), as the Executive Director of the Armed Forces Chaplains Board ("Chaplains Board"). The Chaplains Board is composed of the three chiefs of chaplains of the Military Departments (Army, Navy, and Air Force), the three deputy chiefs, and myself. The Chaplains Board's primary function is to advise the Secretary of Defense on religious, ethical, and moral issues related to the Military Services and policies for the protection of religious guarantees under the First Amendment.

2. Chaplains are clergy persons who are selected and credentialed through a process of endorsement by their faith

In Re Navy Chaplaincy
07-mc-269 (RMU)
EXHIBIT 3

communities to provide professional ministry within the armed forces. Chaplains are "on loan" from and remain fully accountable to their faith communities. Chaplains are able to function within the military only through the ongoing endorsement of their faith community. Thus, chaplains serve as representatives of the variety of religious traditions within the United States.

3. The principal purpose of the military chaplaincy is to satisfy the needs of military members and their families and thus to provide for the free exercise of religion by members of the armed forces, the morale of military members, and the strength of our national defense. Chaplains engage in activities designed to meet the religious needs of a pluralistic military community. In addition to providing worship services, they provide moral and religious education, pastoral counseling, family support, crisis intervention, community services, cultural activities, and humanitarian programs. Chaplains must be trained to minister and survive wherever there are military personnel, including in combat zones.

4. Chaplains are members of the armed forces and are fully accountable to their Military Service. Upon appointment as an officer in the armed forces, a chaplain is subject to the same discipline and training as is given to other officers. Except

for the fact that they have "rank without command," they are commissioned officers with all of the rights, privileges, responsibilities, and restrictions that attend a military commission. As members of the armed forces, chaplains are also personnel of the Federal government and are subject to many of the laws and regulations that govern Federal personnel.

5. No statute or DoD regulation or policy prevents a chaplain from discussing any moral issue in connection with preaching, counseling, or other religious duties.

6. I am familiar generally with the circumstances of the information to Army, Navy, and Air Force Catholic chaplains concerning participation in the Catholic Church's "Project Life Postcard Campaign."

6.a. Reverend Monsignor Aloysius R. Callaghan of the Roman Catholic Archdiocese for the Military Services, in a May 29, 1996 letter, informed Catholic chaplains of the postcard campaign, which was sponsored jointly by the National Committee for a Human Life Amendment and the Secretariat for Pro-Life Activities of the National Conference of Catholic Bishops. According to the May 29 letter, on the weekend of June 29th and 30th, 1996, Catholics around the country were being asked to sign postcards urging their Senators and Representatives to vote to override the

President's veto of HR 1833, known as the Partial Birth Abortion Act. The letter suggested that the Catholic chaplains ask their parishioners to be part of this effort, and provide them names and addresses of legislators. Monsignor Callaghan provided a copy of the "project postcard" with the letter and suggested the chaplains copy it and provide the copies to their parishioners.

6.b. On June 7, 1996, the United States Air Force Chief of Chaplains Service sent out a message to all Major Command Chaplain offices that reminded chaplains of the restrictions on political and lobbying activities by members of the Armed Forces that are contained in DoD and Air Force directives, and informed them that those restrictions preclude chaplains from participating or encouraging others to participate in the postcard campaign. The message from the Chief of Chaplains Service requested that the information be disseminated further to all senior chaplains.

6.c. On June 21, 1996, Rear Admiral Holderby, Jr., Deputy Chief of Chaplains of the United States Navy, issued a memorandum for the Major Claimant Staff Chaplains for immediate and wide distribution within each claimancy. The memorandum described the postcard campaign and the political activities and lobbying restrictions on Armed Forces personnel. Chaplain Holderby informed chaplains that Navy personnel may not participate

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 22, 1996.

Cecil R. Richardson
Chaplain, Colonel, USAF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: NAVY CHAPLAINCY	)	Case No. 1: 07-mc-269 (RMU)
CHAPLAINCY OF FULL GOSPEL CHURCHES	)	
v.	)	Case N0. 99cv2945 (RMU)
THE HONORABLE DONALD C. WINTER, et al.	)	

Pursuant to 28 U.S.C. § 1746, I, Arthur A. Schulcz, Sr, declare as follows:

1. My name is Arthur A. Schulcz, Sr. I am the counsel of record for the plaintiff Chaplaincy of Full Gospel Churches ("CFGC") in these now consolidated cases. I have personal knowledge of and am competent to testify to the matters addressed herein.

2. This declaration addresses the authentication of Plaintiff CFGC's exhibits in this Reply to defendants' Opposition to CFGC's Motion to Amend the Court's 2000 Decision denying CFGC standing.

3. Exhibits 1 and 2, as described below, are scanned copies of documents defendants produced in discovery in *Adair & CFGC v . England*. In the scanning process for Exhibits 1 and 2, and the Optical Character Reading ("OCR") conversion to word processing necessary to convert the document to a pdf file, the words "Redacted" which are not arranged in the original with the normal lines of text have been changed in location. Some other minor changes in words occurred and are not susceptible to precise relocation due to incompatibilities between the OCR process and the word processing system. The Exhibits' headings, CONSEC numbers, and Bates Numbers are as shown on the original. The documents have no chaplain names with one exception. Unscanned copies of the documents will be provided the Court as a courtesy copy.

4. Exhibit 1 is a scanned copy of a copy of part of the FY 2002 Captain Chaplain Promotion Board Report made to the Secretary of Navy reporting on the Promotion Board results. It is dated 22 January 2001 and entitled: OFFICERS IN THE COMPETITIVE CATEGORY OF CHAPLAIN CORPS ON THE ACTIVE-DUTY LIST OF THE NAVY IN THE GRADE OF COMMANDER ELIGIBLE FOR CONSIDERATION FOR PROMOTION TO THE PERMANENT GRADE OF CAPTAIN. The originals were produced in discovery and have the Bates Numbers A 4112 and 4114. It is supposed to list the persons considered by the Board, above, in and below zone. The Names, with one exception, have ben redacted.

5. Exhibit 2 is a copy of part of the FY 1996 Commander Chaplain Selective Early Retirement Board Report made to the Secretary of Navy reporting on the Board results. It is dated 30 November 1995 and entitled: OFFICERS IN THE COMPETITIVE CATEGORY OF CHAPLAIN CORPS ON THE ACTIVE-DUTY LIST OF THE NAVY IN THE GRADE OF COMMANDER ELIGIBLE FOR CONSIDERATION FOR SELECTIVE EARLY RETIREMENT. The original was produced in discovery and has the Bates Numbers A 02727 It is supposed to list the persons considered by the above Board. The Names have ben redacted

6. Exhibit 3 is a copy of the Declaration of Chaplain (COL) Cecil Richardson, USAF, as Executive Director of the Armed Forces Chaplains Board in the case of *Rigdon v. Perry*, 962 F.Supp. 150 (D.D.C. 1997) on behalf of the Department of Defense defendants, including the Navy. Plaintiff's counsel obtained it from the *Rigdon* plaintiffs' counsel.

7. Exhibit 4 is the declaration of Arthur A. Schulcz, Sr.

This testimony is true to the best of my knowledge and ability, it is made under penalty of perjury and reflects the testimony I would give if called to testify in a court of law.

March 9, 2009

/S/
Arthur A. Schulcz, Sr.
Counsel for Plaintiff CFGC