No. 17-955

In the Supreme Court of the United States

FURNISS HARKNESS, PETITIONER

v.

RICHARD V. SPENCER, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that petitioner's challenge to his military duty assignments is not justiciable.

2. Whether the court of appeals erred in holding that the Navy's officer promotion board procedures, as applied to chaplains, do not violate the Establishment Clause.

3. Whether the court of appeals erred in upholding the district court's refusal to grant discovery beyond the administrative record.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 838 F.3d 437. The opinion of the district court (Pet. App. 1b-63b) is reported at 174 F. Supp. 3d 990.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2017. A petition for rehearing was denied on August 17, 2017 (Pet. App. 32a-33a). On October 20, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including December 29, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Chaplains have served in the Navy since at least the Revolutionary War. See *In re England*, 375 F.3d 1169, 1171 (D.C. Cir. 2004), cert. denied, 543 U.S. 1152

(2005). Today, Navy chaplains "accommodate the religious needs of sailors and Marines by providing religious services, counseling, and support." *Ibid.* In addition, they offer "ethics instruction and critical incident debriefings, and advise commanders on religious, moral, and ethical issues." *Ibid.* "A Navy chaplain's role within the service is 'unique,' involving simultaneous service as clergy or a 'professional representative[]' of a particular religious denomination and as a commissioned naval officer." *Ibid.* (quoting Office of the Chief of Naval Operations, U.S. Dep't of the Navy, *OPNAV Instruction 1730.1, Chaplains Manual* 1-2 to 1-3 (Oct. 1973)) (brackets in original). Thus, in addition to satisfying the "normal physical and educational requirements to become a commissioned officer," *ibid.*, "a Navy chaplain must possess specialized theological qualifications as well as a current ecclesiastical endorsement from the denomination she represents," 727 F.3d 465, 467.

At all relevant times, the Navy divided its chaplains for personnel management purposes into four general "Faith Group Categories"—Roman Catholic, Liturgical Protestant, Non-Liturgical Protestant, and Special Worship. 727 F.3d at 467; see *England*, 375 F.3d at 1172. The "Liturgical Protestant" Faith Group Category "primarily includes those protestant denominations that trace their origins to the Protestant Reformation and whose religious services are characterized by a set liturgy or order of worship, including the Lutheran, Episcopal, Methodist, and Presbyterian denominations." *England*, 375 F.3d at 1172. The "Non-Liturgical Protestant" Faith Group Category includes "protestant denominations 'without a formal liturgy or order in their worship service' whose clergy do not wear religious dress during

services, comprising the Baptist, Evangelical, Pentecostal, Bible, and Charismatic churches." *Ibid.* The "Special Worship" Faith Group Category includes Christian Orthodox, Jewish, Muslim, and Mormon chaplains. *Ibid.*

b. Navy chaplains are promoted according to the statutes and regulations that generally govern officer promotions within the armed services. See 10 U.S.C. 14101 *et seq.* (reserve officer promotions).[1] Officers must be considered for promotion by an annual promotion selection board made up of "five or more officers," including at least one member of the officer's "competitive category" or "component." 10 U.S.C. 14102(a)-(c). The Chaplain Corps constitutes one such competitive category or component. See *England*, 375 F.3d at 1173.

Before 2003, chaplain promotion boards consisted of four or more officers from the Chaplain Corps, and at least one officer who was not a chaplain. See *In re Navy Chaplaincy*, 738 F.3d 425, 427 (D.C. Cir. 2013), cert. denied, 135 S. Ct. 86 (2014). Since 2003, chaplain selection boards have consisted of seven members: two chaplains "nominated without regard to religious affiliation," and five other officers. Office of the Secretary, U.S. Dep't of the Navy, *SECNAV Instruction 1401.3A*, Encl. (1), ¶ 1.c.(1)(f) (Dec. 2005); see *Navy Chaplaincy*, 738 F.3d at 427; Pet. App. 3a. The senior member of the board

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[1] Like other officers, Navy chaplains may serve in either active duty or reserve status. The statutory provisions regarding promotion for each status are similar, but not identical. Compare 10 U.S.C. 611 *et seq.* (active-duty officer promotions), with 10 U.S.C. 14101 *et seq.* (reserve officer promotions). Because petitioner primarily challenges promotion decisions made while he served as a reserve chaplain, see Pet. App. 4a-5a, this brief generally cites the provisions governing reserve officer promotions.

may be appointed as board president. Office of the Secretary, U.S. Dep't of the Navy, *SECNAV Instruction 1420.1B*, ¶ 13.b (Mar. 2006). By statute, all members of the board must take an oath to perform their duties "without prejudice or partiality." 10 U.S.C. 14103.

The board recommends for promotion to the next higher grade those officers the board "considers best qualified for promotion within each competitive category," giving due consideration to the service's needs for officers with particular skills. 10 U.S.C. 14108(a). In making this determination, the board considers, *inter alia*, "the percentage of officers the board may recommend from the list of eligible officers," "[s]kill [g]uidance" "relating to the needs of the Navy * * * for officers with particular skills in each competitive category," and the "pertinent records of each officer to be considered by the board." *SECNAV Instruction 1420.1B*, ¶ 13.d (emphasis omitted). As relevant here, the board's recommendations for promotions are considered by the Secretary of the Navy and then transmitted to the Secretary of Defense. 10 U.S.C. 14109-14111; see Exec. Order No. 13,358, 3 C.F.R. 228 (2005) (delegating President's statutory authority to approve promotions of reserve duty officers to Secretary of Defense).

c. An officer who is not recommended for promotion is "considered to have failed of selection for promotion" to the next higher grade. 10 U.S.C. 14501(a). Congress has provided an "elaborate" and exclusive administrative review process for such an officer to challenge the non-promotion decision. 727 F.3d at 469; see 10 U.S.C. 14502 (2012 & Supp. IV 2016). The officer may petition the Secretary to grant a "special selection board" (SSB) that will determine whether the officer should have been promoted that year. 10 U.S.C. 14502(a) and (b)

(2012 & Supp. IV 2016). In deciding whether to convene an SSB, the Secretary must determine whether the original board's action was "contrary to law in a matter material to the decision of the board or involved material error of fact or material administrative error," or whether the "board did not have before it for its consideration material information." 10 U.S.C. 14502(b)(1)(A) and (B) (2012 & Supp. IV 2016); see *SECNAV Instruction 1420.1B*, ¶ 24.b. The Secretary has determined that certain types of error, including constitutional error, are per se material. *SECNAV Instruction 1420.1B*, ¶ 24.e(3)(b).[2]

If the Secretary convenes an SSB, it reviews the officer's file *de novo*, as if it were being considered in the year of the original board. 10 U.S.C. 14502(b)(3) (Supp. IV 2016). If the officer is placed on the promotion list as a result of a recommendation by the SSB, the officer is appointed to the next higher grade in accordance with the law and policies that would have been applicable at the time of the original promotion board and receives back pay. 10 U.S.C. 14502(e).

If the Secretary declines to convene an SSB, or if the SSB denies a promotion, the officer may seek judicial review in district court. The Secretary's decision not to convene an SSB may be overturned only if it was "arbitrary or capricious, not based on substantial evidence, or otherwise contrary to law." 10 U.S.C. 14502(h)(1). In that event, the court must remand to the Secretary for an SSB to consider whether the officer should be promoted. *Ibid.* If the Secretary has convened an SSB, its

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[2] Although board deliberations generally are confidential, 10 U.S.C. 14104(a), the Secretary may in his sole discretion waive the nondisclosure requirement if appropriate during an investigation regarding whether to grant an SSB, 10 U.S.C. 14104(b)(3).

decision may be overturned only if it was "contrary to law or involved material error of fact or material administrative error." 10 U.S.C. 14502(h)(2). As relevant here, the court then remands the matter to the Secretary for reconsideration by a new SSB. *Ibid.*

An officer may invoke this judicial-review scheme only after exhausting any claims before the Secretary. See 10 U.S.C. 14502(g)(1); 727 F.3d at 470. Active-duty officers are exempt from this requirement if they challenge the "validity of any law, regulation, or policy relating to" promotion boards. 10 U.S.C. 628(i)(1). There is no corresponding exemption for challenges brought by reserve officers. See generally 10 U.S.C. 14502 (2012 & Supp. IV 2016).

2. Petitioner Furniss Harkness is a now-retired Navy Reserve Chaplain. Pet. App. 4a. He entered active duty in 1987, endorsed by a non-liturgical Christian church, the Disciples of Christ. *Ibid.* Petitioner took reserve status in 1995. *Ibid.*

Petitioner and the Navy have been engaged in litigation for more than 17 years. In 2000, petitioner and 16 other non-liturgical Protestant chaplains sued the Navy, alleging that it had engaged in systemic discrimination against them because of their religious affiliation, including in the decisions of Navy active-duty promotion boards. Pet. App. 5a (citing *Adair* v. *England*, 183 F. Supp. 2d 31, 38 (D.D.C. 2002)); see 727 F.3d at 468. That litigation, which has been appealed to the D.C. Circuit numerous times, remains pending in the United States District Court for the District of Columbia. Pet. App. 5a (citing *In re Navy Chaplaincy*, 170 F. Supp. 3d 21 (D.D.C. 2016)).

After petitioner left the active service and took reserve status, he was considered for promotion annually

(when eligible) by reserve officer promotion boards. As relevant here, petitioner was not promoted by the board in 2007, and the Secretary denied his request for an SSB. Pet. App. 5a. In 2010, petitioner challenged that denial in district court, but the court held that petitioner had failed to exhaust his constitutional challenge to the Navy's chaplain promotion procedures. See *ibid.*; No. 10-cv-2868, 2011 WL 3902756, at *11-*12. The court of appeals affirmed. 727 F.3d at 472.

In 2012, while that litigation was pending, the Secretary agreed to convene an SSB to reconsider the 2007 promotion board's decision. Pet. App. 5a-6a. The SSB did not select petitioner for promotion. *Ibid.* The Secretary then denied petitioner's request for a second SSB to review that decision. *Id.* at 6a. Separately, a new promotion board considered petitioner in 2013 but did not select him for promotion. *Ibid.* The Secretary denied petitioner's request for an SSB to reconsider that decision. *Ibid.*

3. Petitioner filed this lawsuit in December 2013. Pet. App. 6a. As relevant here, he challenged on statutory and constitutional grounds the Secretary's decision not to convene a second SSB in 2012 to review the decision of the first SSB regarding the 2007 promotion board's decision, as well as the Secretary's decision not to convene an SSB to review the decision of the promotion board in 2013. *Id.* at 6a-7a. Petitioner also argued that the Navy had denied him certain duties and assignments in retaliation for his past litigiousness. *Id.* at 7a.

The district court dismissed petitioner's retaliation claim for lack of subject-matter jurisdiction, Pet. App. 8b-12b, and granted summary judgment to the Secretary on petitioner's statutory and constitutional challenges to the Secretary's refusal to grant a second SSB

in 2012 and a first SSB in 2013, *id.* at 28b-61b. The court also denied petitioner's motion for partial summary judgment on his constitutional challenge to the Navy's procedures, *id.* at 42b-56b, and denied his request for discovery beyond the administrative record on the decisions of the SSBs, *id.* at 12b-28b.

4. The court of appeals affirmed. Pet. App. 1a-29a.

First, the court of appeals held that petitioner's claim that he was denied various duty assignments in retaliation for his past litigiousness against the Navy was not justiciable. Pet. App. 8a-12a. The court relied on this Court's decision in *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), which held that although a doctor conscripted into the army was required to receive assignments within the general medical field, courts lacked the power to review the specific duties assigned to him within that field. *Id.* at 92-94; see Pet. App. 9a. Acknowledging petitioner's argument that *Orloff* does not bar all constitutional claims regarding duty assignments, the court of appeals alternatively applied the justiciability test articulated by the Fifth Circuit in *Mindes* v. *Seaman*, 453 F.2d 197 (1971), which considers "the nature and strength of the plaintiff's challenge; the potential injury to the plaintiff of withholding review; the degree of anticipated interference with the military function; and the extent to which military expertise or discretion is involved." Pet. App. 10a (citing *Mindes*, 453 F.2d at 201-202). The court concluded that petitioner's claim was not justiciable under *Mindes* because it "lack[ed] * * * detail and clarity"; in light of the discretionary nature of the assignments and petitioner's retirement, he had suffered "no injury—past, present, or future—that could be obviated by judicial review"; and "[d]uty assignments lie

at the heart of military expertise and discretion." *Id.* at 11a-12a.

Second, the court of appeals upheld the Secretary's decisions not to convene a second SSB in 2012 and a first SSB in 2013. Pet. App. 12a-26a. As relevant here, the court rejected petitioner's Establishment Clause challenge to the promotion board procedures. *Id.* at 15a-16a. Because those procedures do not facially prefer one religion over another, the court applied the Establishment Clause test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). Pet. App. 17a-18a. The court concluded that a reasonable observer would not view the chaplain promotion system as an endorsement of religion for several reasons: the statute requires that chaplains serve on promotion boards because they are officers in the same competitive category as the chaplains being considered for promotion; members of the promotion boards vote anonymously; and the Navy uses the same procedures for chaplain promotion boards that it uses for other officer promotion boards. *Id.* at 20a-21a.

Relying on the D.C. Circuit's decision in *Navy Chaplaincy*, 738 F.3d at 427, the court of appeals rejected petitioner's argument that certain statistical studies nonetheless demonstrate an Establishment Clause violation. Pet. App. 20a-23a. As the court explained, petitioner "primarily" relied on outdated statistics "cover[ing] a period that ended fifteen years ago, when the composition of promotion boards" was different. *Id.* at 21a. Moreover, "even assuming that [petitioner's] data is relevant," the finding that a disparity in promotion rates based on denomination was "statistically significant" meant only that the disparity could not be attributed to pure chance. *Id.* at 22a (citing *Navy Chaplaincy*, 738 F.3d

at 431). Petitioner's statistics did not address other potential "confounding factors—such as[] promotion ratings, education, or leadership skills" that could explain the disparity. *Ibid.* Thus, petitioner's statistics could not "reasonably" cause an observer to "perceive government endorsement of religion." *Ibid.*

The court of appeals also rejected petitioner's alternative Establishment Clause argument that the Navy had improperly delegated governmental authority to a religious body without effective guarantees of neutrality. Pet. App. 24a (citing *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982), and *Board of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687 (1994)). The court explained that, unlike in *Larkin* where churches were given a standardless power to veto liquor licenses for nearby establishments, the activity of chaplain promotion boards is governed by statute and administrative directives that are secular and neutral. *Id.* at 25a. And unlike the delegation of authority in *Grumet*, where the State created a special school district for a Jewish sect, chaplains serve on promotion boards not because of their religious affiliation but because they are Navy officers "evaluating the secular qualifications of their fellow officer[s]." *Id.* at 26a.

Finally, the court of appeals upheld the district court's decision not to permit discovery beyond the administrative record. Pet. App. 27a-29a. The court explained that review of the Secretary's decisions regarding SSBs and promotions is generally limited to the administrative record, and no exception applied because petitioner had not shown that the Secretary had deliberately or negligently excluded evidence from the record or acted in bad faith. *Id.* at 28a-29a. Instead, petitioner had simply failed to include in his SSB petitions

additional information he now sought to raise. *Ibid.* The court also rejected petitioner's argument that his constitutional claims "cannot be decided on the administrative record." *Id.* at 27a n.9 (citation omitted).

ARGUMENT

Petitioner renews (Pet. 19-50) his contentions that the district court should have exercised jurisdiction over his retaliation claim; that the Navy's procedures for chaplain promotion boards violate the Establishment Clause; and that the district court should have permitted discovery beyond the administrative record. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or of another court of appeals. To the contrary, the decision below is in accord with the D.C. Circuit's decision considering similar claims brought by petitioner and other plaintiffs. See *In re Navy Chaplaincy*, 738 F.3d 425, 427 (2013), cert. denied, 135 S. Ct. 86 (2014). Further review is not warranted.

1. a. Petitioner contends (Pet. 19-24) that the court of appeals erred in affirming the dismissal of his First Amendment retaliation claim. In particular, petitioner argues that the courts below should have exercised jurisdiction over his claim that, in retaliation for his litigiousness, the Navy denied him "various duty assignments," including "a recorder position on promotion selection boards, an assignment working on the 2010 National Boy Scout Jamboree, a training position at Naval Region Europe, and various APPLY board positions." Pet. App. 7a-8a.[3]

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[3] The APPLY Board, more formally known as the National Command and Senior Officer Non-Command Screening and Assignment

The court of appeals correctly rejected that argument. As a threshold matter, although the lower courts did not address the issue in these terms, see Pet. App. 8a, 11b, petitioner has retired and does not seek damages for the allegedly wrongful denial of the past duty assignments. It therefore appears that he lacks a redressable injury as required by Article III. See, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

In any event, as the court of appeals explained, "[a]lthough some military personnel decisions are indeed reviewable, courts are generally reluctant to review claims involving military duty assignments." Pet. App. 8a (citations omitted). The "seminal case," *id.* at 9a, is *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), in which this Court held that it could not review the specific duties assigned to a conscripted doctor, so long as those duties were within the general medical field, *id.* at 92-94. *Orloff* reflects that courts "lack * * * expertise" regarding military assignments; that "deference" is due "to the unique role of the military in our constitutional structure"; and that significant "practical difficulties * * * would arise if every military duty assignment w[ere] open to judicial review." Pet. App. 8a; see *Orloff*, 345 U.S. at 93-94.

Petitioner attempts to distinguish *Orloff* as having "addressed no constitutional issues or illegal acts." Pet. 22. But petitioner cites no authority for his view that courts must intervene in internal military affairs whenever a plaintiff raises a constitutional claim. In-

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Board, possesses "delegated authority to appoint officers to Selected Reserve billets" pursuant to guidance from the Commander of the Navy Reserve Forces Command. *Antonellis* v. *United States*, 723 F.3d 1328, 1330 (Fed. Cir. 2013).

deed, *Orloff* rejects that argument. In addition to challenging his duty assignments, the petitioner there contended that the Army's decision not to grant him a commission was "punish[ment] for [his] having claimed a privilege which the Constitution guarantees"—the privilege against self-incrimination. 345 U.S. at 91. Yet the Court declined to compel the Army to issue a commission, concluding that "[w]hether Orloff deserves appointment is not for judges to say." *Id.* at 92; see *Sebra* v. *Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986) (holding that due process claim arising out of military transfer was not justiciable).

b. In any event, the court of appeals did not rely solely on *Orloff* or hold that constitutional claims regarding military duty assignments are never reviewable. Instead, like "other circuits," Pet. App. 10a, the court applied the Fifth Circuit's decision in *Mindes* v. *Seaman*, 453 F.2d 197 (1971), which provides a four-factor test for determining when a plaintiff's constitutional challenge to "internal military affairs" is justiciable, *id.* at 201. Petitioner does not dispute (Pet. 23-24) the merits of the court of appeals' conclusion that petitioner's claim is unreviewable under *Mindes* because it "lack[s] * * * detail and clarity"; petitioner alleges "no injury * * * that could be obviated by judicial review"; and "[d]uty assignments lie at the heart of military expertise and discretion." Pet. App. 11a-12a.

Instead, petitioner contends that the court of appeals' application of *Mindes* violated the "cross-appeal rule." Pet. 23 (capitalization and citation omitted). In particular, petitioner notes (*ibid.*) that in a prior order, the district court denied the Secretary's motion to dismiss petitioner's retaliation claim for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),

see Pet. App. 65b-67b, and the Secretary did not appeal from that decision. Accordingly, petitioner asserts (Pet. 23-24) that the court of appeals could not rely on the insufficiency of his claim to hold that it lacked jurisdiction.

Petitioner's argument lacks merit and does not warrant this Court's review. A court of appeals may affirm on any ground supported by the record, and a victorious party in district court need not cross-appeal if the party is not seeking to expand the judgment in its favor. *Jennings* v. *Stephens*, 135 S. Ct. 793, 798 (2015); see, *e.g.*, *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984) ("[W]e may affirm on any ground that the law and the record permit and that will not expand the relief granted below."). Here, the relevant portion of the district court's judgment was its dismissal of petitioner's retaliation claim for lack of jurisdiction. Pet. App. 12b. The court of appeals did not expand that portion of the judgment; it simply affirmed it.[4]

Nor is petitioner correct that the court of appeals' decision conflicts with the prior order of the district court. The court of appeals' jurisdictional ruling was not based solely on the insufficiency of petitioner's factual allegations. See Pet. App. 9a-12a. Instead, it turned on *all* of the *Mindes* factors, including that petitioner, a retired chaplain, lacks a significant or judicially remediable injury, that duty assignments "lie at the heart of military expertise and discretion," and that judicial review of "every such assignment" would have "a deleterious effect" on military operations and overall preparedness. *Id.* at 12a.

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[4] Contrary to petitioner's suggestion (Pet. 23), the government addressed *Mindes* in the court of appeals. See Gov't C.A. Br. 24.

2. Petitioner further contends (Pet. 24-36, 45-50) that the court of appeals erred in rejecting his Establishment Clause challenges to the Navy's promotion board procedures. Petitioner's arguments lack merit, and the decision below does not conflict with any decision of this Court or of another court of appeals.

a. i. Petitioner first challenges (Pet. 24-36, 48-50) the denial of his 2012 and 2013 SSB requests.[5] Consistent with the D.C. Circuit's decision in the *Navy Chaplaincy* litigation, the court of appeals here held that because the Navy's promotion board policies do not differentiate among religions, petitioner's Establishment Clause challenge is governed by *Lemon* v. *Kurtzmann*, 403 U.S. 602, 612-613 (1971). Pet. App. 17a-18a; see *Navy Chaplaincy*, 738 F.3d at 430. Under that test, the challenged government practice must "(1) have a 'secular legislative purpose,' (2) have a 'principal or primary effect . . . that neither advances nor inhibits religion,' and (3) not result in 'excessive government entanglement with religion.'" Pet. App. 19a (quoting *Lemon*, 403 U.S. at 612-613). Because petitioner challenged the Navy's procedures under only the second *Lemon* prong, the court of appeals focused its analysis on "whether a reasonable observer acquainted with the text, history, and implementation of the challenged procedures would

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[5] As the court of appeals explained (Pet. App. 16a n.6), "[a]lthough [petitioner] appears to frame his Establishment Clause claim as a general challenge to the Navy's chaplain promotion procedures," standing and statutory-exhaustion requirements limit his challenge to the Secretary's decisions to deny SSBs in 2012 and 2013. Petitioner's argument is thus best construed as contending that the Secretary should have convened the SSBs because the promotion panels' decisions were "contrary to law" insofar as the composition of the panels, and the scoring system they employed, violated the Establishment Clause. *Ibid.*; see Pet. 25.

view them as a government endorsement of religion." *Ibid.* (citation and internal quotation marks omitted). Again consistent with the D.C. Circuit's decision, see *Navy Chaplaincy*, 738 F.3d at 430-431, the court of appeals held that a reasonable observer would not view the Navy's procedures as an endorsement of religion; indeed, because "the Navy employs the[same] procedures for other promotion boards, * * * its use of them for chaplain promotion boards cannot be perceived as an effort to endorse religion." Pet. App. 20a.[6]

Petitioner was thus "left arguing, in effect, that a 'reasonable observer, contemplating the *results* of the policies'"—as demonstrated by petitioner's statistics—"'would infer that the government had as a practical matter endorsed' the use of religion in chaplain-promotion decisions." Pet. App. 20a-21a (quoting *Navy Chaplaincy*, 738 F.3d at 430). But like the D.C. Circuit, the court of appeals correctly rejected petitioner's sta-

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[6] Although petitioner couches his challenge as an Establishment Clause claim, see, *e.g.*, Pet. iii, and the court of appeals considered it as such, Pet. App. 15a n.6, it is in essence a claim of religious discrimination: petitioner contends that he was denied a promotion because of discrimination against his non-liturgical Protestant faith, see, *e.g.*, Pet. 32-35. "Where the claim is invidious discrimination in contravention of the First and Fifth Amendments," this Court has "ma[d]e clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 676 (2009). Here, however, petitioner's statistical expert did "not opine that this is intentional, knowing, denominational discrimination on the part of the individual chaplains who have served on selection boards." D. Ct. Doc. 42-4, at 45 (May 21, 2015) (FY2014 Administrative Record 84) (emphasis omitted); see *Navy Chaplaincy*, 738 F.3d at 429-430 (rejecting chaplains' claim of discriminatory intent). Petitioner's claim thus fails even if considered under equal-protection principles.

tistics as unreliable. The court explained that the statistics on which petitioner "primarily" relied concerned actions taken between 1981-2000, when the rules governing the composition of Navy promotion boards were different from the rules that applied to the boards at issue in this case. *Id.* at 21a (citing *Navy Chaplaincy*, 738 F.3d at 431). In particular, pre-2003 promotion boards "consisted of five or more members, only one of wh[om] was *not* a chaplain," whereas post-2003 promotion boards "consisted of seven members, only two of wh[om] *were* chaplains." *Ibid.* This change, the court noted, "largely * * * mitigated" any denominational preference. *Ibid.*

Moreover, the court of appeals agreed with the D.C. Circuit that petitioner's outdated statistics showed only that a denominational disparity was "statistically significant," *i.e.*, it "was not 'due to chance.'" Pet. App. 22a (quoting *Navy Chaplaincy*, 738 F.3d at 431). Petitioner's studies "fail[ed] to control for other confounding factors"—including "promotion ratings, education, or leadership skills"—that could explain the disparity. *Ibid.* (citing *Navy Chaplaincy*, 738 F.3d at 431). "From this ambiguity," the court of appeals concluded, "one could not reasonably perceive governmental endorsement of religion under *Lemon*." *Ibid.*

ii. Petitioner contends (Pet. 25-31) that the court of appeals' decision contravenes this Court's decisions in the Title VII context, which suggest that a statistical analysis that fails to account for all factors other than discrimination may still be admissible and probative of discrimination. See *Bazemore* v. *Friday*, 478 U.S. 385 (1986) (per curiam); *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 309 n.15 (1977). But *Bazemore* rec-

ognized that some statistical analyses could be "so incomplete as to be * * * irrelevant." 478 U.S. at 400 n.10 (Brennan, J., concurring in part). That is the case here, because petitioner's statistics focus on the wrong period and fail to account for a variety of relevant factors. Moreover, as the court of appeals explained, the cases petitioner cites rely on statistical analyses to bolster "other evidence of discrimination in the record." Pet. App. 23a; see *Bazemore*, 478 U.S. at 401-404 (Brennan, J., concurring in part) (discussing additional evidence). Here, however, the record contained no "other evidence" of alleged discrimination. Pet. App. 23a.[7]

b. Petitioner next contends (Pet. 45) that allowing two chaplains to serve on a fellow chaplain's seven-member promotion board delegates governmental authority to those chaplains and "fuse[s] civic and religious power" in violation of the Establishment Clause.

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[7] For similar reasons, petitioner's reliance (Pet. 25) on *Bazemore* and *Hazelwood School District* for the proposition that "old" statistics may be informative is unpersuasive. Those cases state that older statistics may be pertinent "'where relevant aspects of the decision making process had undergone little change,'" Pet. 26 (quoting *Hazelwood Sch. Dist.*, 433 U.S. at 309-310 n.15), but here the "relevant aspects of the decision making process," *ibid.*—specifically, the makeup of the promotion boards—changed beginning in 2003. See pp. 16-17, *supra*. Petitioner's contention (Pet. 27-28) that the decision below is inconsistent with the Sixth Circuit's decision in *Phillips* v. *Cohen*, 400 F.3d 388 (2005), is also mistaken. Like *Bazemore*, *Phillips* held only that on the specific facts of a particular Title VII case, the plaintiff's statistical evidence, when "coupled with" "other evidence in the record," was sufficient to survive summary judgment. *Id.* at 401. And even if *Phillips* and the decision below could be construed as in tension with each other, "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Specifically, petitioner takes issue with the boards' voting system, in which each board member gives each candidate a score of 100, 75, 50, 25, or 0—a system he claims permits a single chaplain to "zero out" another chaplain's chance of promotion. See Pet. 12, 32, 48.

Petitioner bases his argument on this Court's decisions in *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982), and *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687 (1994). But those cases involved materially different regulatory schemes. In *Larkin*, this Court invalidated a statute that "vest[ed] in the governing bodies of churches * * * the power effectively to veto applications for liquor licenses within a 500-foot radius of the church," 459 U.S. at 117, while providing no standards for the exercise of that discretion, *id.* at 125. And in *Grumet*, the Court determined that a statute authorizing the "residents of the 'territory of the village of Kiryas Joel,'" 512 U.S. at 699 (plurality opinion), to operate an independent school district effectively delegated governmental authority to a religious entity, because the village was "owned and inhabited entirely" by members of a religious sect, *id.* at 691 (majority opinion) (citation omitted). *Larkin* and *Grumet*, this Court has explained, stand for the proposition that "a State may not delegate its civic authority to a group chosen according to a religious criterion." *Id.* at 698 (plurality opinion).

The court of appeals correctly determined that the Navy's selection process does not violate that principle. Navy chaplains—who are themselves governmental officers—are appointed to promotion boards pursuant to the Navy's general practice for officer promotion boards, and without regard to denominational affilia-

tion, because they are officers from the same "competitive category" as the chaplains being considered for promotion. Pet. App. 26a (citation omitted). Thus, unlike in *Larkin* and *Grumet*, Navy chaplains receive authority on promotion boards based "on principles neutral to religion"; their "religious identities are incidental to their receipt of civic authority." *Ibid.* (quoting *Grumet*, 512 U.S. at 699). They act not as "religious representative[s]," but instead as "Navy officer[s] evaluating the secular qualifications of their fellow officer[s]." *Ibid.* To that end, board members take an oath to serve without prejudice or partiality, and "Congress and the Secretary have 'articulated secular, neutral standards to guide selection board members in evaluating candidates for promotion.'" *Id.* at 25a (quoting *In re Navy Chaplaincy*, 697 F.3d 1171, 1179 (D.C. Cir. 2012)).

For similar reasons, petitioner errs in suggesting (Pet. 47-48) that the decision below conflicts with the Second Circuit's decision in *Commack Self-Service Kosher Meats, Inc.* v. *Weiss*, 294 F.3d 415 (2002), cert. denied, 537 U.S. 1187 (2003), or the Fourth Circuit's decision in *Barghout* v. *Bureau of Kosher Meat & Food Control*, 66 F.3d 1337 (1995). In those cases, the courts of appeals determined that state and municipal kosher fraud laws excessively entangled government and religion because they delegated governmental authority to religious leaders "on the basis of religion." *Commack Self-Serv. Kosher Meats, Inc.*, 294 F.3d at 429; see *Barghout*, 66 F.3d at 1342 (ordinance was "on its face unconstitutional" because it "vest[ed] significant investigative, interpretive, and enforcement power in a group of individuals based on their membership in a specific religious sect"). By contrast here, Navy chaplains are selected to sit on promotion boards not because of their

religious affiliations, but (like other officers selected to sit on other promotion boards) because they are from the same competitive category as the officers seeking promotion.

3. Finally, petitioner contends (Pet. 37-44) that the court of appeals erred in upholding the district court's refusal to consider evidence that was not present in the administrative record. See Pet. App. 16a n.6; *id.* at 23a, 27a-29a. That decision was correct, and petitioner does not suggest that it conflicts with any decision of this Court or of another court of appeals.

Petitioner primarily contends (Pet. 37, 41-44) that Establishment Clause claims should not be limited to the administrative record. But Congress expressly provided that "[n]o * * * court of the United States shall have power or jurisdiction * * * over *any* claim based in *any* way on the failure of an officer or former officer of the armed forces to be selected for promotion by a selection board" unless those claims are first exhausted before the Secretary. 10 U.S.C. 14502(g)(1) (emphases added); see 10 U.S.C. 14502(h). Congress did not exempt a reserve officer's constitutional challenges from that requirement, see 727 F.3d at 471-472, and petitioner provides no authority for the proposition that because he raised such a challenge, he was not required to fully exhaust his claim, or that review should not be limited to the record before the Secretary. See Pet. App. 27a n.9 ("[T]here is no general bar to reviewing constitutional claims on an administrative record."). Thus, while petitioner was entitled to raise a constitutional challenge to the Secretary's decisions, the court of appeals did not err in upholding the district court's decision to limit petitioner to the evidence presented to the agency.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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