IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REV. DR. MICHAEL NEWDOW, Plaintiff, v. JAMES M. EAGEN, III, Chief Administrative Officer of the Congress; CHRIS BAPTISTE, Payroll Supervisor of the Congress; EMILY J. REYNOLDS,[1] Secretary of the Senate; TIMOTHY WINEMAN, Financial Clerk of the Senate; THE CONGRESS OF THE UNITED STATES; and THE UNITED STATES OF AMERICA, Defendants.	)	Case No. 1:02CV01704 (HHK)

REPLY MEMORANDUM OF SENATE DEFENDANTS IN SUPPORT OF THE CONGRESSIONAL DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

In this *pro se* action, plaintiff seeks to relitigate the constitutionality of the legislative chaplaincies, a question unambiguously settled by the United States Supreme Court, *Marsh v. Chambers*, 463 U.S. 783 (1983), and by the D.C. Circuit *en banc*, *Murray v. Buchanan*, 720 F.2d 689 (D.C. Cir. 1983) (per curiam), twenty years ago. Plaintiff, nonetheless, complains that the existence and public funding of the congressional Chaplaincies violate the Establishment Clause of the First Amendment to the Constitution and Article VI.

[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Secretary of the Senate Emily J. Reynolds is automatically substituted for her predecessor in office, Jeri Thomson, as a defendant in this action.

Defendants moved to dismiss plaintiff's Establishment Clause claim for lack of subject-matter jurisdiction because, as the claim is barred by binding precedent, it fails to raise a substantial constitutional question, and because plaintiff cannot satisfy the irreducible constitutional minimum requirements to establish standing to bring it. Defendants sought dismissal of plaintiff's Article VI claims for lack of standing, for seeking to present a nonjusticiable political question, for invading the protections afforded by legislative immunity, and for failing to state a claim upon which relief can be granted.

None of the reasons set forth in plaintiff's opposition to defendants' motion provides a basis for denying it. This Court, contrary to plaintiff's contentions, lacks the discretion to disregard the appellate precedent mandating dismissal of his Establishment Clause claim. And plaintiff's Article VI claims, putting aside the threshold separation-of-powers doctrines requiring their dismissal, amount to an attempt to relitigate settled Establishment Clause questions under another provision of the Constitution. Accordingly, defendants' motion should be granted, and the complaint should now be dismissed.

ARGUMENT

I. *STARE DECISIS* REQUIRES DISMISSAL OF PLAINTIFF'S ESTABLISHMENT CLAUSE CLAIM FOR LACK OF SUBJECT-MATTER JURISDICTION

The doctrine of *stare decisis* requires dismissal of plaintiff's Establishment Clause claim for lack of subject-matter jurisdiction. *Stare decisis* compels lower courts to "adhere to . . . decided cases," *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 954 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (quoting *Black's Law Dictionary* 1406 (6th ed. 1990)), unless and until they are overruled. Because the United States Supreme Court and the D.C. Circuit *en banc* have squarely upheld the constitutionality of legislative chaplains,

see Marsh v. Chambers, 463 U.S. 783, and *Murray v. Buchanan*, 720 F.2d 689, plaintiff's Establishment Clause challenge, like the challenge to the congressional Chaplaincies in *Murray*, should be dismissed for failure to raise a substantial constitutional question.

Plaintiff concedes that the Supreme Court and the D.C. Circuit *en banc* have decided the Establishment Clause question presented by this case, *see* Compl. ¶ 14 & Plaintiff's Opposing Memorandum of Law in Response to Defendants' Motions to Dismiss (hereinafter "Pl. Opp.") at 1 & 2 n.20, and appears to concede that he is presenting his Establishment Clause claim in this Court only to preserve it for Supreme Court review. *Id.* at 2-3. The required dismissal of plaintiff's Establishment Clause claim will permit him to seek Supreme Court review.

Further in his opposition brief, however, plaintiff appears to argue that this Court is not bound by *Marsh* or *Murray* because those decisions are wrongly decided, are inconsistent with subsequent Supreme Court authority, and – because they were decided in 1983 – are "no longer recent" decisions. *Id.* at 15-27, 31-34. Indeed, plaintiff devotes a number of pages to an exegesis seeking to demonstrate that the Supreme Court was "mistaken" in *Marsh*. *Id.* at 5, 17-26. In such circumstances, plaintiff argues, *stare decisis* is not an "inexorable command" precluding this Court from holding the congressional Chaplaincies unconstitutional. *Id.* at 31-34. None of plaintiff's arguments has merit.

Stare decisis, while not an "inexorable command" that *the Supreme Court* follow its own precedent, is just such a command that the *lower courts* do so. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *id.* at 486 (Stevens, J., dissenting) (stating that majority opinion "correctly acknowledge[d]" that "Court of Appeals . . . engaged in an indefensible brand of judicial activism" by renouncing Supreme Court precedent); *Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) (stating that *stare decisis*

"applies *a fortiori* to enjoin lower courts to follow the decision of a higher court") (emphasis added); *see also* 18 *Moore's Federal Practice* § 134.01[1] (Matthew Bender 3d ed. 2000) (stating that *stare decisis* "*compels* lower courts to follow the decisions of higher courts on questions of law") (emphasis added). That is why all of the authority plaintiff cites (Pl. Opp. at 31-34), involved the reconsideration of precedent *by the Supreme Court*, not by the lower courts.

Contrary to plaintiff's contention, the "obligation" of lower courts to follow the decisions of higher courts "is not dependent on the correctness of the . . . decision." *Brewster v. County of Shasta*, 112 F. Supp. 2d 1185, 1191 (E.D. Cal. 2000). "[U]nless we wish anarchy to prevail within the federal judicial system," *Hutto v. Davis*, 454 U.S. 370, 375 (1982), Supreme Court precedent "must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Id.* Accordingly, "[w]hatever merit" there may be to plaintiff's claimed errors in the reasoning of *Marsh, see* Pl. Opp. at 5, 17-27, "an inferior court cannot disregard it. The Supreme Court retains the exclusive prerogative of overruling its own decisions and until it does so, the lower courts are bound to follow them." *United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars ($639,558) in U.S. Currency*, 955 F.2d 712, 718 (D.C. Cir. 1992).

Nor does the date of the *Marsh* and *Murray* holdings diminish their precedential weight. *See* Pl. Opp. at 2 n.20 & 34 (arguing that lower courts are not required to follow *Marsh* and *Murray* because they are "no longer recent" decisions). Regardless of whether a decision was rendered twenty, *e.g.*, *Marsh* and *Murray*, or two hundred, *e.g. Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), years ago, "[t]here is simply no merit to the proposition that precedent somehow becomes less binding solely with the passage of time." *Seggerman Farms, Inc. v. Commissioner of Internal Revenue*, 308 F.3d 803, 807 (7th Cir. 2002). Supreme Court precedent

must be followed "no matter how old the [precedent] and no matter how much it differs from a judge's view of sound policy." *Automatic Sprinkler Corp. of America v. Darla Environmental Specialists, Inc.*, 53 F.3d 181, 181 (7th Cir. 1995) (reversing district court decision refusing to follow 1846 Supreme Court decision).

No more compelling is plaintiff's contention that *Marsh* and *Murray* may be disregarded because they are inconsistent with subsequent Supreme Court authority. The D.C. Circuit has explained that even where (unlike here) the Supreme Court has explicitly "abandoned the reasoning embodied" in prior precedent, *Ellis v. District of Columbia*, 84 F.3d 1413, 1418 (D.C. Cir. 1996), but not overruled it, "the *only course* open to us is to comply with the rule expressed [by the Supreme Court] in *Rodriguez de Quijas*," *id.* (emphasis added), which states:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Id. (citing *Rodriguez*, 490 U.S. at 484). Unless and "[u]ntil the Court instructs us otherwise, we *must follow*" the binding decisions at issue. *Id.* (emphasis added). So must this Court.

Finally, although unnecessary to the disposition of plaintiff's Establishment Clause claim, it bears emphasizing that there is no foundation for his contention that the "holding" in *Marsh* is "completely incompatible" with 17 subsequent Supreme Court decisions. *See* Pl. Opp. at 1-3 & App. A, thereto. It was only after a thorough examination of the history of legislative chaplaincies, expressly including recognition of Madison's later views, *Marsh*, 463 U.S. at 791 n.12, that the Supreme Court in *Marsh* stated, with "unmistakable clarity," *Murray*, 720 F.2d at 690, that legislative chaplaincies have, throughout our history, comfortably coexisted with principles of disestablishment and religious freedom. *Marsh*, 463 U.S. at 786.

The Supreme Court has never questioned that conclusion. Of the 17 Supreme Court decisions allegedly inconsistent with *Marsh*, Pl. Opp. at 3 & App. A, thereto, none pertained to legislative prayer practices. And none of plaintiff's 61 quotations from those decisions, *id.* at App. A, either referenced legislative prayer or *Marsh*, much less criticized the decision. To the contrary, many of the 17 allegedly inconsistent decisions – in portions of opinions not quoted by plaintiff – examined and relied upon *Marsh* in the process of evaluating whether the challenged practice before the Court violated the Establishment Clause. *See Lee v. Weisman*, 505 U.S. 577, 596-98 (1992); *id.* at 624-26, 630 (Souter, J., concurring); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 602-06 (1989); *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987); *id.* at 597 (Powell, J., concurring); *id.* at 625 (O'Connor, J., concurring); *id.* at 662-65, 669 (Kennedy, J., concurring and dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985); *id.* at 63 (Powell, J., concurring); *id.* at 68, 80-81 (O'Connor, J., concurring); *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985); *Lynch v. Donnelly*, 465 U.S. 668, 674, 679, 682, 686 (1984); *id.* at 692-93 (O'Connor, J., concurring); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 858 (1995) (Thomas, J., concurring).[2] The constitutionality of the congressional Chaplaincies is thus as firmly established today as it was in 1983 when the decisions in *Marsh* and *Murray* were rendered.

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[2] In light of the fact that *Marsh* is firmly established as settled law, it is no surprise that there is absolutely no basis for plaintiff's spectacular claim that "six Justices" in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 313 (2000), "obviously c[a]me to the . . . conclusion" that legislative prayer was unconstitutional. Pl. Opp. at 33-34. The decision in *Santa Fe* did not reference *Marsh* or legislative prayer, and, in fact, pertained to school prayer, which the Supreme Court has repeatedly distinguished from legislative prayer. *See Lee*, 505 U.S. at 597 (describing the "obvious differences" between legislative and school prayer); *id.* at 630 n.8 (Souter, J., concurring) (same); *School Dist. of City of Grand Rapids*, 473 U.S. at 390 (same).

Accordingly, because plaintiff's Establishment Clause claim is foreclosed by prior decisions, principles of *stare decisis* mandate its dismissal for lack of subject-matter jurisdiction.[3]

II. PLAINTIFF'S ARTICLE VI CLAIMS SHOULD BE DISMISSED FOR LACK OF STANDING, NON-JUSTICIABILITY, AND FAILURE TO STATE A CLAIM

Plaintiff has also asserted three claims challenging the congressional Chaplaincies under Article VI of the Constitution. Specifically, plaintiff alleges a violation of the religious test prohibition, Art. VI, cl. 3, *see* Compl. ¶¶ 47-66, the Supremacy Clause, Art. VI, cl. 2, *see* Compl. ¶¶ 67-70, and the Chaplains' oath of office, *see* Compl. ¶ 71. While those claims are nominally brought under different constitutional provisions from plaintiff's Establishment Clause challenge, they are nothing more than a strained and ultimately unsuccessful attempt to evade the application of binding precedent that mandates rejection of plaintiff's challenge to the congressional Chaplaincies. Even taking plaintiff's Article VI claims as separate from his Establishment Clause challenge, those claims should be dismissed because plaintiff lacks standing to raise them, one of them is barred by the political question doctrine and the Speech or Debate Clause, and all three claims fail on the face of plaintiff's allegations to state claims upon which relief can be granted.

A. Plaintiff Has Failed to Establish Standing to Raise His Article VI Claims

1. *The Payment of Federal Salary to the Legislative Chaplains Does Not Establish Taxpayer Standing for Plaintiff's Article VI Claims*

In order to establish taxpayer standing under *Flast v. Cohen*, 392 U.S. 83 (1968), and its progeny, a plaintiff must challenge congressional action under the tax and spending clause of Article I, section 8 of the Constitution, on grounds that it violates the Establishment Clause. As

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[3] In addition, as indicated in our opening memorandum, for reasons explained by the United States in its initial (pp. 8-16) and reply (pp. 1-5) briefs, which we incorporate by reference, plaintiff's Establishment Clause claim should be dismissed for the additional reason that he lacks standing to bring it.

the congressional defendants explained in their opening memorandum, *see* Memorandum of Points and Authorities in Support of the Congressional Defendants' Motion to Dismiss at 18-22 (hereinafter "Cong. Defs. Memo."), plaintiff's Article VI claims, which are directed at the actions of the Senate and House in choosing their respective Chaplains and statements made by the Chaplains in their daily prayers, do not meet the requirements of *Flast* because they challenge actions that: (a) are not "exercises of congressional power," but individual actions of each House, *see Kurtz v. Baker*, 829 F.2d 1133, 1140 (D.C. Cir. 1987); (b) are not accomplished under Congress' tax and spending power but rather under each House's power to choose its "Officers," *see* U.S. Const. art. I, § 2 & § 3 , and to "determine the Rules of its Proceedings," *id.* art. I, § 5, cl. 2; and, (c) do not raise Establishment Clause claims but rather allege violations of Article VI.

Plaintiff offers two arguments in response. First, he argues that his Article VI claims do challenge an exercise of congressional tax and spending power because the Chaplains are paid pursuant to federal legislation enacted by Congress. *See* Pl. Opp. at 11 n.31. This argument lacks merit because the Chaplains' salaries are not linked to the conduct plaintiff's Article VI claims challenge. Plaintiff's Article VI claims do not challenge the spending of federal funds on the Chaplaincies, but rather attack the existence of the Chaplaincies themselves based on the historical election of Chaplains from theistic faiths and on statements made by the Senate and House Chaplains in offering the daily prayers in the Senate and House. None of these actions has any direct nexus with the fact that Chaplains are paid a salary authorized by federal law. While it is true that if the legislative chaplaincies were abolished, no government funds would be expended on salaries for those positions, such an ancillary link between the challenged action and congressional spending is insufficient to establish plaintiff's taxpayer standing to raise his Article VI claims. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974)

(rejecting taxpayer standing of plaintiff challenging constitutionality of Congressmen serving in Armed Forces Reserves, even though Congressmen received federal pay for Reserve service).

Similarly unavailing is plaintiff's argument that his Article VI claims meet the narrow conditions of taxpayer standing because the prohibition on religious tests is effectively subsumed within the protections of the Establishment Clause. *See* Pl. Opp. at 11 n.31. Merely because the protections afforded by Article VI's religious test prohibition in this context overlap with the protections provided by the broader Establishment Clause does not convert plaintiff's Article VI religious test claim into an Establishment Clause challenge for purposes of taxpayer standing under *Flast*. Plaintiff is already asserting a separate Establishment Clause claim; he cannot bootstrap taxpayer standing for his Article VI claims on his Establishment Clause claim.[4]

2. *Plaintiff's Alleged Employment and Stigmatic Injuries Are Not Legally Cognizable Injuries, Traceable to the Individual Congressional Defendants, or Redressable by a Judgment Against the Defendants.*

In addition to taxpayer standing, plaintiff asserts that he has standing to raise his Article VI claims based on allegations that he will be discriminated against in his "application" to be Senate or House Chaplain and that he has been stigmatized by a prayer of the Senate Chaplain. These allegations fail to satisfy the three-part test for standing: injury-in-fact, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

First, as pointed out in the congressional defendants' opening memorandum, *see* Cong. Defs. Memo. at 22-26, neither of these two alleged harms qualifies as a legally cognizable injury. Plaintiff's putative employment injury is not legally cognizable because an individual cannot

[4] Moreover, plaintiff's argument ignores two of his three Article VI claims – the Supremacy Clause claim and the oath of office claim. Certainly those provisions are not "subsumed" into the Establishment Clause.

fairly claim to be harmed by not receiving a position that he seeks to have abolished. Indeed, such conflicting statements – that plaintiff is injured by not being selected Chaplain and that the Chaplaincies are unconstitutional and must be abolished – demonstrate that plaintiff's asserted employment injury is merely a contrived attempt to evade the strictures of Article III and secure a judicial ruling on a constitutional question that interests him. However, "the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast*, 392 U.S. at 96 (internal quotation marks and citation omitted).

Plaintiff's alleged "stigma injury" also fails to demonstrate a concrete and particularized injury-in-fact. Plaintiff asserts that he has been stigmatized as an atheist both by the mere existence of the Senate and House Chaplaincies, which turn him into an "outsider," and by statements of the Senate Chaplain regarding the Pledge of Allegiance that allegedly disrespected plaintiff's religious views. Pl. Opp. at 13-14. However, this Circuit, in a case involving the guest chaplain practice of the House and Senate, expressly rejected such allegations as insufficiently particularized to demonstrate an injury-in-fact for Article III standing. *See Kurtz*, 829 F.2d at 1141 ("As [the Supreme Court's decision in] *Allen* [*v. Wright*, 468 U.S. 737 (1984)] makes clear, allegations of stigmatic injury will not suffice to link a plaintiff personally to the conduct he challenges unless, as in *Heckler* [*v. Matthews*, 465 U.S. 728 (1984)], the plaintiff personally has been denied a benefit.").

Plaintiff's alleged employment and stigmatic injuries also fail to meet the second and third parts of the standing test because those alleged harms are neither fairly traceable to the individual congressional defendants nor likely to be redressed by a decision against them. Plaintiff asserts that his employment injury is caused by "Congress' refusal to consider Plaintiff for the position of chaplain," Pl. Opp. at 8, and that the stigmatic injury is caused by "the maintenance of the

office of congressional chaplain" and by statements of the current Senate Chaplain. *Id.* at 13-14; Compl. ¶¶ 90-93. These assertions, however, do not demonstrate causation or redressability as they fail to show that plaintiff's injuries were caused by the *individual defendants named in this action* and not by the actions of a third party not before the Court. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) ("[T]he 'case or controversy' limitation of Art. III . . . requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."). The four congressional defendants plaintiff has named are all administrative officials of the Senate or House who disburse the salaries of the Senate and House Chaplains. They did not establish the offices of Chaplain, and they cannot abolish them, as plaintiff requests, *see* Pl. Opp. at 14. They have no role in electing the Chaplains, and thus can neither remove the current Chaplains nor select plaintiff to be the next Chaplain. They also do not decide whether to pay a salary to the Chaplains, which is prescribed by law. In short, these defendants did not cause – indeed, could not have caused – plaintiff's alleged employment injury in failing to be selected or considered for the position of Senate or House Chaplain. *See, e.g.*, *Kurtz*, 829 F.2d at 1142 (causation lacking where plaintiff sued Senate and House Chaplains for denying his requests to address Members from the floor of their respective chambers but made no "allegation that the chaplains had the power to permit [plaintiff] to address the House and Senate in the manner he sought"). In addition, because these officials do not control the Chaplains' conduct or the content of their prayers, these defendants did not cause, and cannot remedy, plaintiff's purported "stigma" injury caused by statements of the Senate Chaplain.

Finally, plaintiff's attempt to name the United States Congress as a defendant does not cure the defects in causation and redressability for his alleged employment and stigma injuries.

As the congressional defendants pointed out in their opening memorandum, Cong. Defs. Memo. at 27 n.15, Congress is immune from suit and, therefore, is not a proper defendant in this case.[5] In addition, under the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, a court cannot dictate to the House or Senate whom to elect as their officers or how to manage their internal affairs. *Cf. Newdow v. U.S. Congress*, 292 F.3d 597, 601-02 (9th Cir. 2002) ("[I]n light of the Speech or Debate Clause of the Constitution . . . the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation.") (citing *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975)), *petition for rehearing on other grounds pending.*[6]

Plaintiff's suggestion that Congress' sovereign immunity is overcome when a plaintiff alleges an Establishment Clause violation, *see* Pl. Opp. at 38-40, must be rejected. The legal basis of a claim is not relevant to the issue of sovereign immunity, except in determining if a waiver exists. Similarly, the Speech or Debate Clause's protection is not abrogated based on the putative "seriousness" of the constitutional claims raised. Indeed, the Ninth Circuit rejected this

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[5] Plaintiff's assertion that Congress' sovereign immunity is waived by 28 U.S.C. § 1346(a)(2) is incorrect. That provision, often referred to as the Little Tucker Act, provides for concurrent jurisdiction in the District Courts and the Claims Court over contract claims against the government and waives the government's sovereign immunity for money damages. Section 1346(a)(2) does not waive sovereign immunity to claims seeking equitable relief. *See Student Loan Marketing Assn. v. Riley*, 104 F.3d 397, 401 (D.C. Cir. 1997); *Berman v. United States*, 264 F.3d 16, 20-21 (1st Cir. 2001); *Chabal v. Reagan*, 822 F.2d 349, 353 (3d Cir. 1987); see also 14 Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction 3d* § 3657, at 502-03 (1998) ("[I]t was decided early, and the cases have reiterated the point time and time again, that the Tucker Act authorizes suits against the United States only for money damages, not for declaratory or other various forms of equitable relief."). As plaintiff's claims in this action are not based in contract and seek exclusively equitable relief, 28 U.S.C. § 1346(a)(2) is inapplicable and does not waive Congress' sovereign immunity to plaintiff's claims.

[6] Plaintiff's claim that "the federal courts reign [sic] in the legislative branch's constitutional transgressions virtually every term," Pl. Opp. at 38, is irrelevant to the question of whether Congress itself may be sued without its consent. Tellingly, in none of the cases cited by plaintiff in support of this argument, *see* Pl. Opp. at 38 n.74, was Congress a party defendant.

very argument when asserted by plaintiff in another case: "Newdow argues that because the [challenged] Act violates the Establishment Clause, Congress should not be protected by the Speech or Debate Clause. This argument misses the jurisdictional, or separation of powers, point." *Newdow*, 292 F.3d at 602; *see also Cable News Network v. Anderson*, 723 F. Supp. 835, 841 (D.D.C. 1989) ("That plaintiffs have alleged a First Amendment violation does not eviscerate the protection of the Speech or Debate Clause."). These immunities from suit are predicated on the identity of the party sued (i.e., a sovereign entity) or the sphere of the activity challenged (i.e., legislative activity), *not* on the importance or seriousness of the legal claims asserted.[7]

Hence, because Congress is not a proper defendant, there is no merit to plaintiff's assertions of causation and redressability against Congress for his alleged stigmatic and employment injuries. *See, e.g.*, Pl. Opp. at 8 (stating that "Congress' refusal to consider Plaintiff for the position of chaplain due to his atheism is the cause of the injury"), 9 ("theistic religious bias of Congress is the cause of this injury, the elimination of that theistic religious bias will provide redress"), 14 ("maintenance of the office of congressional chaplain" cause of stigma injury). Because Congress is immune from suit, plaintiff cannot base his standing to raise Article VI claims on any causation or redressability of his injuries by that sovereign entity.

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[7] Similarly, plaintiff's contention that sovereign immunity does not protect against claims asserted under the Constitution, *see* Pl. Opp. at 40-41, is belied by the numerous cases where courts have dismissed constitutional claims on sovereign immunity grounds. *See, e.g., Ascot Dinner Theatre, Ltd. v. Small Business Admin.*, 887 F.2d 1024, 1031-32 (10th Cir. 1989) (rejecting argument that assertion of First Amendment constitutional claim removes bar of sovereign immunity); *Blakely v. United States*, 276 F.3d 853, 870 (6th Cir. 2002); *Rivera v. United States*, 924 F.2d 948, 951 (9th Cir. 1991) ("The courts lack subject matter jurisdiction to hear *constitutional* damage claims against the United States, because the United States has not waived sovereign immunity with respect to such claims.") (emphasis added).

B. Plaintiff's Religious Test Claim Is Barred by the Political Question Doctrine and Speech or Debate Immunity, Because It Intrudes into the House's and Senate's Election of Their Officers

Plaintiff's Article VI religious test claim must also be dismissed because it raises a non-justiciable political question and is barred by the Speech or Debate Clause. Plaintiff responds that his claims are not foreclosed by these legal doctrines because all he is seeking is an adjudication of the constitutionality of congressional actions, and, he asserts, the Supreme Court considered the merits of similar claims in *Powell v. McCormack*, 395 U.S. 486 (1969). *See* Pl. Opp. at 37-38, 41-43. Plaintiff's arguments are unavailing as they are based on a mischaracterization of his religious test claim and a misapplication of the Supreme Court's decision in *Powell* to the distinct circumstances in this case.

As set forth in the congressional defendants' opening memorandum, *see* Cong. Defs. Memo. at 28-31, plaintiff's religious test claim gives rise to a non-justiciable political question because it implicates a matter textually committed to each House by the Constitution and because resolution of the claim would require the Court to interfere in a manner that would express a lack of respect due a coordinate branch. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). Plaintiff responds that, similar to the Court's conclusion in *Powell* that the House's power to exclude Members-elect was limited by the Constitution's own terms, the House's and Senate's authority to choose their officers is limited – and, thus, not textually committed to their discretion – by the Constitution's prohibition on religious tests. Pl. Opp. at 37.

Plaintiff's reliance on *Powell* is misplaced. In that case, the Supreme Court found justiciable a Congressman-elect's challenge to his exclusion by the House of Representatives. In finding the case justiciable, the Court held that the Constitution sets out three qualifications for Members of the House – age, citizenship, residency – that constitute the only qualifications

that can be imposed on membership in the House. 395 U.S. at 547-50. In excluding Congressman-elect Powell, the House had specifically noted that he met those three qualifications, yet voted to exclude him anyway on other grounds. *Id.* at 489, 511-12. The Supreme Court held that, while the Constitution committed to the House the power to judge the qualifications of its Members, the House could not impose qualifications beyond those expressly set forth in the Constitution. Thus, the House's exclusion of Powell for reasons other than age, citizenship, and residency did not constitute a political question, as such power was not textually committed to the House. *Id.* at 547-48.[8] Unlike the specifically listed qualifications for membership in the House, however, the Constitution imposes no "identifiable textual limits," *Nixon v. United States*, 506 U.S. 224, 237-38 (1993), on the Senate's or House's selection of their officers. Consequently, like the Senate's power to try impeachments at issue in *Nixon*, the power of each House to choose its own officers is textually committed to those bodies and precludes judicial control over the independent performance of that responsibility.

Plaintiff has not, in either his complaint or his opposition, pointed to any rule or statute imposing a religious test on the Senate or House Chaplaincies. Rather, plaintiff grounds his religious test claim on the existence and historical role of the Senate and House Chaplains, the Members' selection of theistic Chaplains over the life of those offices, and the stated opinions of Members regarding religious matters, arguing that these allegations demonstrate a *de facto* religious test imposed on the Chaplaincies. Thus, this claim does not ask the Court merely to

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[8] The Court did note that if the House voted to exclude a Member for failing to meet one of the three specified qualifications, "the federal courts might . . . be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing [three] qualifications. This is an issue not presented in this case and we express no view as to its resolution." *Powell*, 395 U.S. at 521 n.42.

adjudicate the constitutionality of a federal statute or even a rule of one of the Houses of Congress, but in fact requires the Court to delve into the votes of the Senate and House in selecting their Chaplains and to consider the content of speeches by Members from the Senate and House floor, in order to infer the existence of a religious test on the office of Chaplain. Such a judicial inquiry is precluded by the plenary power committed to each House by Article I.

Plaintiff also argues that resolving his claim would not require the Court to demonstrate disrespect for the Congress, as "such 'interference' is precisely what the federal courts are supposed to do." Pl. Opp. at 38. To the contrary, while federal courts have, in appropriate cases, passed on the constitutionality of legislation enacted by Congress, that is different from a judicial inquiry into the motives of Senators and Representatives in selecting their officers, as plaintiff's religious test claim would require. Such adjudication would entail a serious intrusion by a court into the internal proceedings of Congress, thus showing a lack of due respect for that coordinate branch. *See Murray v. Morton*, 505 F. Supp. 144, 147 (D.D.C. 1981), *vacated on other grounds*, 720 F.2d 689 (D.C. Cir. 1983).

Plaintiff's religious test claim is also barred by the Speech or Debate Clause as it requires a court to probe the legislative actions of Members of the House and Senate. Plaintiff argues that his claim is not barred by the Speech or Debate Clause because, like in *Powell*, he sues officers or employees of the Senate and House. *See* Pl. Opp. at 42-43. In *Powell*, however, the defendants were employees who executed the House resolution excluding Congressman Powell by preventing him from appearing on the House floor and by withholding his congressional salary. *See Powell*, 395 U.S. 503-06. In this case, unlike in *Powell*, plaintiff's religious test claim does not seek the payment of unpaid wages withheld by the named defendants nor the performance of any other ministerial acts that are assigned to them; rather, plaintiff's religious

test claim is a direct challenge to the office of the Senate and House Chaplains and their election by Members, matters in which the named congressional defendants – who merely oversee the disbursement of salary to the Chaplains – play no role. The individuals who took the activities challenged by plaintiff – the election of only theistic Chaplains – are Members, and their votes electing the Chaplains, as plaintiff appears to recognize, are protected by the Speech or Debate Clause. *See Gravel v. United States*, 408 U.S. 606, 617 (1972) (Speech or Debate immunity "equally cover[s]" "[c]ommittee reports, resolutions, and the act of voting" as it does actual speech or debate). Hence, unlike in *Powell*, the naming of employees of the House and Senate in this case does not allow plaintiff to evade the bar of the Speech or Debate Clause because the defendant congressional employees have not taken or withheld any actions that are challenged by plaintiff's religious test claim.

C. Plaintiff's Article VI Allegations Fail to State Constitutional Claims

Plaintiff's complaint asserted three Article VI claims – (1) that the congressional Chaplaincies violate the religious test prohibition, Art. VI, cl. 3, *see* Compl. ¶¶ 47-66; (2) that various statements the Chaplains have made violate the Supremacy Clause, Art. VI, cl. 2, *see* Compl. ¶¶ 67-70; and, (3) that the Chaplains have violated their oath to uphold the Constitution, *see* Compl. ¶ 71. As the congressional defendants demonstrated in their opening memorandum, Cong. Defs. Memo. at 34-42, each of these claims is without any legal merit and should be dismissed for failure to state a claim upon which relief can be granted.

First, plaintiff's religious test claim fails because plaintiff has not alleged or otherwise identified any religious test imposed on the office of Chaplain. The religious test prohibition in Article VI protects against any religious test or declaration being included in the oath or affirmation that the Constitution, art. VI, cl. 3, requires of all federal and state legislators and

executive and judicial officers. Yet, plaintiff's opposition wholly fails to point to any part of the Chaplains' oath of office or any other provision of federal law or the rules of the Senate or House that sets forth a religious test for the Chaplain. Plaintiff's arguments, which are based on the religious affiliation of past Chaplains elected by the House and Senate, are simply insufficient to state a claim for a violation of the prohibition on religious tests.

Plaintiff's Supremacy Clause allegations also fail to state a constitutional claim. The Supremacy Clause addresses the relationship of the national government to the states, and, specifically, provides that the laws of the national government take precedence over any state laws to the contrary. *See White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848 (9th Cir. 1987); *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222, 225 (2d Cir. 1987). Plaintiff's assertion that the Chaplains' statements that "God is 'Sovereign Lord of our Nation'" violate the Supremacy Clause, Pl. Opp. at 31, is without merit. Such statements simply do not implicate any conflict between federal and state law – or any issue concerning the relationship of the federal government to the states – that could involve the Supremacy Clause. Plaintiff's perfunctory discussion of his Supremacy Clause claim in his opposition fails to address defendants' argument but merely recites the assertions in his complaint. *See id.* Accordingly, plaintiff's Supremacy Clause allegations fail to state a claim and must be dismissed.

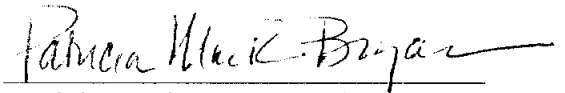
Finally, plaintiff's third Article VI claim – that the Chaplains' statements concerning the sovereignty of God violate their oath to uphold the Constitution – fails both because there is no private cause of action to enforce the oath of office, *see Lewis v. Green*, 629 F. Supp. 546, 554 n.14 (D.D.C. 1986) ("Neither Article VI, clause 3, which mandates that federal judges swear an oath of allegiance to the Constitution, nor 28 U.S.C. § 453, which sets forth that oath, creates a substantive cause of action against federal judges for violating that oath by acting contrary to the

Constitution."), and because the Chaplains' statements about the "sovereignty of God" simply do not violate their oath to uphold the Constitution. Plaintiff's opposition, like his complaint, does not identify any legal authority recognizing a private cause of action for a public official's alleged violation of his or her oath of office, nor does it explain how the Chaplains' statements violate the terms of their oaths. Indeed, plaintiff's opposition offers no argument or rebuttal whatsoever in response to defendants' arguments challenging the legal sufficiency of his claim that the Chaplains have violated their oaths, apparently recognizing the weakness of his claim.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Memorandum of Points and Authorities in Support of the Congressional Defendants' Motion to Dismiss, this Court should dismiss with prejudice all of plaintiff's claims against the Congressional Defendants.

Respectfully submitted,



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