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Self-Executing Irreparable Harm: *Chaplaincy of Full Gospel Churches v. England* ("England II") 454 F.3d 290 (D.C. Cir. 2006)

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Perhaps unbeknownst to many, the United States Navy maintains, and has since 1775, a group of officers who serve "to meet the spiritual needs of those who serve in the Navy and their families" known as the "Chaplain Corps."[1] Appellants in *Chaplaincy of Full Gospel Churches v. England*, current and former members of this corps, brought suit against the Navy alleging violation of the Establishment Clause in the form of maintenance of a religious quota system for promoting, assigning, and retaining Navy Chaplains.[2] Appellants base this claim on the fact that the Navy divides its chaplains into four religious groups (Catholic, liturgical Protestant, non-liturgical Protestant, and "special worship"[3]) and the Navy's practices, which they allege includes religious quotas and other discriminatory practices, work a detriment against their religious group (non-liturgical Protestant).[4]

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[1] Chaplaincy of Full Gospel Churches v. England (England II), 454 F.3d 290, 293 (D.C. Cir. 2006) (citation omitted). *See also In re* England (England I), 375 F.3d 1169, 1171-72 (D.C. Cir. 2004) (discussing history and organization of Navy Chaplains).

[2] *England II*, at 295.

[3] *See England I*, at 1172 (explaining classifications).

[4] *England II*, at 294.

The complaint, filed on November 5, 1999, began a "prolonged series of motions and petitions" that has developed into a case best described as "wearisome, piecemeal litigation."[5] The instant case comes from the District Court's denial of Appellant's motion for preliminary injunctive relief. The District Court based its decision on the fact that Appellants failed to demonstrate irreparable injury.[6]

The Circuit Court, per Judge Brown, disagreed. While Appellants could not meet the typical test for irreparable injury, namely a "certain and great" injury that is "beyond remediation[,]"[7] a second way to show irreparable injury is by showing that the alleged action constitutes irreparable harm *per se*. Appellants in this case have done so given the court's holding that "a party alleging a violation of the Establishment Clause per se satisfies the irreparable injury prong of the preliminary injunction calculus."[8]

Appellants argued for this holding based on language in the Supreme Court's plurality opinion of *Elrod v. Burns*, specifically the line, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[9] Appellees countered by arguing the court's previous applications of *Elrod* to First Amendment rights

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[5] *Id.* at 295 (internal citations omitted).

[6] Appellants also moved for partial summary judgment based on discovery issues and the District Court denied that motion as premature. Discussion of that issue is irrelevant to this article.

[7] *England II*, at 297 (citing Wisc. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

[8] *Id.* at 304.

[9] 427 U.S. 347, 373 (1976) (opinion of Brennan, White and Marshall, J.J.).

indicate that some showing of "a chilling effect on their rights" be required, above a bar accusation of an Establishment Clause violation.[10]

The court was eager to point out that the "crucial distinction" the Appellees were not recognizing is that the constitutional right dealt with in *Elrod* was the Freedom of Expression clause, not the Establishment Clause.[11] The right being protected in *Elrod* and the cases which have relied upon it deal with the First Amendment rights that involve some sort of action on the part of the claimant, whether it is speech, association, assembly or expression. Establishment is quite different. Violation of that right comes, the court said, "as soon as the government engages in impermissible action."[12] As such, any reliance on cases that deal with constitutional rights that require some kind of affirmative action on the part of the claimant is "both inapposite and

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[10] *England II,* at 301. This argument found ample support in cases from the D.C. Circuit as well as sister circuits.

[11] *England II,* at 300.

[12] *Id.* at 302. *See also id.*:

> This harm . . . occurs merely by virtue of the government's purportedly unconstitutional policy or practice establishing a religion, without any concomitant protected conduct on the movants' part. . . . Because, when an Establishment Clause violation is alleged, infringement occurs the moment the government action takes place--without any corresponding individual conduct--then to the extent that the government action violates the Establishment Clause, First Amendment interests are threatened or in fact being impaired. . . . [B]ecause of the inchoate, one-way nature of Establishment Clause violations, which inflict an erosion of religious liberties that cannot be deterred by awarding damages to the victims of such erosion, we are able to conclude that where a movant alleges a violation of the Establishment Clause, this is sufficient, without more, to satisfy the irreparable harm prong for purposes of the preliminary injunction determination.

(internal citations and quotation marks omitted).

superfluous" given that any "harm inflicted by religious establishment is self-executing and requires no attendant conduct on the part of the individual."[13]

The court also rejected the Appellee's claim that a *per se* rule should not be adopted for Establishment Clause cases for two very similar reasons. First, in such cases, there lacks what the court calls an "anything more": a plaintiff who alleges a violation cannot really show anything more beyond a bare allegation of irreparable harm, since the harm caused by government action that violates the Establishment Clause "is self-executing and requires no attendant conduct on the part of the individual."[14] Second, requiring more than the assertion would foreclose even the most egregious examples of Establishment Clause violations and would allow the government to circumvent the Clause's protection "with a flood of temporary or intermittent infringements."[15]

The court concludes discussion of the issue by reassuring wary defense attorneys that a revolutionary effect of its holding is unlikely. Plaintiffs who allege an Establishment Clause violation and are seeking injunctive relief still have to prove the three remaining elements for a grant of a preliminary injunction. This holding will have no effect on what a plaintiff will have to produce to demonstrate "a substantial likelihood of success on the merits, that the injunction would not substantially injure other interest parties, and that the public interest would be furthered by the injunction."[16] The court believes the other prongs of the preliminary injunction

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[13] *Id.* at 302, 303. Despite the critical distinction found between *Elrod* and the case *sub judice*, by nature of its very holding, this case extends *Elrod* to all permanent injunctions alleging Establishment Clause violations.

[14] *Id.* at 303.

[15] *Id.* at 304 (quoting ACLU of Ill. v. City of St. Charles, 794 F.3d 265, 275 (7th Cir. 1986).

[16] *Id.* at 304. Plaintiffs also have to establish standing to bring such a suit. *Id.* at n.8.

test will serve as a gatekeeper, keeping the unsupported, undeveloped, unmeritorious claims out of the courts.[17] After reviewing these remaining factors, the court remanded the case back to the District Court to address the claim for preliminary and injunctive relief.[18]

Attorneys considering such claims should be advised that the decision here does not eliminate a step of the preliminary injunctive process, but only brings to light a point that should be self-evident but may not be: Establishment Clause violations occur when the government acts – not when a victim surfaces. The harm, well-described as "self-executing," affects all citizens immediately. The court's decision does little to alleviate the burden on plaintiffs seeking injunctive relief. Not only must they meet the remaining prongs, but rules are in place to insure that allegations are only made after "an inquiry reasonable under the circumstances" occurs and "evidentiary support" exists for such a claim.[19] So while plaintiffs need not show more than an allegation of an Establishment Clause violation occurring to show irreparable harm, as counsel, attorneys have a duty, both ethically and under the Federal Rules of Civil Procedure, to conduct some investigation into the basis of the claim. While the irreparable harm allegation will not be probed by the court, an attorney should be sure that there is a sound basis for claiming a violation of his or her client's Establishment Clause rights.

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[17] *England II,* at 304.

[18] *Id.* at 305.

[19] FED. R. CIV. P. 11(b). Sanctions exist to enforce such violations and should serve as motivation for diligent investigation. *See* FED. R. CIV. P. 11(c).