IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL BARKER, Plaintiff, v. HOUSE OF REPRESENTATIVES CHAPLAIN PATRICK CONROY, ASSISTANT TO THE CHAPLAIN ELISA AGLIECO, CHAPLAIN'S LIAISON TO STAFF KAREN BRONSON, PAUL RYAN, SPEAKER OF THE HOUSE OF REPRESENTATIVES IN HIS OFFICIAL CAPACITY, THE UNITED STATES HOUSE OF REPRESENTATIVES, THE UNITED STATES OF AMERICA Defendants.	)	Case No. 1:16-cv-00850-RMC

MEMORANDUM OPPOSING DEFENDANT PATRICK CONROY'S MOTION TO DISMISS ALL INDIVIDUAL-CAPACITY CLAIMS

Eric A. Baker, D.C. Bar No. 481394
Richard L. Bolton, Federal Bar No. WI0034

BOARDMAN &CLARK LLP
One South Pinckney Street, Fourth Floor
P.O. Box 927
Madison, WI 53701-0927
(608) 283-1783 (Telephone)
(608) 283-1709 (Facsimile)
Email: ebaker@boardmanclark.com
Email: rbolton@boardmanclark.com
Attorneys for Plaintiff Dan Barker

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

As an initial matter, plaintiff concedes that this Court does not need to reach a decision on Barker's *Bivens* remedy unless it has foreclosed all the other remedies Mr. Barker has requested. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (noting *Bivens* jurisprudence has been extended "to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct") (citing *Davis v. Passman*, 442 U.S. 228 (1979)); *see also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Thus, there is no need to venture into this analysis if the Court has determined that this case is otherwise justiciable and affords Mr. Barker a remedy.

If this Court has foreclosed Barker's other remedies, the question it faces under *Bivens* is simple: Can a government official discriminate against a citizen because he does not believe in a god? No, and such discrimination deserves a remedy.

The purpose of this suit is not, as the Chaplain has tried to frame it, "to challenge the House Rule requiring that each day's sitting of the House start with a 'prayer.'" Defendant Patrick Conroy's Motion to Dismiss Individual-Capacity Claims ("Individual MTD") at 1; *see also Id.* at 18 ("When one looks behind the plaintiff's *Bivens* claims, it is clear that, at bottom, what he challenges is the House's Rule requiring that its legislative sessions open with a 'prayer'…."). Mr. Barker is not challenging that rule. Mr. Barker was excluded from delivering that prayer because he does not believe in a god and it is that discrimination at issue. Put another way, Congress has decided to have prayers—Mr. Barker is not disputing that in this lawsuit. The Chaplain refused to let Mr. Barker deliver a prayer because he is an atheist, even though (1) a Member of the House invited him, (2) he met all the *ad hoc* requirements the Chaplain imposed on him, and (3) the Supreme Court has said that atheists and laypeople can perform opening

invocations. That is religious discrimination. Any *Bivens* analysis must take place in the context of that discrimination, not "in the context of legislative prayer," as the defendant argues. Individual MTD at 11.

ARGUMENT

I. *Bivens* remedies are available to cure discrimination by House members and that is what Barker is seeking to cure.

Bivens v. Six Unknown Federal Narcotics Agents, held that a "cause of action for damages" arises under the Constitution when Fourth Amendment rights are violated. 403 U.S. 388, 389 (1971). The Supreme Court has explained that the "purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001).

If there is a constant under our Constitution, it is that "[n]o man in this country is so high that he is above the law. . . . All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." *U.S. v. Lee*, 106 U.S. 196, 220 (1882). In the Constitution, "We the people" showed this world a new way to govern and created a "system of jurisprudence [that] rests on the assumption that all individuals, whatever their position in government, are subject to federal law." *Butz v. Economou*, 438 U.S. 478, 506 (1978).

The issue presented in this case, given that *Bivens* is meant to be employed as a deterrent for constitutional violations, is whether a cause of action and a damages remedy can also be implied when the Due Process Clause of the Fifth Amendment, the religion clauses of the First Amendment, and Article VI clause 3 of the Constitution are violated.

As the Chaplain has already acknowledged, the Supreme Court has implied a damages remedy for violations of the equal protection component of the Due Process Clause. *See Davis v. Passman*, 442 U.S. 228 (1979); Individual MTD at 8, 16, 19, 21. In *Passman*, the Court held that

a woman had a damages remedy against her employer, a U.S. Representative, for gender discrimination under that equal protection component. If such a remedy exists for gender discrimination, it also exists for religious discrimination. If anything, the right to be free from religious discrimination is more established and substantial than the right to be free from gender discrimination, though both certainly exist. The equality enshrined in the Fifth Amendment's Due Process Clause protects Barker from discrimination and gives him a remedy against the Chaplain under *Bivens* and *Passman.*

Barker raises two other constitutional provisions under which a *Bivens* remedy is appropriate: the religious test ban in Article VI and the First Amendment Establishment Clause. Both of these clauses, as Barker asserts them, contain anti-discrimination protections similar to the Due Process Clause's. Finding a *Bivens* remedy for either would not require extending that rationale into a new context, it would simply keep the remedy in the already recognized discrimination context.

As noted in Barker's primary brief, the religious test ban in Article VI centers on an anti-discrimination principle. It is meant remove civil disabilities from individuals seeking to serve the people by serving the government. Barker incorporates those arguments in full. *See* Memorandum in Opposition of the Official Defendants Motion to Dismiss ("Plaintiff's Primary Response"), section 2.[1]

The U.S. Supreme Court has repeatedly emphasized that the Establishment Clause prohibits governmental bodies from discriminating based on religion: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over

[1] To avoid duplication, this Memorandum focuses only the on individual-capacity claims against Chaplain Conroy. However, much of this brief, for instance the equal protection analysis, is relevant to both the official and individual capacity claims. Therefore, Barker specifically incorporates, by reference, the facts and arguments in Plaintiff's Primary Response.

another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). *McCreary Cnty. v. ACLU*, 545 U.S. 844, 875 (2005) ("[T]he government may not favor one religion over another, or religion over irreligion."); *Id.* at 860 ("[T]he 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'") (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

Barker is not asking this Court to extend *Bivens* into a "novel context," as the government alleges. Rather, Barker is asking this Court to abide by the remedy *Passman* recognized for those who have been discriminated against, but who have no other remedy available. A First Amendment *Bivens* action has not been foreclosed and in the context of the First Amendment, *Bivens* remedies are sometimes viable. *See, e.g.*, *Hartman v. Moore*, 547 U.S. 250, 252, 256 (2006) (finding *Bivens* remedy where officials induced a prosecution in retaliation for speech but finding that lack of probable cause must be pled and proven); *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (assuming without deciding that a First Amendment free exercise claim is actionable under *Bivens*).

Other courts have found that *Bivens* remedies for violations of the Establishment Clause are at the very least sufficient to survive a motion to dismiss. *See, e.g.*, *Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1284–85 (D. Or. 2014). It is an open question whether the same is true of free exercise rights under the First Amendment. *See Turkmen v. Hasty*, 789 F.3d 218, 236 (2d Cir. 2015), (holding Guantanamo inmates did not have a *Bivens* remedy against the military for denying them timely access to the Koran and Halal food and failing to stop staff from interfering with prayers), *cert. granted sub nom.*, *Hasty v. Turkmen*, No. 15-1363, 2016 WL 2626263 (U.S. Oct. 11, 2016) *consolidated with Ziglar v. Turkmen*, (U.S. Oct. 11, 2016) and *Ashcroft v. Turkmen* (U.S. Oct. 11, 2016).

Barker is protected from religious discrimination at the hands of the Chaplain under all three of these clauses and deserves a remedy. Once the Chaplain's mistaken framing of the issue is corrected, it becomes clear that *Passman* controls the outcome of Barkers claims, requiring a damages remedy against the Chaplain.

The similarities between the Shirley Davis' suit against Rep. Passman and Barker's claims against the Chaplain are striking. Like the Chaplain's letter explaining that Barker was rejected because of his lack of religion, Passman wrote a letter explaining that his decision was discriminatory. Passman rejected Davis because "it was essential" that the person in her position "be a man," even though she and many other women had proved themselves capable of the job. *Passman*, 442 U.S. at 230. The Chaplain rejected Barker, also in writing, because he is nonreligious, even though Barker met all the requirements, including the Chaplain's unwritten, ad hoc requirements. *See* Compl. ¶¶ 92–117. And like the women who paved the way for Davis, showing that women can do any job men can, nonreligious Americans have delivered many secular invocations and prayers before government bodies. *See* Compl. ¶¶ 80–84. For both Davis and Barker the discrimination was open and written down for the world to see.

II. Barker's claim to be free from religious discrimination is a constitutionally protected right and a cause of action for which damages are appropriate.

The Court in *Davis v. Passman* used a three pronged inquiry to determine if a damages remedy was available: **first**, "petitioner asserts a constitutionally protected right; **second**, that petitioner has stated a cause of action which asserts this right; and **third**, that relief in damages constitutes an appropriate form of remedy." 442 U.S. 228, 234 (1979) (emphasis added). Barker has met all three of these prongs.

A. Barker is constitutionally protected from discrimination by the federal government, including discrimination on the basis of his religion.

In *Passman*, the Court devoted one paragraph to this analysis, quickly concluding that "the equal protection component of the Due Process Clause thus confers on petitioner a federal constitutional right to be free from gender discrimination" which was not substantially related to the achievement of an important governmental objective. 442 U.S. at 236. Essentially, through the Fifth Amendment the Court applied intermediate scrutiny to Passman's gender discrimination, consistent with other sex-based discrimination analysis. *See, e.g., United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (describing standard for sex-based discrimination).

Here, the analysis can be similarly concise, though instead of intermediate scrutiny, this Court should apply strict scrutiny because religion-based classifications are suspect and because the rights alleged are fundamental. The analysis of the Fifth Amendment's equality protection is essentially the same as the Fourteenth Amendment's analysis. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

"Any discrimination that relates to the exercise of a fundamental right is subject to strict scrutiny and survives an equal protection challenge only if the fundamental infringement on rights of the disadvantaged class is narrowly tailored to serve a compelling state interest." *Hedgepeth v. Wash. Metro. Area Transit*, 284 F. Supp. 2d 145, 152–53 (D.D.C. 2003) (citing *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535, 541–42 (1942)), *aff'd sub nom. Hedgepeth ex rel. Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004).

No government interest can justify this discrimination, especially since the Supreme Court has recognized that atheists and laypersons are capable of delivering prayers. Nor can the Chaplain's requirements be narrowly tailored given that he has not applied them to all comers.

The Chaplain discriminated against Barker, violating his right to equal treatment under the Fifth Amendment.

Barker must allege two additional items, and he has. First, he must provide evidence that persons similarly situated have not been discriminated against. He has shown in the complaint that many similarly situated individuals, with less qualifications and not meeting all the *ad hoc* requirements, were granted the guest chaplaincy. He was not because he is an atheist. The second thing he must show is that the discrimination was the basis of an unjustifiable standard, *see Wayte v. United States*, 470 U.S. 598, 608 (1984); *Martin v. Parratt*, 549 F.2d 50, 52 (8th Cir. 1977); *United States v. Berrigan*, 482 F.2d 171, 174 (3d Cir.1973), "such as race, religion, or other arbitrary classification," *Oyler v. Boles*, 368 U.S. 448, 456 (1962), or to prevent the defendant's exercise of a fundamental right. *See United States v. Goodwin*, 457 U.S. 368, 372–74 (1982). Here it was done because Barker is an atheist and to prevent him from invoking a higher power that was not satisfactory to the Chaplain.

As explained above, Barker also has the right to be free from religious discrimination under both the Establishment Clause and Article VI.

B. Barker has stated a cause of action under the Constitution that is not committed to another branch.

The second prong of the *Passman* inquiry was whether the plaintiff had a cause of action. 442 U.S. at 236–44. More specifically, whether the plaintiff is the appropriate party to bring the case because court had jurisdiction and the plaintiff had a constitutional right:

> It is clear that the District Court had jurisdiction under 28 U.S.C. § 1331(a) to consider petitioner's claim. *Bell v. Hood*, 327 U.S. 678 (1946). It is equally clear, and the en banc Court of Appeals so held, that the Fifth Amendment confers on petitioner a constitutional right to be free from illegal discrimination.

Id. at 236. The same is true in the present case. As Barker's asserted rights are protected under the Constitution, they arise under 28 U.S.C. § 1331 and, as *Passman* noted, the "Court has already settled that a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right." *Id.* at 242 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

Bolling implied a cause of action for racial discrimination under the Fifth Amendment. *Id.* *Passman* implied a cause of action for gender discrimination under the Fifth Amendment and a damages remedy. If no other remedy is available to Barker, this Court should imply a cause of action for religious discrimination under the Fifth Amendment and a damages remedy. Given the overlap of the anti-discrimination goals of the three constitutional provisions Barker has alleged, this Court ought to imply damages remedies for the Establishment Clause and Article VI, too.

Like Ms. Davis in *Passman*, Barker rests his claim "directly on the Due Process Clause of the Fifth Amendment." *Id*. at 243 (noting identical claim in *Bolling*). Both claim their "rights under the Amendment have been violated, and that [they] has no effective means other than the judiciary to vindicate these rights." *Id.* Therefore, Barker is the appropriate party to invoke the general federal-question jurisdiction of this Court to seek relief and has a cause of action under the Fifth Amendment and the other two clauses.

C. Damages are appropriate to remedy the Chaplain's violation of Barker's rights because no special factors counsel against such a remedy.

Bivens holds that a federal district court may provide relief in damages for the violation of constitutional rights if there are "no special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396; *Butz v. Economou*, 438 U.S. 478, 504 (1978). As in *Passman*, "a damages remedy is surely appropriate in this case. 'Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.'" 442

U.S. at 245 (quoting *Bivens*, 403 U.S. at 395). The only outstanding issue is whether any special factors counsel hesitation.

Again, *Passman* provides an excellent analogy. There, a U.S. Representative was held liable for damages by a staffer he fired because she was a female. The Court noted that "although a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct does raise special concerns counseling hesitation, we hold that these concerns are coextensive with the protections afforded by the Speech or Debate Clause." *Id*. at 246.

Barker's challenge is similarly structured but the "special concerns" noted in *Passman* counsel less hesitation, given that case involved a U.S. Representative while Barker is challenging the actions of an officer of the House who is not entitled speak and debate on legislative issues. Unlike a U.S. Representative's speech on the floor of the House during debate, the House Chaplain's conduct is not shielded by the Speech or Debate Clause. *See* Plaintiff's Primary Response, section 4.B.

The government raises four other special factors that it believes counsel against an implied damages remedy, but none do:

(1) Separation of powers;

(2) The availability of alternative remedies;

(3) Administrability concerns;

(4) Congress' activity in a particular field suggesting that its inaction for a particular type of claim or harm has not been inadvertent.

(1) The separation of powers is not a license to discriminate on the basis of religion without consequence.

There are two issues with the defendant's argument here. First, this is not a challenge to the House Rule mandating a daily prayer, but to discrimination. Second, the cases declining to find a *Bivens* remedy in the military context are inapplicable.

This case is about discrimination, not about challenging the House's decision to open each session with an invocation. Defendant Conroy argues that the "decision of the Chaplain to allow guest chaplains to fulfill [the Chaplain's] role on a temporary basis [stems] from the constitutionally mandated power of the House to set its own rules of proceedings . . . ." Individual MTD at 14. But there is no statutory basis to conclude that the House ever contemplated, let alone set, such a rule and the actual statutory langue establishing the Chaplain's Office may actually *preclude* the use of guest chaplains. *See* Plaintiff's Primary Response at 2, 40–41. But even if the defendants' claims were true, none of those concerns are present in the Chaplain's action that gives rise to the *Bivens* claim: discrimination. The legislative branch may have extensive internal rulemaking decisions and procedures, but none of those confer an ability to discriminate on the basis of religion. No government official has the power to discriminate in such a way, so there is no power to consider separate—the Chaplain acted illegally and can be held accountable. If "legislators ought . . . generally to be bound by [the law] as are ordinary persons," then certainly the minor officers of the legislature must be similarly bound. *Gravel v. United States*, 408 U.S. 606, 615 (1972).

The Chaplain alleges that several decisions in which courts declined to imply a *Bivens* remedy against military service members preclude Barker's *Bivens* remedy under a separation of powers rationale. This is wrong for two reasons. First, the Supreme Court has already implied *Bivens* remedy against a House member and the Chaplain is, if anything, deserving of less

protection under such a rationale. Second, separation of powers is a relatively minor concern when it comes to a *Bivens* claim against the military. When dealing with the military, it is rarely the sole, let alone primary, rationale counseling courts to abstain: "[m]atters intimately related to . . . national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). Separation is but one of several "concerns regarding the conduct of war, the separation of powers, and the public scrutiny of sensitive information." *Doe v. Rumsfeld*, 683 F.3d 390, 395 (D.C. Cir. 2012).

The "Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures, and remedies." *Chappell v. Wallace*, 462 U.S. 296, 301 (1983). The military has a "comprehensive internal system of justice" and the responsibility for handling grievances resulting from military service lies solely with Congress and the President. *Id.* at 301–02 (citing *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953)). This plenary control includes remedies. *Chappell v. Wallace*, 462 U.S. 296, 301 (1983) (noting that the Constitution give other branches "plenary control over rights, duties, and responsibilities in the framework of the military establishment, *including* regulations, procedures, and *remedies*." (emphasis added)); *Cioca v. Rumsfeld*, 720 F.3d 505, 509 (4th Cir. 2013).

But, as *Passman* shows, the same cannot be said of the House of Representatives. Indeed the contexts are so dissimilar that the when Navy-enlisted men attempted a *Bivens* remedy against their superiors in *Chappell v. Wallace*, the Supreme Court didn't even bother to distinguish *Passman*, decided only four years earlier. Compare *Chappell*, 462 U.S. 296 (1983) with *Passman*, 442 U.S. 228 (1979).

The Court did distinguish *Passman* in another case in which it declined to imply a *Bivens* remedy against the military, *United States v. Stanley*, 483 U.S. 669, 685–86 (1987). The majority noted, "there was a reason" the Court would imply a remedy against House members and not in the military context:

> There the Constitution itself contained an applicable immunity provision—the Speech or Debate Clause, Art. I, § 6, cl. 1—which rendered Members of Congress immune from suit for their legislative activity. The Court held that the "special concerns counseling hesitation" in the inference of *Bivens* actions in that area "are coextensive with the protections afforded by the Speech or Debate Clause." 442 U.S., at 246, 99 S.Ct., at 2277. That is to say, the Framers addressed the special concerns in that field through an immunity provision—and had they believed further protection was necessary they would have expanded that immunity provision.

Id. at 685. In other words, the Chaplain's separation of powers argument has "distorted [the Framers] plan to achieve the same effect as more expansive immunity by the device of denying a cause of action for injuries caused by Members of Congress where the constitutionally prescribed immunity does not apply." *Id.*; *see also* Plaintiff's Primary Response, section 4.B. & 4.C. (arguing that judicial review in this case does not implicate the Speech or Debate Clause and is consistent with the separation of powers).

While the Constitution has fully and completely dedicated the responsibility of the military to the Legislative and Executive branches—plenary power has been given over everything, including remedies—the same plenary power does not exist for Congress. The Supreme Court has already implied a *Bivens* remedy against a member of the House for discrimination. The separation of powers concerns do not counsel against Barker's *Bivens* remedy.

(2) If this Court is analyzing a possible Bivens remedy, then Barker does not have alternative remedies because he is challenging the Chaplain's discrimination against him, not the House Rules declaring that sessions must open with a prayer.

The Chaplain suggests that an injunction is the appropriate alternative remedy. But if this court is engaging in a *Bivens* analysis, that it has already decided that that remedy is not available to Barker. To support this argument, the Chaplain mistakenly frames this case as a challenge against "the House's Rule requiring that its legislative sessions open with a 'prayer.'" Individual MTD at 18. With this re-framing, the Chaplain notes that *Bivens* is not available for challenges to government policies, citing *Arar v. Ashcroft*, 585 F.3d 559, 579 (2d Cir. 2009). But Barker is not challenging the underlying House policy. He is challenging the Chaplain's *ad hoc* discrimination against atheists. If Barker were successful in his constitutional challenge to the Chaplain's actions, the House Rules would remain untouched. Barker brings this case under the simple rationale relied upon in *Town of Greece v. Galloway*, that if a government engages in prayer (as *Marsh* and *Galloway* allow), then it should not discriminate against prayer-givers, even if they are laypersons or atheists. 134 S.Ct. 1811, 1816 (2014).

To the extent that this case is about government policies or rules, it is about the three unwritten, *ad hoc* requirements the Chaplain has forced on Barker but has not applied equally to other guest chaplain. But as was detailed extensively in the complaint, Barker met these requirements, so even if the unwritten rules were not suspect in this case, the Chaplain still discriminated against Barker simply because Barker is an atheist.

If, however, this court determines that Barker's case merits declaratory or injunctive relief, which is the preferred means of correcting unconstitutional actions, then Barker does have an alternative remedy and the *Bivens* remedy against the Chaplain is unnecessary. *Malesko*, 534 U.S. at 74.

(3) There are no administrability concerns with holding the Chaplain responsible for religious discrimination.

This court need not consider the various questions the defendant posed regarding the "legislative prayer context," *see* Individual MTD at 21, because the *Bivens* challenge is not about legislative prayer, but about discrimination. The question is not whether or how the government can pray, but whether the government can exclude individuals from delivering prayers on the basis of their beliefs. And the Supreme Court has already answered this question, as was noted in the first paragraph of the complaint. The *Galloway* Court permitted legislative invocations because the Town of Greece "at no point excluded or denied an opportunity to a would-be prayer giver" and "maintained that a minister or *layperson of any persuasion, including an atheist,* could give the invocation." *Galloway*, 134 S. Ct. at 1815 (emphasis added). The "town maintain[ed] a policy of nondiscrimination" and "represented that it would welcome a prayer by any minister or layman who wished to give" a prayer. *Id.* at 1824.

The Court held that legislative prayer—not government discrimination—was constitutional. Barker is challenging the discrimination, not the prayer. There are no administrability issues with holding the Chaplain liable for his discrimination.

(4) The Congressional Accountability Act, which deals with congressional employees' grievances, does not suggest that Congress has deliberately permitted religious discrimination against citizens.

The defendant has argued that the Congressional Accountability Act is a "comprehensive remedial scheme for Congressional employees and job applicants" that precludes Barker's *Bivens* remedy. *See* Individual MTD at 21. This is a stretch, as the defendant admits, because Barker "is not considered a 'covered employee' under the CAA and cannot obtain relief under either statute for the harms he alleges here." *Id.* The CAA does not suggest that Congress

believes protections against religious discrimination exist solely for its employees but not others; it merely demonstrates Congress's intent to pass a specific set of protections for its employees. *See Packer v. U.S. Comm'n on Sec. & Cooperation in Europe*, 843 F. Supp. 2d 44, 49 (D.D.C. 2012) (limiting the availability of *Bivens*).

If anything, the CAA bolsters Barker's *Bivens* remedy. The CAA "provides the exclusive remedy by which legislative branch employees can bring a suit challenging employment discrimination." *Id.* at 47 (citing *Adams v. U.S. Capitol Police Bd.,* 564 F. Supp. 2d 37, 40 (D.D.C. 2008)). In *Packer*, this Court declined to find a *Bivens* remedy because the plaintiff was a "congressional employee." *Id.* at 48, 49. That decision did not extend *Passman* because Congress has passed the CAA in the interim:

> [*Passman*] recognized the availability of a Fifth Amendment *Bivens* claim to redress discrimination in the federal employment context, this recognition predated passage of the CAA and, therefore, was founded on the lack of any explicit statutory remedies addressing discrimination in that context. *Id.* at 248, 99 S.Ct. 2264. Indeed, the Court recognized that its decision would be impacted by a congressional act.

Id. at 48. But the CAA applies only to "covered employees," which the defendant admits Barker is not. 2 U.S.C.A. § 1301 (3) and (4). Therefore, there is no statutory remedy available to Barker, making the *Bivens* remedy all the more necessary to vindicate his right.

CONCLUSION

While courts have been reluctant to extend *Bivens* actions into novel contexts, no such concerns need stay this Court's hand. *Bivens* has been extended to gender discrimination and to religious discrimination, at least to the point where it withstands a motion to dismiss. Barker has alleged three separate grounds for religious discrimination, including the same equal protection claim under the Due Process Clause that was successfully brought against a member of the House in *Passman*. If this Court has foreclosed Barker's other remedies, then it should imply a

remedy under *Bivens* and hold the House Chaplain personally liable for the damage his religious discrimination has caused.

Dated this 14th day of November, 2016.

Respectfully submitted,

/s/ Richard L. Bolton
Eric A. Baker
DC Bar No. 481394
Richard L. Bolton
Federal Bar No. WI0034
One South Pinckney Street, Fourth Floor
P.O. Box 927
Madison, WI 53701-0927
(608) 283-1783 – Telephone
(608) 283-1709 – Facsimile
ebaker@boardmanclark.com
rbolton@boardmanclark.com
Attorneys for Plaintiff Dan Barker

CERTIFICATE OF SERVICE

I, Richard L. Bolton, hereby certify that on November 14, 2016, I caused to be electronically filed the attached Brief In Opposition with the Clerk of Court using the CM/ECF system.

/s/ Richard L. Bolton
Richard L. Bolton