IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STEPHEN CAVANAUGH, Plaintiff, vs. **RANDY BARTELT**, in his individual capacity only; **FRANK HOPKINS**, in his individual capacity only; **DIANE SABATKA-RINE**, in her individual capacity only; **TIM KRAMER**, in his individual capacity only, and **MICHAEL DORTON**, in his individual capacity only, Defendants.	CIVIL CASE NO. 4:14cv3183 **BRIEF IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

The Plaintiff, Stephen Cavanaugh, *pro se,* is an inmate incarcerated at the Nebraska State Penitentiary located in Lincoln, Nebraska. He served the Defendants, Randy Bartelt, Frank Hopkins, Diane Sabatka-Rine, Tim Kramer, and Michael Dorton, in their individual capacities only. Liberally construed, the suit is brought under 42 U.S.C. § 1983 for a violation of the Establishment, Free Exercise, and Equal Protection Clauses. The Plaintiff is also asserting an RLUIPA claim against the Defendants.

The Plaintiff claims to be a staunch practitioner of Flying Spaghetti Monsterism, otherwise known as "FSM" or "Pastafarianism." He demands the freedom to practice the tenets of his faith without impediment. This would include permission to dress in pirate regalia and

wear a colander, sieve, or other appropriate kitchen strainer on his head. He also seeks $5,000,000.00 for the emotional, psychological, and spiritual pain he suffered in this ordeal, presumably be when his requests for a tricorne and scabbard belt were denied.

The Defendants have filed a Motion to Dismiss. They argue that the Plaintiff's belief in FSM is not a sincere religious belief, and therefore, fails to trigger RLUIPA protection. The failure to meet RLUIPA's burden necessarily requires his § 1983 claims to fail as well.

Alternatively, the Defendants are clearly entitled to the defense of qualified immunity. This may be a case of first impression in the entire country. Without "clearly established" law upon which to rely, the Defendants can assert the immunity defense. It would be impossible for Mr. Cavanaugh to defeat this defense, and the Defendants should therefore be dismissed.

STANDARD OF REVIEW

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Braden v. Wal-Mart Stores, Inc.,* 88 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678; 129 S.Ct. 1937, 1949-50 (2009)). The plausibility standard requires a plaintiff to show at the pleading stage that success on the merits is more than a "sheer possibility." *Id.* Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Id.*

ARGUMENTS

I.
PLAINTIFF'S ESTABLISHMENT CLAUSE CLAIM

In his Complaint, the Plaintiff writes: "The restrictions imposed on Cavanaugh and other members of FSMism are indeed unreasonable and based on no factors other than the religious coordinators' opinion of the religion. This creates a clear and undeniable violation of the First Amendment to the U.S. Constitution." (*Filing No. 1*, pg. 9). Liberally construed, the Plaintiff is making a claim for a violation of the Establishment Clause. (*Filing No. 8*, pg. 1).

The Establishment Clause of the First Amendment to the United States Constitution reads:

> **Congress shall make no law respecting an establishment of religion**, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I (emphasis added). The Establishment Clause compels the State to "pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Stark v. Independent Sch. Dist. No. 640,* 123 F.3d 1068, 1076 (8th Cir. 1997). In order to have standing to bring an establishment clause claim, "a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Patel v. United States Bureau of Prisons,* 515 F.3d 807, 816 (8th Cir. 2008).

> Injury may be established in two ways. First, a plaintiff may have standing as a taxpayer under *Flast v. Cohen,* 392 U.S. 83, 105-06; 88 S.Ct. 1942 (1968) [...]. Second, we have found standing for a plaintiff who establishes an injury of direct an unwelcome personal contact with the alleged establishment of religion."

Id. Prisoners may establish an injury if they "allege they altered their behavior and had direct, offensive, and alienating contact with" a government-funded religious program. *Id.* at 817.

The essence of this action is that prison officials believe the Plaintiff is not sincere in his religious beliefs about a flying lump of spaghetti that first created "a mountain, trees, and a midget." Bobby Henderson, *Open Letter to Kansas School Board,* http://www.venganza.org/about/open-letter/ (last visited Feb. 17, 2015). Nowhere in his Complaint does the Plaintiff allege that he altered his behavior or had direct, offensive, or alienating contact with a religious program. There is no indication that the State's action impairs any right guaranteed by the Establishment Clause. For this reason, the Plaintiff fails to state a claim upon which relief can be granted for a violation of the Establishment Clause.

II.
PLAINTIFF'S FREE EXERCISE, EQUAL PROTECTION, & RLUIPA CLAIMS

The Plaintiff alleges that he is a member of the Church of the Flying Spaghetti Monster ("FSM"), otherwise known as Pastafarianism. (*Filing No. 1*, pg. 8). He complains that his beliefs are "deeply held" and that the Defendants are not treating these "beliefs"—especially the tenant that proselytizers of the faith must be clad in pirate regalia—with the gravitas and respect they deserve. (*Filing No. 1*, pgs. 1-2). The Plaintiff goes on to allege that he "has not asked for anything for FSMism that is not already granted to other religious groups in the institution. This establishes a very clear violation of the Equal Protection Clause [...]." (*Filing No. 1*, pg. 9).

Liberally construed, the Plaintiff is alleging Free Exercise, Equal Protection, and RLUIPA claims. (*Filing No. 8*, pg. 1). Because the threshold inquiry for all three actions is the same (a *sincere* religious belief), and because RLUIPA imposes a higher review on religious burdens than the Constitution, the Defendants are folding all three claims into the same attack: the Plaintiff's belief is not sincere and fails to qualify for RLUIPA protection. *See, Shakur v. Schriro,* 514 F.3d 878, 888 (9th Cir. 2008) (RLUIPA mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness standard

under the First Amendment); *DeHart v. Horn,* 227 F.3d 47, 61 (3rd Cir. 2000) (Both Equal Protection and First Amendment analyses of inmate religious rights have the same threshold question: whether there is a sincerely held religious belief)).

The basic inquiry in this case is whether the Plaintiff possesses a *sincere* religious belief. "Although RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion [...] the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity." *Cutter v. Wilkinson,* 544 U.S. 709, 725; 125 S.Ct. 2113, 2124 n.13 (2005).

> Although a religious belief requires something more than a purely secular philosophical or personal belief, courts approve an expansive definition of religion. The test is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.

Quaring v. Peterson, 728 F.2d 1121, 1123 (8th Cir. 1984) (citing *United States v. Seeger,* 380 U.S. 163, 165-66; 85 S.Ct. 850 (1965)). RLUIPA requires courts to scrutinize the asserted harm of granting specific exemptions to particular religious claimants and to look to the marginal interest in enforcing the challenged government action in that particular context. *Holt v. Hobbs,* ___ U.S. ___; 135 S.Ct. 853 (2015).

Federal courts are still obligated to act as the gatekeepers of RLUIPA; protecting the integrity of the statute against those inmates who seek to game the system. "RLUIPA shows that Congress was confident of the ability of the federal courts to weed out insincere claims." *Burwell v. Hobby Lobby,* ___ U.S. ___; 134 S.Ct. 2751, 2774 (2014); *See also, Yellowbear v. Lampert,* 741 F.3d 48, 54 (10th Cir. 2014) (Under RLUIPA, when inquiring into a claimant's sincerity, the task is to ask "whether the claimant is (in essence) seeking to perpetrate a fraud on the court"); *Korte v. Sebelius,* 735 F.3d 654, 683 (7th Cir. 2013) ("Checking for sincerity and religiosity is important to weed out sham claims"). Allowing in sham lawsuits only dilutes the legitimate claimants

RLUIPA was built to protect. In the current case, it is beyond argument that the Plaintiff's claim of flying spaghetti monsterism perpetrates a sham on this Court for his own amusement and to bleed precious resources from other, worthy plaintiffs.

FSM was created in 2005 by a 25-year-old physics graduate named Bobby Henderson. James Langton, *In the Beginning There Was the Flying Spaghetti Monster,* THE TELEGRAPH, (Sept. 11, 2005, 12:01 AM), http://www.telegraph.co.uk. The birth of FSM can be traced to an open letter Mr. Henderson wrote to the Kansas State Board of Education in reaction to its decision to allow intelligent design curriculum to be taught in Kansas classrooms. Sarah Boxer, *But Is There Intelligent Spaghetti Out There?,* N.Y. TIMES, (August 29, 2005), http://www.nytimes.com/2005/08/29/arts/design/29mons.html; Langton, *supra.*

Mr. Henderson's open letter delights in satirically mimicking the logical fallacies he believes parallel those of intelligent design. For example, when discussing why carbon dating seems to illustrate that the universe is much older than biblical claims, he hand waves away the argument by writing that "what our scientist does not realize is that every time he makes a measurement, the Flying Spaghetti Monster is there changing the results with His Noodly Appendage." Bobby Henderson, *Open Letter to Kansas School Board,* Church of the Flying Spaghetti Monster, http://www.venganza.org/about/open-letter/ (last visited Feb. 18, 2015). In another section, Mr. Henderson invokes the correlation/causation fallacy by referring his readers to the correlative relationship between global warming, earthquakes, and hurricanes to diminishing pirate populations. *Id.* Finally, Mr. Henderson warns the Education Board:

> In conclusion, thank you for taking the time to hear our views and beliefs. I hope I was able to convey the importance of teaching this theory to your students. We will of course be able to train the teachers in this alternate theory. I am eagerly awaiting your response, and hope dearly that no legal action will need to be taken. I think we can all look forward to the time when these three theories are given equal time in our science classrooms across the country, and eventually the world;

> One third time for Intelligent Design, one third time for Flying Spaghetti Monsterism (Pastafarianism), and one third time for logical conjecture based on overwhelming observable evidence

Id.

Undeniably, FSM is a product of biting wit and cleverness, but certainly not sincere religious dogma. After Pastafarianism gained momentum, the New York Times reported that Bobby Henderson's "divine vision" of FSM "was induced by a lack of sleep and mounting disgust over the whole [intelligent design] issue [...]." Boxer, *supra.* The power of FSM lies with its adherents' commitment to the joke. In the same New York Times article, one of Henderson's acolytes is briefly profiled in the hyperbolic style FSM practitioners are known for.

> Dozens of people have posted their sightings of the deity (along with some hilarious pictures). One woman even wrote in to say that she had "conceived the spirit of our Divine Lord," the flying Spaghetti Monster, while eating alone at the Olive Garden.
>
> "I heard singing, and tomato sauce rained from the sky, and I saw angel hair pasta flying about with little farfalle wings and playing harps," she wrote. "It was beautiful." The Spaghetti Monster, she went on, impregnated her and told her, "You shall name Him ... Prego ... and He shall bring in a new era of love."

Id. The belief structure of FSM is thorny, but it is undeniably not literal. Take Mr. Henderson's own thoughts about this case on his website:

> What I say, sometimes, is that some number of Pastafarians do not believe in a literal Flying Spaghetti Monster or our Creation story. And that is perfectly fine — it's a common thing even in mainstream religion to be skeptical of scripture. The distinction is that in FSM, the culture is more accepting of people who are skeptical-minded, while in many mainstream religions, doubt is seen as an affront to the Dogmatic Truth.
>
> My point is that there are doubters in religion in general, simply because religious scripture can be full of nonsense. You wouldn't say Christianity is a parody just because some members don't buy the part about the world being created in 7 days and the talking snake, etc.
>
> Religion is more than a collection of beliefs and rituals, it's a way to form community and a framework to make sense of our place in the universe. And on this level, I think Prison officials did Cavanaugh a disservice in not allowing him

> to pursue his faith. I mean, he wasn't asking for that much. He wanted to buy a pirate costume with his own money and hang out with some other Pastafarians once a week.

Bobby Henderson, *Pastafarian Inmate Sues Prison,* Church of the Flying Spaghetti Monster (November 7, 2014), http://www.venganza.org/2014/11/pastafarian-inmate-sues-prison/. Mr. Henderson is applying a more philosophical meditation on the idea that belief in FSM transcends traditional definitional boundaries. He interlaces a robust definition of belief in a flying glob of omnipotent spaghetti with a greater universal, humanist truth. While these musings may be elegant, they are not legally important. RLUIPA requires a *sincere religious belief*, not a sincere belief in transcendent tortiglioni.

FSM is cloaked in the veil of satire, but underneath that clothing is its true message: an editorial comment sitting between the intersection of religious dogmatism and universal secularism. RLUIPA requires federal courts to act as the gatekeepers to religious belief claims. They must weed out the shams so that claimants who desperately need judicial resources can have their voices heard. Actions such as Mr. Cavanaugh's stifle these legitimate cases. Many RLUIPA cases are close calls; this is not one of them. The Plaintiff's does not possess a *sincere* religious belief to trigger RLUIPA protection. For this reason, the Defendants respectfully ask this Court to dismiss this case for failure to state a claim.

III.
THE PLAINTIFF CANNOT OVERCOME THE DEFENSE OF QUALIFIED IMMUNITY

Government officials sued in an individual capacity are entitled to assert the defense of qualified immunity. *Serna v. Goodno*, 567 F.3d 944, 953 (8th Cir. 2009). Qualified immunity is a question of law, not fact, and must be decided at the earliest possible stage of litigation. *Mathers v. Wright*, 636 F.3d 396, 399 (8th Cir. 2011). The defense is very friendly to government actors,

being designed to protect all but the "plainly incompetent or those who knowingly violate the law." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038 (1987).

A. The Test For Qualified Immunity

Qualified immunity inoculates individual government officials from civil liability for actions that an official, exercising reasonable care, did not know, or could not have known, were violations of clearly established constitutional law. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982). The formal test to determine whether an individual officer is entitled to qualified immunity asks:

1. Whether the plaintiff has alleged the violation of a constitutional right; and
2. Whether that right was clearly established at the time of the alleged violation.

Howard v. Kansas City Police Dep't, 570 F.3d 984, 988 (8th Cir. 2009) (citing *Saucier v. Katz*, 533 U.S. 194, S.Ct. 2151 (2001)). However, courts are not strictly tethered to this two-step approach. Instead, a court may dismiss based on qualified immunity without deciding if there has been a constitutional violation. *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 818 (2009).

The crux of any qualified immunity analysis ultimately depends on whether a right was "clearly established" at the time of the incident. The Supreme Court has seesawed back and forth on how a court should interpret this "clearly established" requirement. Within the last decade however, the Court has consistently held that unless there is a *specific* case on point alerting a government official that his or her *specific* conduct clearly violates a federal constitutional right, the insulation of immunity should remain. Whether an officer violates a clearly established state law right is irrelevant, only federal rights can be considered. *Davis v. Scherer*, 468 U.S. 183, 195-96, 104 S.Ct. 3012, 3019-20 (1984).

B. The Standard for Analyzing "Clearly Established" Law

The Supreme Court has "repeatedly told courts not to define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, 572 U.S. ____, 134 S.Ct. 2012, 2023 (2014). In *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034 (1987), the Eighth Circuit denied a defendant FBI agent qualified immunity after the agent entered the plaintiff's home and conducted a warrantless search. The agent believed a group of bank robbers were hiding in the home; he was mistaken. The Eighth Circuit based its denial on the belief that case law was clearly settled that warrantless searches could not be undertaken without probable cause and exigent circumstances. *Id.* at 637, 3038. The Supreme Court reversed, holding that unless a reasonable officer would know that his or her *specific* conduct violated a plaintiff's federal rights, qualified immunity should be preserved. *Id.* at 635, 3037 (emphasis added). No such case directly on-point existed, and therefore the defendant was entitled to assert the immunity.

More recent cases hew closely to *Anderson*'s specific conduct and case-on-point requirements. In *Lane v. Franks*, 573 U.S. ____, 134 S.Ct. 2369, 2381 (2014) the Court unanimously held that an official who fired a subordinate in violation of the First Amendment was entitled to qualified immunity because there were no specific cases on point with similar facts to put the defendant on notice that his conduct was impermissible. *Id.* at ____, 2383. The Court in *Plumhoff v. Rickard*, 572 U.S. ____, 134 S.Ct. 2012, 2023 (2014), also unanimously held that defendant police officers were entitled to qualified immunity after firing on a fleeing vehicle in which two people were killed. The Court cited a lack of clearly established cases on point as a basis for upholding the finding of immunity. *Id.* at ____, 2016.

Finally, in *Wood v. Moss*, 572 U.S. ____, 134 S.Ct. 2056 (2014), Secret Service agents were granted qualified immunity despite engaging in overt viewpoint discrimination against presidential protestors. In an opinion penned by Justice Ginsburg, a unanimous Supreme Court upheld the agents' qualified immunity because there were no cases directly on point with similar fact patterns describing when Secret Service agents may violate the First Amendment. *Id.* at ____, 2068-69. This despite critics' cries that there was already a plethora of case precedents clearly establishing that viewpoint discrimination violates the First Amendment. *See* Erwin Chemerinsky, *Appearances can be Deceiving: October Term 2013 Moved the Law to the Right*, 17 Green Bag 2d 389, 403 (2013) ("Nonetheless, the Court, in a unanimous decision written by Justice Ginsburg, found that the Secret Service agents were protected by qualified immunity because there were no cases on point concerning when Secret Service agents violate the First Amendment. Again, though, [*Hope v. Pelzer,* 536 U.S. 730 (2002)] should have controlled—it is well established that viewpoint discrimination violates the First Amendment"). Nevertheless, the scarcity of cases with similar factual overlap concerning when Secret Service agents may violate First Amendment rights was determinative.

These cases make clear that for a court to find that a right is "clearly established," it must find cases that are specifically targeted to the current issues and facts before it. "Clearly established" is a specific inquiry; it is not general. *Plumhoff,* 572 U.S. at ____, 134 S.Ct. at 2023.

C. The Plaintiff Fails to Allege that the Defendants Violated "Clearly Established" Law

The Plaintiff's Complaint is framed to suggest that the law is clearly established in this case. "The restrictions imposed on [the Plaintiff] and other members of FSMism are indeed unreasonable and based on no factors other than the religious coordinators' opinion of the

religion. This creates a clear and undeniable violation of the First Amendment to the U.S. Constitution," the Plaintiff insists. (*Filing No. 1*, pg. 9). He continues,

> By allowing members of other faiths to purchase and possess all manner of religious items, including; [*sic*] bandanas, pendants, prayer oils, prayer rugs, prayer beads, thikr [*sic*] beards, kufi, amulets and rosaries, as well as other special ordered religious clothing, while deying [*sic*] any of these items to members of FSMism, the religious coordinators of NSP have clearly violated the Constitution.

(*Filing No. 1*, pg. 10).

The Plaintiff is committing the sin that the Supreme Court warned against in *Plumhoff, supra.* Whether the law is "clearly established" is a very specific inquiry; it is not meant to be general. *Plumhoff,* 572 U.S. at ____, 134 S.Ct. at 2023. The Plaintiff is taking an aerial view of the RLUIPA landscape and branding the Defendants with violating that view. This is not the correct analysis. In fact, the United States Supreme Court has held that prison officials do have wiggle room when evaluating the authenticity of an inmate's religious claims. *See, Cutter v. Wilkinson,* 544 U.S. 709, 725 n.13; 125 S.Ct. 2113, 2124 (2005) ("prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic").

Whether a Plaintiff's belief in FSM falls under RLUIPA's protection appears to be a question of first impression in this circuit, and possibly in the entire United States. The law is not "clearly established" regarding the sincerity of FSM practitioners and RLUIPA. Courts routinely grant qualified immunity to prison officials who encounter a novel religious question. *See, Pittman-Bey v. Celum,* 557 Fed. Appx. 310 (5th Cir. 2014); *Stewart v. Beach,* 701 F.3d 1322 (10th Cir. 2012). This case is no different. The Defendants encountered a novel question of religious sincerity and made a decision without clear guidance from any court in the country, let alone this Circuit. If the plaintiffs in *Anderson, supra, Lane, supra, Plumhoff, supra,* and *Wood, supra* were

entitled to qualified immunity on much less, then certainly the current Defendants are entitled to the defense as well. Because the Defendants did not violate "clearly established" law, the Plaintiff cannot overcome the defense of qualified immunity, and the Defendants should be dismissed.

CONCLUSION

For the reasons set forth in this Brief, the Defendants ask this Court to dismiss the Plaintiff's Complaint for failure to state a claim upon which relief can be granted.

Respectfully submitted this 9th day of March, 2015.

RANDY BARTELT, FRANK HOPKINS, DIANE SABATKA-RINE, TIM KRAMER, and MICHAEL DORTON, in their individual capacities only, Defendants.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of March, 2015, he electronically filed the foregoing Brief in Support of Motion to Dismiss with the Clerk of the District Court using the CM/ECF system, and hereby certifies that he mailed, by United States Postal Service, the document to the following non-CM/ECF participant: Stephen Cavanaugh, # 78775; Nebraska State Penitentiary; P.O. Box 22500; Lincoln, NE 68542-2500.

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