

ABSURDITY, SINCERITY, TRUTH, AND THE CHURCH OF THE FLYING SPAGHETTI MONSTER: TITLE VII RELIGIOUS PROTECTIONS AND PERCEIVED SATIRE

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I. INTRODUCTION

Your newly hired employee, Toni, has just walked into your office on her first day at Meerkat Manufacturing, the private corporation where you serve as a mid-level manager. She is donning a weathered vest with eighteen buttons, a flowing woolen coat over the top that has oversized cuffs (though it's mid-July), striped pants that bag and tuck into high black socks just above her knees. On her head is a large metal colander, the same kind you have under your sink at home. She's come to request Fridays off. Every Friday. Toni says that as a "Pastafarian" she is entitled to have every Friday off as a religious holiday. Your more stayed temperament, combined with a desire to cover yourself, lead you to tell Toni you'll have to "run it by Human Resources." After a quick Google search you explain to Joe, the HR Director, who is responsible for Equal Employment Opportunity policy within the company, that you're pretty sure you can tell Toni that she cannot be dressed like a pirate at work and that she can't have off Fridays for some religion that is clearly made up (and what's with that colander?!). Joe, a veteran in his field, looks up at you and says he's not so sure you're right.

Title VII of the Civil Rights act of 1964 makes it unlawful for an employer to discriminate against an employee or prospective employee on the basis of religion, among other protected classes.¹

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¹ 42 U.S.C. § 2000e-2(a)(1-2) (2018). ("It shall be unlawful employment practice for an employer-

- (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin, or
- (2) To limit segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.")

Shortly after the enactment of Title VII, the Equal Employment Opportunity Commission put forth guidelines, attempting to clarify the less than obvious implications of these religious protections.² In 1972 Congress responded to the EEOC and relevant case law by codifying a definition of religion into Title VII.³ This new provision, which stands as binding law today, “includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”⁴

This definition has been considered overly broad by its critics.⁵ To this day, Title VII religious protection law is a veritable wild west. It follows that nontraditional religions would, in a great number of cases,⁶ be included under this protected class. The question presented to Joe, our fictitious HR Director, and the same question to be answered in this note is: does Pastafarianism (i.e. subscription to the Church of the Flying Spaghetti Monster), which has been repeatedly criticized as nothing more than parody and satire,⁷ elicit protection under Title VII? If so, how much accommodation is required? If not, why not?

Section II will begin with an expansive background of The Church of the Flying Spaghetti Monster (hereinafter CFSM). A timeline of its origins, its account of history, and its increasing popularity will lay the foundation for this background.⁸ Testimonies of sincerity and legitimacy,⁹ references in popular culture,¹⁰ and an examination of its traditions and practices will fill in the gaps and help create a robust picture of the CFSM.¹¹

² 29 C.F.R. § 1605.1(a)(2) (1966) (requiring employers to accommodate religious practices of employees or prospective employees unless it would create a “serious inconvenience to the conduct of the business.”), *see also Id.* § 1605.1(b) (2018) (guideline revision to accommodate scheduling requests).

³ 42 U.S.C. § 2000e(j) (2018).

⁴ *Id.*

⁵ Susannah P. Mroz, *True Believers?: Problems of Definition in Title VII Religious Discrimination Jurisprudence*, 39 Ind. L. Rev. 145, 175-76 (2005) (suggesting a tweaking of the statutory definition itself).

⁶ *See infra* notes 146, 152.

⁷ *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819 (D. Neb. 2016).

⁸ *See infra* notes 24, 25.

⁹ *See infra* note 95.

¹⁰ *See infra* note 86.

¹¹ *See infra* notes 101-20.

A brief analysis of how a plaintiff establishes a *prima facie* case for protection under Title VII's religious provisions in Section III will narrow the scope of this note to the pertinent elements of establishing religious belief.¹² Section IV will parse out more specifically what a religion actually is for Title VII purposes.¹³ This will begin with an examination of the parameters of Title VII religious protections, drawing comparators from claimed protections for purely secular beliefs,¹⁴ white supremacy,¹⁵ eating cat food,¹⁶ and more.

An analysis of what a religion is for these purposes will inevitably lead to the *Seegar/Welsh* standard,¹⁷ which stands for the proposition that whether a religious belief is "truly held" is a question of "sincerity."¹⁸ Section V will then determine whether Pastafarianism can be considered a "sincerely held" belief by carefully analyzing the only federal court decision to date on the matter of the CFSM, in which the court held that the CFSM cannot elicit sincerely held religious beliefs, since it is a parody religion and merely a satire.¹⁹ Since religions that are considered subjectively absurd to outside perspectives are the most likely to fall within the narrow window of cases that actually require a "sincerely held belief" analysis, and since CFSM has specifically been criticized as mere parody due to its perceived absurd nature, this will be the apex of this note.²⁰

Section VI will then apply a widely utilized judicial test for what a "religion" is from the Third Circuit to see, once sincerely held belief has been established, if the CFSM contains further indicia which might be required for protection under Title VII.²¹

Should the CFSM successfully jump these hurdles, there is still the issue of reasonable accommodation.²² Section VII will directly, but briefly examine our hypothetical HR Director Joe's dilemma, seeking to define what accommodations an employer

¹² See *infra* notes 128.

¹³ See *infra* notes 139-41.

¹⁴ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁵ *Peterson v. Wilmur Comm., Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002).

¹⁶ *Brown v. Pena*, 441 F. Supp. 1382 (S.D. Fla. 1977).

¹⁷ See *generally* *United States v. Seeger*, 380 U.S. 163, 185 (1965), see also *generally* *Welsh v. United States*, 398 U.S. 333 (1970).

¹⁸ *Seeger*, 380 U.S. at 185.

¹⁹ See *infra* note 187.

²⁰ See *infra* note 194.

²¹ *Malnak v. Yogi*, 592 F.2d 197, 200 (3d Cir. 1979) (Adams' concurring opinion).

²² 42 U.S.C. § 2000e(j) (2018).

would be required to provide an employee who is a follower of the CFSM by applying the most common burden shifting paradigm for religious accommodations under Title VII.²³

The purpose of this note, through analyzing whether or not the CFSM elicits religious protections under Title VII, will be to parse out what role, if any, perceived absurdity, parody, or satire can rightfully play in judicial analysis of religious protection. It will be the position of this note that these considerations must play no role in that analysis.

II. THE CHURCH OF THE FLYING SPAGHETTI MONSTER BOILED DOWN

The onset of the CFSM's notoriety coincided with a blog post in 2005, weighing in on a Kansas School Board debate about the teaching of evolution, intelligent design, and the definition of science in public schools.²⁴ *The Gospel of the Flying Spaghetti Monster* (hereinafter the *Gospel*), though, posits that Pastafarianism has existed for twenty-five hundred years, since the Flying Spaghetti Monster (hereinafter FSM) "revealed His Noodly Appendage to us, showing us the way."²⁵

According to the *Gospel*, The FSM created the universe five thousand years ago, with "no one except for Himself around to see it."²⁶ Creating Earth in "approximately 0.062831853 seconds," His Noodliness "disguised [the Earth] to appear much older" in order to fool the "nosy" scientists He knew would soon be snooping around.²⁷ To do this, He placed fossils in the earth's surface, such as dinosaur bones.²⁸

Pirates, from whom humans descend, are the chosen people of the FSM, according to the *Gospel*.²⁹ Since we share "99.9 percent of our DNA with Pirates," they are our collective ancestors.³⁰ Goosebumps, the *Gospel* explains, are "cleverly disguised feature[s] that allowed for increased buoyancy once a Pirate hit cold water,"³¹

²³ See *infra* notes 246-47, 249.

²⁴ Bobby Henderson, *Open Letter to Kansas School Board* (2005), <http://www.venganza.org/about/open-letter/>.

²⁵ BOBBY HENDERSON, *THE GOSPEL OF THE FLYING SPAGHETTI MONSTER* 70 (HarperCollinsPublishers 2006).

²⁶ *Id.* at 67-8.

²⁷ *Id.* at 68.

²⁸ *Id.* at 68-69. Pastafarians do believe in dinosaurs, they just believe they coexisted with men and did not have bones.

²⁹ *Id.* at 33.

³⁰ BOBBY HENDERSON, *THE GOSPEL OF THE FLYING SPAGHETTI MONSTER* at 27.

³¹ *Id.* at 29.

and the appendix is a place for a Pirate to hide his gold.³² The *Gospel* goes on to assert that “[the FSM] went through a great deal of trouble to make us believe that Evolution is true – masking the prominent role of Pirates in our origins”³³

Approximately twenty-five hundred years ago, the FSM handed down to mankind a message as to how they should live.³⁴ This way of life was to take place “on the water in great wooden ships, loaded with grog, swag, and hopefully, wenches. This was His will, and so it was done.”³⁵ This began the Golden Age of the Pirate lifestyle.³⁶ Unfortunately, many details of this era have been lost.³⁷

You don’t have to be a true Pastafarian to get into FSM Heaven, but belief in His Noodliness while here on Earth does grant access to the best areas of FSM Heaven.³⁸ Considering that Pastafarian Heaven has a Beer Volcano and a Stripper Factory, converting is, however, strongly urged.³⁹ Conversion is not to be pushed, though, as Pastafarians are to “simply deliver His Word and let the people decide.”⁴⁰ Should spreading His Word be something that interests a follower of the Church, there is an array of literature to distribute to non-believers.⁴¹ Not concerned with the stigma associated with the word, Pastafarian outreach is directly referred to as “Propaganda.”⁴²

The *Gospel* also contains a guide which details how to interact with believers of other faiths and discuss the FSM with them.⁴³ The guide suggests knocking on the doors of Mormons at five o’clock in the morning and offering them orange soda before discussing His Noodliness.⁴⁴ The guide also implies that Jesus may

³² *Id.*

³³ *Id.* at 33.

³⁴ *Id.* at 70.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* (“ . . . possibly because many ships sank, due to overloading. Swag is very heavy, and these, the first Pastafarians, showed less than 100 percent perfect judgment, having drunk too much grog.”).

³⁸ BOBBY HENDERSON, THE GOSPEL OF THE FLYING SPAGHETTI MONSTER at 83.

³⁹ *Id.* In contrast, those who are banished to Flying Spaghetti Monster Hell also have access to a Stripper Factory and a Beer Volcano, but “the beer is stale and the strippers have venereal diseases. Not unlike Las Vegas.”

⁴⁰ *Id.* at 119.

⁴¹ *See Id.* 136-48, *see also* <http://www.venganza.org/materials/>.

⁴² HENDERSON, THE GOSPEL OF THE FLYING SPAGHETTI MONSTER at 119, *see also* <http://www.venganza.org/materials/>.

⁴³ HENDERSON, THE GOSPEL OF THE FLYING SPAGHETTI MONSTER at 123-35.

⁴⁴ *Id.* at 124 (“It also may not hurt to bring along some orange soda-it’s like crack for Mormons. No one knows why exactly, although scientists tell us it

have been the FSM in disguise, which might entice Christians.⁴⁵ Suggesting offering ramen to Jainists, Shintoists, and Rastafarians, the guide is thorough, though it does state very simply that “Scientologists are best left alone.”⁴⁶

A self-proclaimed religion of peace, the *Gospel* points to Christianity as the “Rambo of religions,” and refers to Jews and Muslims as “still duking it out,” while noting that Pastafarianism has never started a war.⁴⁷ Rejecting the dogma of these traditional religions,⁴⁸ the CFSM reserves for itself the right to change its beliefs based on new evidence or greater understanding of old evidence.⁴⁹ In order to convince a Pastafarian that there is no FSM at all, you simply have to provide “proof of His nonexistence.”⁵⁰

Pastafarians do not see the FSM as a perfect being. To the contrary, he was allegedly “careless, cruel, drunk, or even high when he first laid down the templates for life as we know it.”⁵¹ Citing numerous injustices and mistakes, such as religious warfare, mass poverty, and global warming, but also pointing to such annoyances as The Macarena and actor Ben Affleck’s relations with singer/actress Jennifer Lopez, Pastafarians subscribe to a theory of *unintelligent* design.⁵²

The CFSM is not without a moral code. Rather, according to the *Gospel*, a set of ten stone tablets were handed down from the FSM to Pirate Mosey at Mount Salsa.⁵³ Mosey, though, dropped two of the tablets on his way down from Mount Salsa, which “partly accounts for Pastafarians’ flimsy moral standards.”⁵⁴ The remaining tablets were comprised of what the FSM refers to as “I’d Really

probably has something to do with the genetic anomalies caused by generations of endogamous polygamy.”).

⁴⁵ *Id.* at 128.

⁴⁶ *Id.* at 133-34.

⁴⁷ *Id.* at 35-6, 84.

⁴⁸ *Id.* at 36. Henderson notes here that dogma implies an absolute belief in something. In order to have such a belief a person would “basically have to be omniscient,” further explaining in a footnote: “[that] would be cool, but would probably also make you a little uncomfortable around other people.”

⁴⁹ *Id.* at 37.

⁵⁰ *Id.*

⁵¹ HENDERSON, *THE GOSPEL OF THE FLYING SPAGHETTI MONSTER* at 38.

⁵² *Id.* at 39-42.

⁵³ *Id.* at 99. It would be difficult not to draw parallels between this narrative and that of Moses and the Ten Commandments of Abrahamic religions in the Exodus narrative, but many traditional religions also have parallels within each other and even incorporate entire religions into their belief structure.

⁵⁴ *Id.*

Rather You Didn'ts," which read like casually conversational suggestions, such as:

3. I'd Really Rather You Didn't Judge People For The Way They Look, Or How They Dress, Or The Way They Talk, Or, Well, Just Play Nice, Okay? Oh, And Get This In Your Thick Heads: Woman = Person. Man = Person. Samey-Samey. One Is Not Better Than The Other, Unless We're Talking About Fashion And I'm Sorry, But I Gave That To Women And Some Guys Who Know The Difference Between Teal and Fuchsia.⁵⁵

Many of the religious texts possessed by the Pirate ancestors of Pastafarianism were lost when they were forced to conceal their religious documents due to years of attacks by a band of violent kayakers, called Hari Krishnas, in the 18th century, according to the *Gospel*.⁵⁶ The slaughter of Pirates that ensued explains not only the loss of religious text and the low number of Pirates we have today, but also why Pirates began to be known for looting and pillaging, as they were quite "pissed off" by the attacks.⁵⁷ Many of these texts are thought to have been overlooked throughout history as well, some being mistaken for recipes.⁵⁸

Despite a decline in the number of Pirates and loss of presumably important religious texts, Pastafarianism has spread over recent years, especially in European countries.⁵⁹ There are Pastafarian Churches in Austria, Belgium, Bulgaria, the Czech Republic, France, Georgia, Germany, Greece, Iceland, Ireland, Italy, the Netherlands, Norway, Poland, Russia, Spain, Turkey, and Ukraine, to name a few, with varying degrees of activity.⁶⁰ In 2014, a Warsaw court allowed the CFSM to register as an official religion in Poland.⁶¹ The Chamber of Commerce of the Netherlands granted

⁵⁵ *Id.* at 99-100.

⁵⁶ *Id.* at 73-75.

⁵⁷ *Id.* at 74.

⁵⁸ *Id.* at 75.

⁵⁹ Kathy Gilsinan, *Big in Europe: The Church of the Flying Spaghetti Monster*, THE ATLANTIC (Nov. 2016 Issue) <http://www.theatlantic.com/magazine/archive/2016/11/big-in-europe/501131/>.

⁶⁰ Pastafarian Jasper, *List of European Churches of the Flying Spaghetti Monster*, THE EUROPEAN CHURCH OF THE FLYING SPAGHETTI MONSTER (Aug. 26, 2014) <http://www.fsm-europe.eu>.

⁶¹ *Pastafarianism can apply to register as a religion*, RADIO POLAND (Sept. 4, 2014 8:00pm) <http://www.thenews.pl/1/9/Artykul/167733> (allowing Pastafarianism to register as a religion based on an apparent technicality).

the CFMSM official status in January of 2016.⁶² The government of New Zealand has also approved the CFMSM as an organization that is approved for the purpose of marriages in December of 2015.⁶³

The privileges and duties of presiding over holy Pastafarian ceremonies, such as “marriages and baptisms, giving last rites, and casting out false prophets,” are granted to those who are officially ordained by the CFMSM.⁶⁴ Along with a Certificate of Ordination, those who apply also receive an ID card with the aforementioned rights listed, along with being entrusted with sermonizing and “the respect, privileges, and honors due to a person of the cloth.”⁶⁵

On April 16, 2016, New Zealand’s first ever official Pastafarian wedding took place.⁶⁶ The couple wore full pirate regalia and were married by New Zealand’s first “ministeroni.”⁶⁷ Upon the pronouncement of marriage, the newly married couple put either end of a noodle in their mouths and met for a kiss à la the 1955 animated film *Lady and the Tramp*.⁶⁸ New Zealand’s Registrar-General of births, deaths, and marriages explained why he approved Pastafarianism: “While some claim this is a 'parody organisation', members have rebutted this on a number of occasions. Most approved organisations are faith-based and cluster around well-known religious views, however, a number have what might be considered an 'alternative philosophy.’”⁶⁹

The CFMSM in Brandenburg, Germany has had a more difficult time gaining legal recognition.⁷⁰ When Brandenburg Pastafarians were told that they could not post signs advertising their “Nudelmesse” (Noodle Mass), they brought suit against the

⁶² Amy Willis, *The Netherlands has recognised the Church of the Flying Spaghetti Monster as a religion*, METRO (Jan. 28 2016 11:24am), <http://metro.co.uk/2016/01/28/the-netherlands-has-recognised-the-church-of-the-flying-spaghetti-monster-as-a-religion-5649017/>.

⁶³ Marriage (Approval of Organisations) Notice No. 22, NEW ZEALAND GAZETTE NO. 135 (Dec. 10, 2015), <https://gazette.govt.nz/assets/pdf-cache/2015/2015-go7246.pdf?2015-12-10%2010:20:10>.

⁶⁴ Bobby Henderson, *Official Certificates of Ordination*, THE CHURCH OF THE FLYING SPAGHETTI MONSTER (2016), <http://www.venganza.org/ordination/>.

⁶⁵ *Id.*

⁶⁶ Merrit Kennedy, *Holy Macaroni: Welcome To The First Ever Official Pastafarian Wedding*, NPR (April 16, 2016, 4:33pm) <http://www.npr.org/sections/thetwo-way/2016/04/16/474510676/holy-macaroni-welcome-to-the-first-ever-official-pastafarian-wedding>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Gilsinan, *supra* note 59.

local Infrastructure Ministry.⁷¹ The Brandenburg Infrastructure Ministry's Spokesman said that the case was primarily about "whether the group is religious or not."⁷² Brother Spaghetthus, a.k.a. Rüdiger Weida, a Brandenburg Pastafarian who the official CFMSM has called "a great ambassador for all of us Pastafarians,"⁷³ was disappointed when the case was dismissed "merely as a formality," but vowed to appeal.⁷⁴ Not to be disheartened by the results, Brother Spaghetthus and some 40 Pastafarians celebrated the tenth anniversary of the German CFMSM in September of 2016, in a gathering wherein they looked to the future, discussing the finer points of political lobbying for more favorable legislation.⁷⁵ Pasta was served at the gathering, which is a central theme of Pastafarian practice.⁷⁶

Within the United States there has been a light speckling of governmental action in regard to Pastafariansim. In *Cavanaugh v. Bartelt*, a prisoner was denied relief under the Religious Land Use and Institutionalized Persons Act (RLUIPA) because Pastafarianism was not considered by the court to be a 'sincerely held religious belief,' and because the judge deemed it a 'parody' religion.⁷⁷ Other governmental bodies, though, have also been forced to consider the question of religious parody as it relates to Pastafarianism.

Utah and Massachusetts have allowed Pastafarians to pose for driver's license photos with colanders on their head, an explicit nod to the FSM.⁷⁸ The Wisconsin Department of Transportation has also followed suit.⁷⁹ Illinois on the other hand, told Rachel Hoover,

⁷¹ *Id.*

⁷² Ben Knight, *Quirky church, Flying Spaghetti Monster, hits court wall*, DW (April 4, 2016) <http://www.dw.com/en/quirky-church-flying-spaghetti-monster-hits-court-wall/a-19184730>.

⁷³ Bobby Henderson, *The Templin Pastafarians are Fighting the State of Brandenburg*, CHURCH OF THE FLYING SPAGHETTI MONSTER (April 8, 2016), <http://www.venganza.org/2016/04/brandenburg/>.

⁷⁴ Knight, *supra* note 72.

⁷⁵ Daniela Wakonigg, *Mit Lobbyismus und Pasta in die Zukunft*, HUMANISTISCHER PRESSEDIENST (Sept. 21, 2016) <http://hpd.de/artikel/lobbyismus-und-pasta-zukunft-13538>.

⁷⁶ *Id.*

⁷⁷ *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819 (D. Neb. 2016).

⁷⁸ Eric Zorn, *Decision to ban colander from driver's license photo strains belief*, Column: Change of Subject, CHICAGO TRIBUNE (July 12, 2016), <http://www.chicagotribune.com/news/opinion/zorn/ct-pastafarian-drivers-license-illinois-nebraska-perspec-0715-20160712-column.html>.

⁷⁹ Bobby Henderson, *Wisconsin DMV says Colanders are ok*, Church of the Flying Spaghetti Monster (Feb. 11, 2016), <http://www.venganza.org/2016/02/wisconsin/>.

a 21-year-old college student of Arlington Heights, that she had to forfeit an identification card that contained a photograph with a colander on her head.⁸⁰ Illinois Secretary of State spokesman Dave Druker told the Chicago Tribune that “It almost looks like Pastafarians are a mockery of religion.”⁸¹ Tribune columnist Eric Zorn took this comment a step further, saying that “There is no ‘almost’ about it. The CFMS is a broad spoof on all supernatural belief systems that ask for special treatment by citing the constitutional guarantee of free exercise of religion.”⁸² Further, Zorn posed the question: “Implicit in the spoof is a challenge: What makes FSM’s claims about the invisible force that controls the universe any less plausible or less deserving of legal protection than those of established faiths? Popularity? Longevity? Earnestness?”⁸³ Notably, New Jersey and Georgia have also denied Pastafarians the right to wear colanders in driver’s license photos, with the Georgia Department of Driver Services noting that “Pastafarianism is not actually a religion. Rather it is a philosophy that mocks religions.”⁸⁴

In the realm of popular, or at least academic culture, renowned evolutionary biologist and author Richard Dawkins has regularly mentioned Pastafarianism in speeches,⁸⁵ as well as his written work, including his highly respected book; *The God Delusion*.⁸⁶ Dawkins often utilizes The Spaghetti Monster a comparator to the Judeo-Christian God, Allah, and other common monotheistic Gods.⁸⁷ He also displays The Spaghetti Monster alongside “Zeus, Apollo, Amon Ra, Mithras, Baal, Thor, Wotan, [and] the Golden Calf . . .” to posit that each are entities that are as logical to believe in as any other gods.⁸⁸

⁸⁰ Zorn, *supra* note 78.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Zorn, *supra* note 78 (discussing New Jersey denying pastafarians the right to wear colanders in driver’s license photos), *see also* Angelique B. McClendon, General Counsel, Georgia Department of Driver Services, *Letter of December 18, 2015*, <http://www.venganza.org/wp-content/uploads/2016/01/ddsletter2.jpg> (stating Georgia denied pastafarians the right to wear colanders in driver’s license photos).

⁸⁵ Eyedunno, YOUTUBE, *Richard Dawkins - “What if you’re wrong?”* (Nov. 25, 2006), <https://www.youtube.com/watch?v=6mmskXXetcg>.

⁸⁶ RICHARD DAWKINS, *THE GOD DELUSION* (First Mariner Books 2008) (2006) (indicating on the inside flap that *The God Delusion* was selected as a Best Book of the Year by *The Economist*, *Financial Times*, *San Francisco Chronicle*, *Salon*, *St. Louis Post-Dispatch*, *Capital Times*, *Kirkus Reviews*, and others.)

⁸⁷ *Id.* at 77.

⁸⁸ *Id.*

The *Gospel* directly addresses Intelligent Design,⁸⁹ providing fodder for those who claim that Pastafarianism is nothing more than an anti-religion stemming from Henderson's 2005 letter directed at a School Board that was debating the teaching of Intelligent Design in science classrooms.⁹⁰ Further, many critics have made the assumption that The CFMS is a sort of atheist organization.⁹¹

There are those, even within the Church, that view Pastafarianism as satire.⁹² Andrea Robert of the P.A.S.T.A. Foundation, which is, by all appearances a small organization that seeks Pastafarian equality, wrote of the importance of religious satire shortly after the Charlie Hebdo shooting in France in January of 2015.⁹³ In an attempt to show solidarity with those killed in the attack, Robert wrote that Pastafarianism "is a religion born, in part, out of satire," going on to reference Bobby Henderson's open letter/blog post regarding a Kansas school board's 2005 decision to implement teachings about intelligent design alongside evolution in science classrooms, calling it a "satirical point."⁹⁴

Bobby Henderson, though, has addressed these assertions with explicit claims of legitimacy. "**This is NOT an atheists club,**" reads the official CFMS website.⁹⁵ Making that point abundantly

⁸⁹ See HENDERSON, THE GOSPEL OF THE FLYING SPAGHETTI MONSTER at 43-5, *FSM vs. ID, an Unlikely Alliance*; see also *Id.* at 215 ("We've pointed to much evidence supporting His existence, certainly enough to get Pastafarianism included in the curriculum alongside Evolution and Intelligent Design.")

⁹⁰ Article: *If Judges were angels: religious equality, free exercise, and the (underappreciated merits of Smith)*, 102 Nw. U.L. Rev 1189 n.33 (2008) (asserting, in part, that "the creators of the Church of the Flying Spaghetti Monster clearly intended it as a snide attack on the proponents of Intelligent Design (and nothing more).")

⁹¹ Michael Blank, Note, *Disestablishing Deism: Advocating Free Exercise Challenges to State-Induced Invocations of God*, 31 WASH. U. J.L. & POL'Y 157, 167 n.64 (2009) ("There also are other Atheist organizations that identify as "churches," like the Church of the Flying Spaghetti Monster, and the Temple of the Invisible Pink Unicorn."), See also *Ponorovskaya v. Stecklow*, 45 Misc. 3d 597, 616 (N.Y. Sup. Ct. 2014) (stating, in dicta, that The Church of the Flying Spaghetti Monster is a "religious group comprised of atheists . . .")

⁹² Bobby Henderson, *About*, THE CHURCH OF THE FLYING SPAGHETTI MONSTER, <http://www.venganza.org/about/> (last visited Mar. 7, 2018) ("Some Pastafarians honestly believe in the FSM, and some see it as satire.")

⁹³ Andrea Robert, *In Defense of Religious Satire, A Pastafarian Response to the Charlie Hebdo Terror Attack*, PATHEOS (Jan. 15, 2015), <http://www.patheos.com/blogs/wwjtd/2015/01/guest-post-in-defense-of-religious-satire-a-pastafarian-response-to-the-charlie-hebdo-terror-attack/>.

⁹⁴ *Id.*

⁹⁵ Henderson, *supra* note 92.

clear, Henderson goes on to explain that “[s]ome Pastafarians honestly believe in the FSM, and some see it as satire.”⁹⁶ Continuing:

Compare our religion to those that are built on lies. I am not talking necessarily about mainstream religions (which themselves are often full of mysticism and ad-hoc reasoning), but think of cults, or churches where the leaders are scamming their followers out of money. These are groups where the followers fully believe. Are these churches legitimate since they have many True Believers?⁹⁷

Henderson also clarifies that Pastafarianism is “not a joke. Elements of our religion are sometimes described as satire and there are many members who do not literally believe our scripture, but this isn’t unusual in religion. A lot of Christians don’t believe the Bible is literally true – but that doesn’t mean they aren’t True Christians.”⁹⁸ The *Gospel* further bolsters CFSM’s religious assertions with a “Disclaimer” at the beginning of the text which reads:

While Pastafarianism is the only religion based on empirical evidence, it should also be noted that this is a faith-based book. Attentive readers will note numerous holes and contradictions throughout the text; they will even find blatant lies and exaggerations. These have been placed there to test the reader’s faith.⁹⁹

The CFSM has quite a few practices and traditions that are laid out in detail in the *Gospel*. Dressing like a Pirate and consuming pasta are at the core of Pastafarian practice. Pirate regalia is “His chosen garb.”¹⁰⁰ As Bobby Henderson explains in his 2005 blog post:

It is disrespectful to teach our beliefs without wearing His chosen outfit, which is of course pirate regalia. I cannot stress the importance of this enough, and unfortunately cannot describe in detail why this must

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ HENDERSON, THE GOSPEL OF THE FLYING SPAGHETTI MONSTER, at xiv.

¹⁰⁰ *Id.* at xiii.

be done [. . .] The concise explanation is that He becomes angry if we don't.¹⁰¹

There does seem to be some explanation in the *Gospel*, as well. The *Gospel* posits that there is a “statistically significant inverse relationship between Pirates and global temperature.”¹⁰² While Henderson does note that “not all correlations are causal,”⁷⁹ he asserts, in his 2005 letter, that “global warming, earthquakes, hurricanes, and other natural disasters are a direct effect of the shrinking numbers of Pirates since the 1800s.”¹⁰³

Pastafarian Communion consists of a devouring a twelve-hundred calorie portion of spaghetti and meatballs.¹⁰⁴ Pastover is a holiday, “analogous to the Jewish holiday of Passover,” which also involves eating copious amounts of pasta with family members who are dressed as Pirates.¹⁰⁵ “Holiday” stretches over most of December and January and seems to be reflective of the holiday celebrations of other religions.¹⁰⁶ Ramendan is comparable to Ramadan, the Islamic period of fasting, though instead of fasting or praying, Pastafarians “spend a few days of the month eating only Ramen noodles,” and toward the end of the month “Pastafarians are encouraged to give their extra Ramen to those who are more needy.”¹⁰⁷ International Talk Like a Pirate Day, which falls on September 19th, is considered an especially good day for Pastafarian evangelism, and the *Gospel* suggests that one half of the Church’s annual conversions occur that day.¹⁰⁸

Halloween is also especially important to Pastafarians because of its historical significance.¹⁰⁹ The first Pastafarians (Pirates) “were peace-loving explorers and spreaders of goodwill.”¹¹⁰ This goodwill led these Pirate Pastafarians to distribute candy to children, “thus establishing what is now known as Halloween.”¹¹¹ Halloween took on a darker meaning in the 18th century, though.¹¹²

¹⁰¹ Henderson, *supra* note 24.

¹⁰² HENDERSON, THE GOSPEL OF THE FLYING SPAGHETTI MONSTER at 33.

¹⁰³ Henderson, *supra* note 24.

¹⁰⁴ HENDERSON, THE GOSPEL OF THE FLYING SPAGHETTI MONSTER at 51-52.

¹⁰⁵ *Id.* at 159.

¹⁰⁶ *Id.* at 162.

¹⁰⁷ *Id.* at 160-61 (noting that Pastafarians do not fast or pray because “doing so would conflict with their flimsy moral standards.”).

¹⁰⁸ *Id.* at 161-62.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 71

¹¹¹ *Id.*

¹¹² *Id.* at 72-73.

The Hari Krishnas declared a holy war against the Pirates during this period, but importantly, they began the slaughter of Pirates on Halloween, a day that previously had a meaning of goodwill in Pastafarian culture.¹¹³ The modern celebration of Halloween is also additional justification for Pastafarianism's Pirate/global warming theory. Since a large number of people emulate Pirate behavior and dress on Halloween, and the months that follow Halloween are colder than the ones preceding Halloween, the *Gospel* presents this as "solid evidence that [Halloween Pirates] are indeed making a difference on weather patterns."¹¹⁴

Friday is the most important and holiest of Pastafarian holidays.¹¹⁵ Meant to be observed with the "utmost of piety," Pastafarians are supposed to "take it easy" every single Friday, and "if possible, try to find some sun."¹¹⁶ Friday acts as both a lure for converting people to the CFSM,¹¹⁷ and as the only day that Pastafarians do not evangelize.¹¹⁸ There is a strong similarity here to Judeo-Christian Sabbaths, except that Friday is widely considered a workday in the United States.¹¹⁹

Bobby Henderson and his staff directly address the issue of practicing Pastafarianism in the workplace, suggesting that "you may encounter people who disagree with your right to miss school or work every Friday, to wear an eye patch in public, to talk like a pirate, etc."¹²⁰ Adding that:

If, after learning about our religion, people still refuse to allow you to express your constitutionally protected right of freedom of religion, then you should write a letter. [. . .] If you're at work, write to your supervisor, copying the company's director of human resources – and again, forward a copy to the ACLU.¹²¹

If the CFSM is legitimately and sincerely a religious belief to those who follow it, then there should be no prohibitive issues presented in providing protections to Pastafarians in the workplace. The limits on those protections may obviously still be delineated,

¹¹³ *Id.* at 73.

¹¹⁴ *Id.* at 81-82.

¹¹⁵ *Id.* at 162.

¹¹⁶ *Id.* at 124-25.

¹¹⁷ *Id.* at 143.

¹¹⁸ *Id.* at 163.

¹¹⁹ Though the concept of a workweek and a weekend in the United States did evolve around weekly holy days in the first place.

¹²⁰ *Id.* at 213.

¹²¹ *Id.* at 214.

should that be the case. If Pastafarianism is, in fact, a farce, it appears intricately and almost assuredly purposely designed to pass judicial tests, and seems to openly welcome such a challenge.

III. BEGINNING TO ESTABLISH A *PRIMA FACIE* CASE UNDER TITLE VII RELIGIOUS PROTECTION

While the percentage of charges filed with the Equal Employment Opportunities Commission¹²² on the basis of religion has increased steadily between Fiscal Years 1997 and 2015, that number still hovers around 4% of total charges.¹²³ Within Title VII's religious protections, claims typically fall under disparate treatment, reasonable accommodation, or religious harassment framework.¹²⁴ Claims of systemic disparate treatment, disparate impact, and retaliation are technically available in the religious context under Title VII, but it is more common, pursuant to 42 U.S.C. § 20003(j),¹²⁵ for a reasonable accommodation claim on the basis of religious discrimination, or a claim of individual disparate treatment on that same basis, to be brought.¹²⁶ For those reasons, this note's scope will be narrowed to assessing individual disparate treatment and reasonable accommodation claims.

It has been somewhat unclear as to whether reasonable accommodation claims are a standalone claim, or serve as an affirmative defense for employers since *EEOC v. Abercrombie & Fitch Stores* was decided by the Supreme Court.¹²⁷ Prior to

¹²² The federal employment discrimination law enforcement agency with whom charges must be filed prior to filing a suit against one's employer.

¹²³ *Charge Statistics FY 1997 Through FY 2015*, Equal Employment Opportunities Commission (last visited Jan. 2, 2017), <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

¹²⁴ Naomi C. Earp, *Directives Transmittal Num. 915.003*, Equal Employment Opportunities Commission (July 22, 2008), https://www.eeoc.gov/policy/docs/religion.html#_ftn10 ("The Section defines religious discrimination, discusses *typical* scenarios in which religious discrimination may arise, and provides guidance to employers on how to balance the needs of individuals in a diverse religious climate.") (emphasis added).

¹²⁵ 42 U.S.C. § 2003(j) ("The term 'religion' includes all aspects of religions observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably accommodate* to an employee's or prospective employee's religions observance or practice without undue hardship on the conduct of the employer's business.") (emphasis added).

¹²⁶ *What You Should Know About Workplace Religious Accommodation*, Equal Employment Opportunities Commission (last visited Feb. 17, 2017), https://www.eeoc.gov/eeoc/newsroom/wysk/workplace_religious_accommodation.cfm.

¹²⁷ *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015).

Abercrombie, a *prima facie* case for religious accommodation was established if the employee was able to show that he/she 1) had a bona fide religious belief or practice that conflicted with an employment requirement, 2) informed his/her employer of that belief or practice, and 3) suffered an adverse employment action as a result of the conflict (such as discharge, lack of promotion, diminished pay, etc.).¹²⁸ *Abercrombie*, however, made clear that the second prong of this test is unnecessary to establish a *prima facie* case for a reasonable accommodation claims, as Title VII does not impose an employer knowledge requirement under its religious discrimination framework.¹²⁹

Abercrombie appears to conflate reasonable accommodation claims and disparate treatment claims altogether, leaving little clarity as to whether or not a standalone claim for failure to accommodate still exists.¹³⁰ If it does not exist as a standalone claim, it is likely that the default individual disparate treatment test from *McDonnell-Douglas v. Green* for the establishment of a *prima facie* case will be applied,¹³¹ but that an affirmative defense will be available to the employer to show that the employer was unable to reasonably accommodate the employee or prospective employee's religious observance or practice without undue hardship pursuant to 42 U.S.C. § 2003(j).¹³²

A crucial element of the *McDonnell-Douglas prima facie* case requirements is that the complainant must belong to a protected

¹²⁸ Ansonia Bd. Of Educ. V. Philbrook, 479 U.S. 60, 65-6 (1986).

¹²⁹ *Abercrombie*, 135 S.Ct. 2028, 2032-33 (“For example, the Americans with Disabilities Act of 1990 defines discrimination to include an employer’s failure to make “reasonable accommodations to the known physical or mental limitations” of the applicant. Title VII contains no such limitation.”).

¹³⁰ *Id.* at 2033 (“Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward....”).

¹³¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (“(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.”). This test has been shown to be flexible to fit linguistically with differing motivations for discrimination as well as differing adverse employment actions. *See Int’l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 358 (1977) (“The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the act.”); *see also McDonnell Douglas*, 411 U.S. 792, n. 13.

¹³² *See supra* note 125.

class.¹³³ It logically follows that to receive religious protections, one must be a member of a religion. On the other hand, if a standalone reasonable accommodations claim continues to exist post-*Abercrombie* it is clear in the first element of that test that, to establish a *prima facie* case, the complainant must “have a bona fide religious belief or practice....”¹³⁴

Finally, there is the possibility, if multiple motives for the adverse employment action are present, that a “mixed motives” framework will apply, since the Civil Rights Act of 1991 specifically added language to Title VII that subjects employers to liability if protected class status was a “motivating factor” in their employment decision.¹³⁵ Here, too, it logically follows that it is a crucial element of establishing a *prima facie* case not simply that the religion be actually followed, but also that it must actually be a religion in itself.

IV. WHAT IS A RELIGION FOR THE PURPOSES OF TITLE VII?

Religion causes a special problem in the establishment of a *prima facie* case, which may be due to the fact that it is arguably the least immutable characteristic protected by Title VII.¹³⁶ After all, race, color, sex, and national origin are characteristics typically associated with birth.¹³⁷ This problem could also be attributable to the fact that religions are manmade constructions, subject to alteration, and also that new religions can be created.¹³⁸ Whatever

¹³³ See *supra* note 131.

¹³⁴ *Ansonia Bd. Of Educ. v. Philbrook*, 479 U.S. 60, 65 (1986).

¹³⁵ 42 U.S.C. § 2000e-2(m) (“Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors motivated the practice.”)

¹³⁶ Sharon Hoffman, *Article: The Importance of Immutability in Employment Discrimination Law*, 52 Wm. & Mary L. Rev. 1483, 1516 (2011) (“Although many individuals remain members of their religions of birth, a significant percentage of Americans convert to a different religion or choose not to identify with any religion at all. Title VII’s prohibition of religions discrimination makes not distinction between individuals who never altered their religious affiliation and those who have.”)

¹³⁷ *Id.* at 1511-12. Being an “accident of birth” is a predominant definition of immutability that has been adopted by the Supreme Court and many lower courts. It is, of course, true that modern American jurisprudence is currently in a struggle to define the role of birth in sex (orientation and gender), but religion still seems to be more malleable.

¹³⁸ DAWKINS, *THE GOD DELUSION* at 123 (“The only difference between *The Da Vinci Code* and the gospels is that the gospels are ancient fiction while *The Da*

the distinction, the difficulty of judicially defining religion for the purposes of membership in the protected religious class pursuant to Title VII is pervasive in those rare cases where a mainstream religion is not at issue.

For the purposes of Title VII, a religion is defined only as including “all aspects of religions observance and practice, as well as belief...”¹³⁹ The EEOC has further adopted the standard set out by the Supreme Court in *United States v. Seeger* and *Welsh v. United States*,¹⁴⁰ which turns on the broad question of whether the beliefs of a person’s “religion” “occupy the same place in the life of the [individual] as an orthodox belief in God holds in the life of one clearly qualified.”¹⁴¹

To determine whether a person’s beliefs occupy this place in their life, the *Seeger/Welsh* test turns on the question of whether a belief is “truly held,” or, as the EEOC Guidelines phrase it, “moral or ethical beliefs as to what is right or wrong which are sincerely held with the strength of traditional religious views.”¹⁴² This does not indicate that a court should seek to find the “truth” of a belief itself, but merely whether or not it is “truly/sincerely held.”¹⁴³ There are courts who take a narrower view than the broad *Seeger/Welsh* test, such as the Third Circuit’s three-part factor test, which has been adopted by many circuits, and which will be discussed below.¹⁴⁴ First, though, it will be necessary to set the parameters that have already been judicially delineated more generally, in order to see where Pastafarianism may fit on that spectrum.

First, it is clear that non-traditional religions are covered under Title VII.¹⁴⁵ For example, in *EEOC v. Red Robin Gourmet*

Vinci Code is modern fiction.”). New Atheists such as Richard Dawkins, Sam Harris, and Christopher Hitchens have developed extensive theoretical dialogues on the probability that religious texts and practices are manmade, without the hand of the Abrahamic God (or any others) being involved, but that will not be a point necessary for the understanding of this note.

¹³⁹ 42 U.S.C. § 2003(j)

¹⁴⁰ See *United States v. Seeger*, 380 U.S. 163, 185 (1965); *Welsh v. United States*, 398 U.S. 333 (1970).

¹⁴¹ *Seeger*, 380 U.S. at 184.

¹⁴² *Guidelines on Discrimination Because of Religion*, 29 C.F.R. § 1605.1 (2009).

¹⁴³ *Seeger*, 380 U.S. at 187.

¹⁴⁴ *Malnak v. Yogi*, 592 F.2d 197, 207-208 (3d Cir. 1979) (Adams’ concurring opinion).

¹⁴⁵ Naomi C. Earp, *Directives Transmittal Num. 915.003*, Equal Employment Opportunities Commission (July 22, 2008), https://www.eeoc.gov/policy/docs/religion.html#_ftn10 (“Religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism,

Burgers, Inc., a plaintiff who was terminated for refusing to cover his tattoos was entitled to relief because those tattoos were related to his practice of Kemetecism, which is an ancient Egyptian religion that worships the sun god, Ra.¹⁴⁶ However, there do appear to be limits on this broad delineation. Purely secular beliefs, for example, will not suffice,¹⁴⁷ though nontheists are considered to be members of the protected class.¹⁴⁸ The beliefs at issue, held by a nontheist, though, must fit within the *Seeger/Welsh* standard of being “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”¹⁴⁹

It is clear that Pastafarianism is not a traditional belief, given its only recent popularity and its foreign seeming practices. If Bobby Henderson is to be believed, that the CFMS is “not an atheists club,” then an analysis of the protected class membership of its followers as nontheists will be unnecessary.¹⁵⁰ For the purposes of this note, as well as the required precarious judicial distinction between the truth of a belief and the truth of the sincerity of that belief, we must assume that Pastafarians generally do not fall under protected class status on the basis of nontheism, but rather, under a theory of non-traditional theism. There does not seem to be a great distinction between worship of the sun god, Ra, and that of the FSM.¹⁵¹ On the basis of non-traditional religious belief, therefore, there seems to be no barrier to Title VII protection.

and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sec, and only subscribed to by a small number of people, or that seem illogical or unreasonable to others.”).

¹⁴⁶ EEOC v. Red Robin Gourmet Burgers, Inc., 2005 U.S. Dist. LEXIS 36219, 12-13 (W.D. Wash. Aug 29, 2005).

¹⁴⁷ Frazee v. Ill. Dep’t of Employment Sec. 489 U.S. 829, 833 (1989) (citing United States v. Seeger, 380 U.S. 163 (1965) and Wisconsin v. Yoder, 406 U.S. 205, 215-216 (1972)).

¹⁴⁸ *Questions and Answers: Religious Discrimination in the Workplace*, Equal Employment Opportunities Commission (last modified January 31, 2011) https://www.eeoc.gov/policy/docs/qanda_religion.html (“Religious beliefs include theistic beliefs as well as non-theistic ‘moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.’”).

¹⁴⁹ *Id.*

¹⁵⁰ Bobby Henderson, *Questions and Answers, About, THE CHURCH OF THE FLYING SPAGHETTI MONSTER* (2016), <http://www.venganza.org/about/>.

¹⁵¹ Recall Richard Dawkins’ direct comparison between Amon Ra (a later fusion of Ra and Amun, another chief Egyptian god) and the Flying Spaghetti Monster in his *argument ad absurdum*, *supra* note 88.

A religion also need not necessarily be “acceptable, logical, consistent, or comprehensible to others.”¹⁵² Further, the fact that a religious belief is not subjectively more or less ethical is not dispositive of it being a religion.¹⁵³ For example, in *Peterson v. Wilmur Communs., Inc.*, the District Court for the Eastern District of Wisconsin held that “Creativity,” a belief structure based on White Supremacy, including that African-Americans should be “shipped back to Africa,” and that Jews control the United States and have instigated all wars this century, was considered to be a religion because it functioned as one for the plaintiff.¹⁵⁴ Had these simply been political beliefs, though, separate and apart from a religious belief, they would not have sufficed to constitute a religion.¹⁵⁵

The beliefs and practices avowed by *The Gospel* are not built on a foundation of mere political or secular beliefs. While certainly Pastafarian practices are likely to seem unacceptable, illogical, inconsistent, or incomprehensible to some, if not a large majority of reasonable people, this will not disqualify the CFM’s followers from protection under Title VII. Further, the White Supremacist tenets in *Peterson* appear to be more inherently repugnant to any sense of common decency than those of Pastafarianism,¹⁵⁶ and those beliefs sufficed to constitute a religion despite their unconventional, even highly offensive nature.

Mere matters of personal preference, though, will intuitively not constitute religious belief.¹⁵⁷ For example, in *Brown v. Pena*, an employee claimed that consuming Kozy Kitten Cat Food was a “personal religious creed,” however, the Fifth Circuit, pointing to the Supreme Court’s “mere personal preference” standard in

¹⁵² *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981); see also Naomi C. Earp, *Directives Transmittal Num. 915.003*, 12-1:A(1) Example 4 – Supervisor Considers Belief Illogical, Religious Discrimination, Equal Employment Opportunities Commission (July 22, 2008), <https://www.eeoc.gov/policy/docs/religion.html> (“The supervisor’s refusal to accommodate her on the ground that he believes her religion is illogical violates Title VII unless the employer can show her request would impose an undue hardship. The law applies to religious beliefs even though others may find them ‘incorrect’ or ‘incomprehensible.’”).

¹⁵³ *Peterson v. Wilmur Communs., Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002).

¹⁵⁴ *Id.* at 1015, 1024.

¹⁵⁵ *Id.* at 1026.

¹⁵⁶ Except maybe talk of Heaven’s Stripper Factory or venereal diseases *supra* note 39, but anti-Semitism in historical context, for example, is surely more offensive than basic perceptions of crudeness.

¹⁵⁷ *Wisconsin v. Yoder*, 406 U.S. 205, 215-6 (1971).

Wisconsin v. Yoder, held that a “belief in pet food does not qualify legally as a religion.”¹⁵⁸

Pastafarian practices, such as eating pasta and wearing pirate regalia, are written and justified in *The Gospel*.¹⁵⁹ Even absent justification this would indicate that these preferences are not merely personal, but a part of a larger existential answer. While the practice of followers wearing colanders on their heads does not appear to be directly advocated in the *Gospel*, it is nonetheless clearly a collective practice. Like any non-scripturally developed collective religious practice, this is also clearly not indicative of mere personal preference. Even if all members of the religion do not abide by the practice, the identifiable sect that does still participates in a collective practice of its own, as opposed to mere individual exercise of personal taste.

While this is certainly not an exhaustive examination of the parameters of religious protection for the purpose of Title VII, it suffices as a cross-section which points to the analytical conclusion that the content that makes up Pastafarianism and its practices do not raise any extra legal hurdles for the purposes of protected class status in making out a *prima facie* case. However, the way in which the practices are carried out, and the subjective purposes of Pastafarians themselves may present an issue insofar as the *Seeger/Welsh* test’s “sincerely held” belief standard.

V. IS PASTAFARIANISM A “SINCERELY HELD” BELIEF?

Cavanaugh v. Bartelt is the only known federal case to date to have discussed the CFSM directly.¹⁶⁰ While the case was heard in the United States District court for the District of Nebraska,¹⁶¹ the decision turns on the most poignant question when considering whether Pastafarians are a protected class under Title VII. Judge John M. Gerrard granted the defendants’, prison officials, motion to dismiss plaintiff Cavanaugh’s complaint because he failed to allege facts showing that the defendants had substantially burdened a religious exercise.¹⁶² Specifically, the court found that Pastafarianism is “not a ‘religion’ within the meaning of the

¹⁵⁸ *Brown v. Pena*, 441 F. Supp. 1382, 1384-85 (1977).

¹⁵⁹ Henderson, *supra* notes 100 and 104.

¹⁶⁰ *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819 (D. Neb. 2016).

¹⁶¹ *Id.*

¹⁶² *Id.* at 824, 834.

relevant federal statutes and constitutional jurisprudence.”¹⁶³ Rather, it found the CFSM to be a “parody, intended to advance an argument about science, the evolution of life, and the place of religion in public education.”¹⁶⁴ The court went on to say that “the trappings of the satire used to make that argument are [not] entitled to protection as a ‘religion.’”¹⁶⁵

Judge Gerrard’s decision cites extensively to the *Gospel of the Flying Spaghetti Monster*, calling Henderson’s explanations of gravity and intelligent design “a comedic extrapolation of the philosophical argument known as ‘Russell’s Teapot.’”¹⁶⁶ Notably, evolutionary biologist Richard Dawkins has made this same comparison between CFSM and Russell’s Teapot, which spells out the logical fallacy inherent to the assertion that a failure to disprove the existence of an object or being affirms that object or being’s existence.¹⁶⁷

The court considered Cavanaugh’s claims under the First Amendment of the U.S. Constitution, article I, §§ 3-4 of the Nebraska Constitution, and the Equal Protection provisions of the U.S. Constitution, but it will be most relevant that the court examined Cavanaugh’s claim for religious protections under the Religious Land Use and Institutionalized Persons Act (RLUIPA) for the purposes of this note.¹⁶⁸ This is because under RLUIPA, the *Cavanaugh* court recognizes, as it must, that “[t]he ‘truth of a belief is not open to question; rather the question is whether the objector’s beliefs are truly held.’”¹⁶⁹ It is the opinion of this note that the court decided this matter incorrectly, and in analyzing this decision, it

¹⁶³ *Id.* at 824.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Cavanaugh, 178 F. Supp. 3d at 826.

¹⁶⁷ RICHARD DAWKINS, *THE GOD DELUSION* 74-78 (First Mariner Books 2008) (2006). Dawkins’ use of *argument ad absurdum* and the Russell’s Teapot argument point to the conclusion that he views the possibility of the existence of the FSM as absurd in itself. This, though, is not simply an indication that the FSM likely does not exist, it is also inherently an implication that Pastafarianism is *as* legitimate as the religions he compares Pastafarianism to. “. . . the odds in favour of the teapot (spaghetti monster / Esmeralda and Keith / unicorn etc.) are not equal to the odds against,” Dawkins suggests. Going on to discuss the odds against Intelligent Design, among numerous other creationist arguments, Dawkins keeps a seemingly even playing field for the various religious theories, utilizing each to further his conclusion that there are no gods and is no God; *See also* HENDERSON, *THE GOSPEL OF THE FLYING SPAGHETTI MONSTER* at 37 (“. . . we could change our minds someday. All we ask is proof of his nonexistence.”).

¹⁶⁸ Cavanaugh, 178 F. Supp. 3d at 827.

¹⁶⁹ *Id.* at 828 (citing *Burwell v. Hobby Lobby Stores, Inc.*, S. Ct. 2751, 2779 (2014)).

will be shown that Pastafarianism can absolutely be considered to be a sincerely or truly held religious belief.

The *Cavanaugh* court conflates the very precarious balance it seeks to uphold and hinges its decision on the truth of Pastafarianism itself, rather than the sincerity of the plaintiff's beliefs.¹⁷⁰ Judge Gerrard emphasizes "that the Court is not engaged in-and has been careful to avoid-questioning the validity of Cavanaugh's beliefs."¹⁷¹ However, in that same paragraph, Gerrard states that "it is no more tenable to read the FSM Gospel as proselytizing for supernatural spaghetti than to read Jonathan Swift's 'Modest Proposal' as advocating cannibalism," going on to further compare the *Gospel* to works by Kurt Vonnegut and Robert A. Heinlein, both popular Twentieth Century American science-fiction novelists.¹⁷² Gerrard also states that "to read the FSM Gospel literally would be to misrepresent it-and, indeed, to do it a disservice in the process. That would present the FSM Gospel as precisely the sort of Fundamentalist dogma it was meant to rebut," and goes on to say that "The FSM Gospel is plainly a work of satire, meant to entertain while making a pointed political statement."¹⁷³

The court acknowledges that Cavanaugh relies on the FSM *Gospel* as the basis for his religious belief.¹⁷⁴ It does not take great syllogistic strain to see that the *Cavanaugh* court therefore decided as to the truth of the religion itself, as opposed to whether or not the plaintiff's beliefs were truly or sincerely held: Cavanaugh claims that his religious belief is based on a book; the court says that the book is not meant to be believed in a religious manner, despite claims to the contrary within said book; therefore, Cavanaugh does not believe in a real religion. Analysis of actual sincerity is lost in this line of reasoning.

It is also worth noting that a simple replacement of "FSM Gospel" in the court's reasoning with the word "Bible," while it might be subjectively offensive to a Christian, provides no objective difference of analysis. "To read [the Bible] as religious doctrine would be little different from grounding a 'religious exercise' on any other work of fiction;" ". . . aside from identifying [the Bible], Cavanaugh has not alleged anything about what it is he actually

¹⁷⁰ *Id.* at 830.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

believes”¹⁷⁵ Also, to analyze the validity of a literal reading of the Bible, as the court does with the *Gospel*, is not an objectively distinguishable analysis insofar as both inquiries are clearly designed to test the truth of the religious belief, as opposed to whether the belief is truly held.¹⁷⁶ Even if the call of the question at hand was to inquire as to literal interpretations of the FSM *Gospel* and the Bible, a simple scriptural presentation to a clergyman of certain passages from the books of Genesis or Revelation may well send them retreating into allegory.¹⁷⁷ This, too, would be an inquiry into the underlying truth of the religion itself and the truth of the beliefs, not whether they are truly or sincerely held.

The court also relies on the origins of the CFSM, saying it “began as an attempt to vex the Kansas Board of Education by demanding, not only that students be taught about a Flying Spaghetti Monster, but that teachers dress as pirates to do so,” in reference to Bobby Henderson’s letter to the Kansas Board of Education mentioned above.¹⁷⁸ Again, a comparison to the widely disputed and ever-evolving perceptions as to the origins of the Bible in order to determine either its value of truth or the ability of its followers to believe in it sincerely will suffice to show the analytical fallacy of this argument.¹⁷⁹ Further, the court again uses this

¹⁷⁵ Cavanaugh, 178 F. Supp. 3d at 830 (references to the Bible added). Richard Dawkins actually *does* make this argument in *The God Delusion*, saying that “[t]he only difference between *The Da Vinci Code* and the gospels is that the gospels are ancient fiction while *The Da Vinci Code* is modern fiction.” DAWKINS, *THE GOD DELUSION* at 123.

¹⁷⁶ Cavanaugh, 178 F. Supp. 3d at 830.

¹⁷⁷ See DAWKINS, *supra* note 167 at 269; see also Genesis 2:22 (“Then the Lord God made a woman from the rib he had taken out of the man, and he brought her to the man.”); Revelation 4:8 (“Each of the four living creatures had six wings and was covered with eyes all around, even under its wings.”); Revelation 17:5-6 (“The name written on her forehead was a mystery: BABYLON THE GREAT THE MOTHER OF PROSTITUTES AND OF THE ABOMINATIONS OF THE EARTH. I saw that the woman was drunk with the blood of God’s holy people, the blood of those who bore testimony to Jesus.”)

¹⁷⁸ Cavanaugh, 178 F. Supp. 3d at 831.

¹⁷⁹ See, e.g., Gordon Wenham, Themelios 22.1, PENTATEUCHAL STUDIES TODAY at 3 (October 1996), (“Far from the books being written by one author in a short period (c. 1400 BC), they were written by many hands over a long period. It was held that the earliest sources were written several centuries after Moses: J about 900 BC, E about 800 BC, Deuteronomy about 600 BC, the Priestly source about 500 BC, and the final edition later still. This is known as the documentary hypothesis and its chief advocate in Germany was J. Wellhausen.”) https://biblicalstudies.org.uk/article_pentateuch_wenham.html.

argument to undermine the truth of the religion itself, not the sincerity of the belief, calling the religion itself “a joke.”¹⁸⁰

Even if the premise is accepted that the CFSM is a parody or satire of religion and nothing more,¹⁸¹ that alone is far from conclusive of whether or not Cavanaugh held a true or sincere belief. Recall first that the Supreme Court has held that a religious belief need not be “acceptable, logical, consistent, or comprehensible to others.”¹⁸² This means that an analysis as to the sound logic of the belief structure is not to be a part of the judicial framework. Second, note that, if the Cavanaugh court’s decision rested on the truth of the religion itself, it is unhelpful in deciding whether a religious belief, specifically Pastafarianism, that is perceived by others to be satirical can be sincerely held by someone else, is sincerely held. Third, recall that the EEOC guideline as to whether a religious beliefs are truly held requires that they be “moral or ethical beliefs as to what is right or wrong which are sincerely held with the strength of traditional religious views.”¹⁸³ This agency standard is drawn from the *Seeger/Welsh* and has been applied consistently by the Commission.¹⁸⁴ Here the “strength of traditional religious views” is clearly measured as to the subjective belief of the complaining party separate and apart from the type of analysis the *Cavanaugh* court embarked on. The *Cavanaugh* court, if it were to properly analyze whether Pastafarianism was “sincerely held” in that case, must therefore have embarked on an analysis of the religious or nonreligious belief of the *plaintiff himself*. It, of course, did not do so.

Satire is the “wit, irony, or sarcasm used to expose and discredit vice or folly.”¹⁸⁵ Parody is a form of imitation, utilized for comic effect or ridicule.¹⁸⁶ Both of these words point to a third party or concept in analyzing whether or not the secondary work is, in fact, parody or satire. It was, therefore, whether Cavanaugh held a subjective, personal belief that Pastafarianism was simply a falsified version of another religion designed to ridicule that other

¹⁸⁰ Cavanaugh, 178 F. Supp. 3d at 831.

¹⁸¹ A view this note is not prepared to take.

¹⁸² *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981).

¹⁸³ *Guidelines on Discrimination Because of Religion*, 29 C.F.R. § 1605.1 (2009).

¹⁸⁴ *Id.*

¹⁸⁵ Merriam-Webster Dictionary, “satire”, <https://www.merriam-webster.com/dictionary/satire> (last visited Feb. 07, 2017).

¹⁸⁶ Merriam-Webster Dictionary, “parody”, <https://www.merriam-webster.com/dictionary/parody> (last visited Feb. 07, 2017).

religion, not whether he legitimately claimed a sincerely held belief in the original religion (Pastafarianism), that was decided in *Cavanaugh*. So, if both parody and satire require an antecedent which can only be found through examination of the tenets of the subject religion, how can the satirical or parodic nature of a religious belief be analyzed without also analyzing the basic truth value of that religion itself? It is irreducibly simple. It cannot.

Further than simply asserting that the *Cavanaugh* court's decision was incorrect, it is the position of this note that "parody" and "satire" are analytically inappropriate queries in determining whether a belief is sincerely or truly held. With that established, it is surely possible that such an intricately constructed belief structure could be subjectively believed by a person in a way no different than an Abrahamic religion, or "Zeus, Apollo, Amon Ra, Mithras, Baal, Thor, Wotan, [or] the Golden Calf . . ." ¹⁸⁷ The inquiry into such a subjective belief is properly made on a case by case basis as to the particular plaintiff's asserted belief itself.

In *Cavanaugh*'s case, he alleged his Pastafarianism and had "openly declared his beliefs for many years."¹⁸⁸ He even had several tattoos "proclaiming his faith."¹⁸⁹ *EEOC v. Red Robin Gourmet Burgers, Inc.*, the District Court for the Western District of Washington case mentioned above,¹⁹⁰ in which an employee was entitled to relief under Title VII after being discharged for a refusal to cover his tattoos dedicated to the Ancient Egyptian God, Ra, is instructional here.¹⁹¹ The *Red Robin* court found that the plaintiff's tattoos were evidence which, when viewed alongside belief in scripture and statements he made relating to his faith, were sufficient to demonstrate a bona fide religious belief.¹⁹² While of course *Red Robin* was by no means binding precedent, the *Cavanaugh* court should have, but did not consider the plaintiff's tattoos, years of open declarations of belief, and reference to religious scripture as sufficient evidence of a sincerely held bona fide religious belief.

It is actually quite rare that a sincerely held religious belief will even come into question,¹⁹³ but alleged parody and satire

¹⁸⁷ DAWKINS, at 76.

¹⁸⁸ *Cavanaugh*, 178 F. Supp. 3d at 827 (citing Filing 1 at 8).

¹⁸⁹ *Id.*

¹⁹⁰ *See supra* note 146.

¹⁹¹ *EEOC v. Red Robin Gourmet Burgers, Inc.*, 2005 U.S. Dist. LEXIS 36219, 12-13 (W.D. Wash. Aug 29, 2005).

¹⁹² *Id.* at 12.

¹⁹³ *Guidelines on Discrimination Because of Religion*, 29 C.F.R. § 1605.1 (2009) ("In most cases whether or not a practice or belief is religious is not at issue.").

religions tend to fit within that very narrow window in which it does. Though the Cavanaugh court answered the wrong question (whether the CFSM is a religion under the guise of examining the plaintiff's sincerely held religious belief), whether the CFSM does, in fact, compromise a religion will need to be examined separate and apart from the subjective sincerity test. The Cavanaugh court recognizes, as does this note, that there are varying judicial approaches to defining a religion and religious belief beyond the narrow inquiries utilized in Title VII and RLUIPA cases of being "sincerely held," and the Cavanaugh court opts for the Third Circuit's *Malnak v. Yogi* test as laid out in Judge Arlin Adams' concurring opinion in that case.¹⁹⁴

VI. DOES PASTAFARIANISM PASS THE THIRD CIRCUIT'S INDICIA TEST?

It will be necessary to apply a thorough judicial test that has an arguably less forgiving and certainly more modern analysis than the basic *Seeger/Welsh* standard in order to properly decide whether the CFSM stands up to scrutiny as a religion. Judge Arlin Adams' three prong test defining religion in his concurring opinion in *Malnak* has been adopted by a number of circuits, and seems to be the most currently widespread supplementary judiciable test.¹⁹⁵ Judge Adams' indicia are as follows:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.¹⁹⁶

A. *Addresses fundamental and ultimate questions having to do with deep and imponderable matters.*

¹⁹⁴ Cavanaugh v. Bartelt, 178 F. Supp. 3d 819, 829 (D. Neb. 2016); citing Love v. Reed, 216 F.3d 682, 687 (8th Cir. 2000); citing Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3rd Cir. 1981); citing Malnak v. Yogi, 592 F.2d 197, 207-208 (3d Cir. 1979) (Adams' concurring opinion).

¹⁹⁵ See, e.g., Dehart v. Horn, 227 F.3d 47 (3d Cir. 2000); Love v. Reed, 216 F.3d 682 (8th Cir. 2000); United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996); Alvarado v. City of San Jose, 94 F.3d 1223 (9th Cir. 1996).

¹⁹⁶ Cavanaugh, 178 F. Supp. 3d at 829.

Judge Adams describes the first of these three indicia as the most important.¹⁹⁷ At this stage the court “must, at least to a degree, examine the content of the supposed religion, not to determine its truth or falsity, or whether it is schismatic or orthodox, but to determine whether the subject matter it comprehends is consistent with the assertion that it is, or is not, a religion.”¹⁹⁸ Comparing these fundamental questions to “ultimate concern[s],” Judge Adams lists factors for this first indicia as “the meaning of life and death, man’s role in the Universe, [and] the proper moral code of right a wrong” as those “likely to be most ‘intensely personal’ and important to the believer,” and therefore most deserving of protection from “governmental interference.”¹⁹⁹

The CFSM has a direct answer to each of these questions. First, The FSM handed down a message as to the meaning of life twenty-five hundred years ago.²⁰⁰ This way of life was to take place “on the water in great wooden ships, loaded with grog, swag, and hopefully, wenches. This was His will, and so it was done.”²⁰¹ As to death, Pastafarians believe that there is a Heaven.²⁰² Pastafarian faith is also not required for entry.²⁰³

Second, as to man’s role in the universe, humans are descended from Pirates according to the *Gospel*.²⁰⁴ Sharing “99.9 percent of our DNA with Pirates,” humans are descendants of the chosen people of the FSM.²⁰⁵ The *Gospel* also describes the relationship between humans and its god, for example, the FSM designed the earth to look much older than it is in order to hide the truth that it is five thousand years old from mankind.²⁰⁶

The third and last example of the first indicia of Judge Adams’ test is that of the existence of a moral code.²⁰⁷ The CFSM happens to have a very specific moral standard, written down in a set of ten stone tablets which were handed down from the FSM to

¹⁹⁷ Malnak, 592 F.2d 197, 208.

¹⁹⁸ *Id.* The *Cavanaugh* court unsurprisingly steered its analysis of this indicia headlong into the explicitly prohibited truth determination, with Judge Gerrard asserting that “FSMism is not a belief system addressing ‘deep and imponderable’ matters: it is, as explained above, a satirical rejoinder to a certain strain of religious argument.” *Cavanaugh*, 178 F. Supp. 3d at 829.

¹⁹⁹ Malnak, 592 F.2d 197, 208.

²⁰⁰ HENDERSON, *supra* note 25.

²⁰¹ HENDERSON, *supra* note 35.

²⁰² HENDERSON, *supra* note 38.

²⁰³ HENDERSON, *supra* note 39.

²⁰⁴ HENDERSON, *supra* note 29.

²⁰⁵ HENDERSON, *supra* notes 29-30.

²⁰⁶ HENDERSON, *supra* notes 26.

²⁰⁷ Malnak, 592 F.2d 197, 208.

Pirate Mosey at Mount Salsa.²⁰⁸ The “I’d Really Rather You Didn’t,” along with the fact that Mosey dropped two of the tablets on his way down the Mount, comprise what is explicitly referred to as a “flimsy moral standard.”²⁰⁹ Flimsy though it may be, Pastafarians believe that the FSM gave to mankind a clear set of moral rules delineating what is right and what is wrong.

B. Is comprehensive in nature and consists of a belief-system as opposed to an isolated teaching.

The second indicia of Judge Adams’ test, the component of comprehensiveness, looks to the scope of the belief structure and requires that it be broad.²¹⁰ For example, the “so-called ‘Big Bang theory, an astronomical interpretation of the creation of the universe, may be said to answer an ‘ultimate’ question, but it is not, by itself, a ‘religious’ idea.”²¹¹ While the *Gospel* does actually mention a Big Bang theory, it is markedly different from the commonly accepted Big Bang theory.²¹² The *Gospel* also explicitly acknowledges that while it is based on empirical evidence, it is also a faith-based book.²¹³ The Disclaimer at the beginning of the *Gospel* further acknowledges that there may be contradictions within the text, but that these contradictions are designed to test the reader’s faith.²¹⁴

The self-awareness of the *Gospel*, along with the length and specificity of it, are surely enough on their own to fulfill the requirement of comprehensiveness. At over two hundred pages, the *Gospel* covers the entire history of our known universe, a history of the CFSM, instructional guides, and answers to the imponderables as mentioned in the first indicia.²¹⁵ This certainly reaches beyond

²⁰⁸ HENDERSON, *supra* note 53.

²⁰⁹ HENDERSON, *supra* note 54.

²¹⁰ Malnak, 592 F.2d 197, 209 (“a religion is not generally confined to one question or one moral teaching; it has a broader scope.”).

²¹¹ *Id.* This example, knowingly or not, implicates David Hume’s is-ought problem, which stands for the proposition that positive statements and prescriptive statements/ideas are clearly distinguishable, and that simply because something “is,” provides no evidence of what “ought” to be. David Hume, *A Treatise of Human Nature*, Book III, Part I, Section I (1739) (reprinted: Oxford: Clarendon Press, 1896) (available at <https://people.rit.edu/wlrgsh/HumeTreatise.pdf> 244-245).

²¹² HENDERSON, THE GOSPEL OF THE FLYING SPAGHETTI MONSTER AT 91. In a deep slumber after “hit[ting] the beer volcano hard,” the Flying Spaghetti Monster “rolled out of bed and landed hard on the firmament.”

²¹³ HENDERSON, *supra* note 99.

²¹⁴ *Id.*

²¹⁵ *Id.* at Contents.

an “isolated teaching” and is a broad enough set of beliefs to satisfy the second indicia of Judge Adams’ test.²¹⁶

Further, communities around the world have taken up the teachings of CFMS and added their own nuances to the practice.²¹⁷ While varying developed practices serve to bolster the second indicia here, practice and traditions also serve to fill out the third indicia.

C. The presence of certain formal and external signs.

As to the third indicia, Judge Adams lists signs that “can be helpful in supporting a conclusion of religious status,” such as “formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions.”²¹⁸ While “a religion can exist without rituals and structure, they may nonetheless be useful signs that a group or belief system is religious.”²¹⁹

Before examining the traditions and practices of a religion, though, it is helpful to conduct a brief check as to the naturally occurring bias against absurdity that comes with a description of such traditions and practices, if those practices seem especially foreign or unreasonable. Consider, for example, the custom of Kapparot/Kaporos in the Jewish tradition, which involves symbolically transferring the sins of a person to a fowl, which is then swung in a circle three times above the head, then sacrificed and given to the poor as atonement for sins.²²⁰ Or consider that Mormonism teaches that Jesus visited ancient America.²²¹ Or that some families in rural India purposely drop their babies thirty feet off the roof of a shrine for good luck.²²² For the purposes of this section it will be unnecessary to compare these practices to those of Pastafarianism directly, but considering briefly their existence provides a small check on a bias that might otherwise fuddle subjectively absurd religious practices with objectively nonreligious practices.

²¹⁶ Cavanaugh, 178 F. Supp. 3d at 829.

²¹⁷ Jasper, *supra* note 60.

²¹⁸ Malnak, 592 F.2d at 209.

²¹⁹ *Id.* at 210.

²²⁰ Jim Dwyer, *A Raw Deal for Chickens, as Jews Atone for Sins*, THE NEW YORK TIMES (Oct. 6, 2016).

²²¹ *The Book of Mormon*, 3 Nephi 11:18.

²²² Ayesha Venkataraman, *For Babies in India, a 30-Foot Plunge for Good Luck*, THE NEW YORK TIMES (July 28, 2016).

First, as to formal services and ceremonial functions, the *Gospel* tells us that Pastafarian Communion ceremonies had specific dietary practices.²²³ In Brandenburg, Germany, Pastafarians hold “Nudelmesse” (Noodle Mass) services.²²⁴ On April 16, 2016 New Zealand’s first official Pastafarian wedding took place.²²⁵ There are also numerous local CFMS sects, especially in Europe, that practice their own ceremonies based on the teachings of the *Gospel* with their own adaptations.²²⁶

Next, as to the existence of clergy, structure, and organization, there are certainly CFMS church leaders within each sect of Pastafarianism. For example, Rüdiger Weida, a.k.a. Brother Spaghettus, is a Brandenburg Pastafarian who the official CFMS has referred to as “a great ambassador for all of us Pastafarians.”²²⁷ There is also an ordination process with an official Certificate of Ordination and an ID card with specific duties and privileges entrusted to those who wish to apply for it.²²⁸ Structure and organization seem to exist primarily on a localized level, with sects organizing gatherings within their own cities and countries.²²⁹ The official website of the CFMS, though, does provide information and news about ongoing events worldwide, as well as the actual ordination process.²³⁰

Efforts at propagation are laid out directly and specifically in the *Gospel*, with a guide that details how Pastafarians should spread the word of the FSM to members of other religions.²³¹ Both the *Gospel* and the official website also contain “Propaganda” sections which provide followers with informational materials to distribute in service of the Church.²³² While conversion is not something the CFMS recommends pushing on people, disseminating information about the Church and letting others decide for themselves is recommended to those who wish to do so.²³³

²²³ HENDERSON, *supra* note 104.

²²⁴ Gilsinan, *supra* note 71.

²²⁵ Kennedy, *supra* note 66.

²²⁶ Jasper, *supra* note 60.

²²⁷ Henderson, *supra* note 73.

²²⁸ Henderson, *supra* note 65-66.

²²⁹ Gilsinan, *supra* note 59.

²³⁰ Henderson, *Home*, CHURCH OF THE FLYING SPAGHETTI MONSTER (2016), <http://www.venganza.org>.

²³¹ HENDERSON, *supra* note 43.

²³² HENDERSON, *supra* note 42.

²³³ HENDERSON, *supra* note 40.

The observation of holidays is quite possibly the most robust evidence that the CFSM fulfils this third indicia of Judge Adams' test. The Pastafarian holidays of Pastover and Ramendan are comparable to Jewish and Muslim holidays with dietary and attitudinal instructions.²³⁴ "Holiday" is reflective of the December and January holiday celebrations of many other religions.²³⁵ International Talk Like a Pirate Day is considered an especially good day for evangelism.²³⁶ Halloween has deep and storied historical significance for the CFSM.²³⁷ Friday, the most important of Pastafarian holidays, is designated every week for Pastafarians to "take it easy"; a veritable Sabbath.²³⁸

In sum, the CFSM easily meets these objective guidelines, as set down in *Malnak v. Yogi* by Judge Adams' concurrence, and subsequently adopted by numerous circuits.²³⁹ While these indicia are intended to be helpful, and not a final test for religion,²⁴⁰ and even a religion lacking any combination of these indicia may very well be considered a religion,²⁴¹ the evidence points strongly in the direction of qualifying the CFSM as a religion under this test, as well as broader tests, such as the *Seeger/Welsh* standard.

VII. WHAT DO WE DO WITH TONI?

It is not common that establishing membership in a protected class will be the most rigorous analysis under Title VII, especially because so many of those classes consist of irrefutably immutable and observable characteristics.²⁴² However, in the rare case of an alleged parody or satire religion, this is the bulk of the analysis. The remainder of the analysis will depend on the particular facts of the case, as opposed to the nature of the religion, so a return to the original hypothetical is appropriate.

We have established that Toni, the newly hired employee, is a member of a protected class, since her religion, Pastafarianism, has survived the related inquiries.²⁴³ We know that she is seeking

²³⁴ HENDERSON, *supra* notes 105, 107.

²³⁵ HENDERSON, *supra* note 106.

²³⁶ HENDERSON, *supra* note 108.

²³⁷ HENDERSON, *supra* note 109.

²³⁸ HENDERSON, *supra* notes 116.

²³⁹ *Malnak*, 592 F.2d at 208-10.

²⁴⁰ *Id.* at 210.

²⁴¹ *Id.* at 209.

²⁴² Hoffman, *supra* note 136.

²⁴³ The EEOC does not recommend that employers take these inquiries upon themselves, as "the definition of religion is broad and protects beliefs and practices

religious accommodations as to having Fridays off, that she is wearing unusual garb (pirate regalia), and that she is wearing a colander on her head.

The *prima facie* case for religious accommodation claims under Title VII, as mentioned above, will either take the form of the standalone post-*Abercrombie* test or the default Title VII disparate treatment test from *McDonnell Douglas*,²⁴⁴ but with an affirmative defense of “undue hardship” for the employer, if a standalone claim for religious accommodation no longer exists.²⁴⁵ Since both tests require an analysis of reasonable accommodation and undue hardship, because the purpose of this note is not to walk through all frameworks at length, and because the more difficult aspects of Title VII analysis as it relates specifically to the CFMSM have already been parsed out, a brief examination of the hypothetical under the post-*Abercrombie* standalone cause of action framework will suffice as instruction on the matter.

Under the post-*Abercrombie* test, having already established the first step of the *prima facie* case, that Pastafarianism is a bona fide religious belief, it remains to be shown that 1) this belief conflicts with an employment requirement, 2) the employer knows that the belief or practice is religious, and 3) that the employee suffered an adverse employment action as a result of the conflict.²⁴⁶

Here the employment requirement in question is that you (the hypothetical you) would like to require Toni not to dress like a pirate and to keep that colander off of her head. Of course, you would also like to not be forced to give one employee every Friday off, since it is a workday for the rest of Meerkat Manufacturing. Both of these requirements, if made of Toni, conflict with her Pastafarian practices.

Toni has also informed you that her request for Fridays off is religious, so the second prong of the post-*Abercrombie* prima facie case is satisfied. While she has not directly informed you that the pirate regalia or the colander are religious, you and Joe (Meerkat’s HR Director) discussed the matter, and after a cursory internet search, decide that both are probably a part of her Pastafarian

with which the employer may be unfamiliar, [and] the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely-held religious belief,” though there may be some certain situations that do justify the inquiry. Naomi C. Earp, *Directives Transmittal Num. 915.003*, 12-1:A(3), Equal Employment Opportunities Commission (July 22, 2008) <https://www.eeoc.gov/policy/docs/religion.html>.

²⁴⁴ Green, 411 U.S. 792 at 802.

²⁴⁵ *Supra* notes 128-31.

²⁴⁶ *Abercrombie*, 135 S.Ct. 2028 at 2032-33.

practice. In a post-*Abercrombie* analysis, this will also satisfy the second prong.²⁴⁷

The third prong of the post-*Abercrombie prima facie* case will be satisfied by either of two scenarios. One scenario is that, after repeated warnings to wear normal clothing, and Toni's repeated insistence to wear pirate regalia and a colander on her head, either you or Joe take an adverse employment action against her, such as firing her, diminishing her pay, demoting her, or so on. The second scenario will be that such an adverse employment action is taken against Toni because of her refusal to work on Fridays. With this last prong satisfied, a *prima facie* case has been established.

If Toni should bring a suit against Meerkat and the the *prima facie* case is established, the burden of proof will shift to Meerkat to show that it either provided a reasonable accommodation or that it could not have accommodated Toni without undue hardship.²⁴⁸ Here it will be simplest to allow the hypothetical to branch off into two subhypotheticals, so that each can be analyzed in a vacuum, as the subject matter is distinct. The first will operate under the presumption that Tony has been suffered an adverse employment action, discharge if only for the sake of simplicity, for wearing pirate regalia and a colander on her head. The second will presume that she has been either discharged for refusing to work Fridays, or that she is claiming she has been constructively discharged relating to the lack of accommodation in having Fridays off.

A. *Toni is discharged for wearing pirate regalia and a colander on her head.*

First and foremost, it would be wise for the company try to accommodate Toni's religious dress before carrying out any adverse employment action against Toni, especially since the employer is only required to grant those requests for accommodation that do not pose an undue hardship on the conduct of its business.²⁴⁹ This undue hardship need only pose "more than *de minimis*" cost or burden,

²⁴⁷ *Id.* Though, in a pre-*Abercrombie* analysis, it would have been necessary for Toni to directly tell you that the pirate regalia and the colander were actually religious.

²⁴⁸ 42 U.S.C. § 2000e(j).

²⁴⁹ Naomi C. Earp, *Directives Transmittal Num. 915.003*, 12-4:A(2), Equal Employment Opportunities Commission (July 22, 2008) <https://www.eeoc.gov/policy/docs/religion.html>.

which seems to be an easy standard to meet.²⁵⁰ However, it is merely her religious garb that is at issue here, and it is difficult to imagine a situation where more than *de minimus* cost or burden would be imposed on Meerkat unless Toni is in a position wherein she deals with customers regularly, and those customers are averse to pirate regalia. If this is the case then evidence may well be brought to show that those specific customer relations were impacted by her garb, but if she is not in such a position it is likely that Meerkat will not be able to carry its burden of proof.

To require Toni not to wear her pirate regalia, under threat of adverse employment action, may trigger a Title VII religious accommodation claim. If no reasonable accommodation is offered to her in the alternative, Meerkat may be exposed to liability under Title VII.

B. Toni is discharged for a refusal to work on Fridays.

If Toni is discharged for a refusal to work on Fridays or claims that she was constructively discharged due to her claimed inability to do so under religious pretenses, the analysis will be different than that of the pirate regalia, and Meerkat will likely succeed on any claims brought. This is because there is caselaw on point in *Trans World Airlines, Inc. v. Hardison*.²⁵¹

TWA is a Supreme Court case which involved a plaintiff who was a member of the Worldwide Church of God, a religion that observes the Sabbath from sunset on Friday until sunset on Saturday.²⁵² Due to the always-running nature of the plaintiff's department, whenever an employee's job in that department was not filled, another employee needed to be shifted from another department to cover the job.²⁵³ The company temporarily solved the issue by transferring the plaintiff to a job that accommodated his Sabbath observation, however, when a fellow employee went out of town he was asked to work Saturdays again.²⁵⁴ The company then refused a proposal that he work only four days a week.²⁵⁵ The employee refused to report for work on Saturdays and, after a hearing, was discharged for insubordination for refusing to work during his designated shift.²⁵⁶

²⁵⁰ *Id.* at 12-IV: Overview.

²⁵¹ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

²⁵² *TWA v. Hardison*, 432 U.S. 63, 67 (1977).

²⁵³ *Id.*

²⁵⁴ *Id.* at 68.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 69.

Since another employee would have been required to work in the employees' stead, the court held that it would be incorrect to "conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far."²⁵⁷ The Court also noted that "to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion."²⁵⁸ While TWA could have incurred extra costs to secure a replacement for the plaintiff, the Court held that "it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs."²⁵⁹

If Meerkat Manufacturing is a five-day workweek company, Toni will likely not be able to take Fridays off, unless she is somehow in a position that does not require anyone else to put forth extra effort in her absence, but at that point she would already be an expendable employee on that day. While it would be highly recommended that Meerkat offer some reasonable accommodation to Toni, TWA indicates that this might not be necessary if it is a Sabbath-like conflict, which taking Fridays off certainly seems to be. Toni cannot be granted preference over her fellow employees on the basis of her religion if the TWA majority opinion is binding and applicable, which in this factual scenario, it clearly is.

VIII. CONCLUSION

Whether or not a woman who works at a manufacturing company can don a vest with eighteen buttons, a wool coat that has oversized cuffs, puffy striped pants, and a colander on her head is hardly the point of this note, though it does help to illustrate the primary issue. If the primary issue was whether or not she can have off every Friday to consume pasta and take it easy, I could have cited TWA and concluded the issue before it arose.

The primary point this note puts forward is that, while many courts recognize that the sincerity with which a belief is held is not the same as the truth of that religion, and while some of those same courts are willing to apply reasonably crafted judicial inquiries as to whether followers of a certain religion warrant legal protection,

²⁵⁷ *Id.* at 81. While the court goes on to bolster this point with evidence of a bona fide seniority system, it also notes that it is doing just that; bolstering. The point can, and does, stand on its own as binding precedent.

²⁵⁸ TWA, 432 U.S. 63 at 84.

²⁵⁹ *Id.* at 84-85.

implicit biases and recognition of absurdity sometimes cloud that analysis. This has been the case with religions viewed subjectively as parodies and satire. This was the case in *Cavanaugh v. Bartelt*.

Legal recognition of the Church of the Flying Spaghetti Monster under Title VII is not simply about wearing pirate regalia in the workplace. Far from it. Legal recognition of the Church of the Flying Spaghetti Monster under Title VII ensures that our judiciary is not dictating to the citizens who stand before them what it is they can and cannot believe answers the existential questions that are so common to humanhood.

The question of whether the Church of the Flying Spaghetti Monster is “the most unquestionably true theory ever put forth in the history of humankind,”²⁶⁰ or, to the contrary, is “plainly a work of satire,”²⁶¹ and therefore untrue in and of itself, is an inquiry that is closed to the judiciary by precedent. Without this inquiry, Title VII protections for those who believe in the Flying Spaghetti Monster appear highly likely to pass muster. This will necessarily be true of any religious belief which, but for being subjectively perceived to be absurd, satirical, or a parody, would have satisfied requirements for Title VII protections.

Is a religion a satire because it claims that humans are decedents of Pirates?²⁶² What if it claims we descend from primates instead? Is it then a parody of the other? Is a religious belief held less sincerely because it claims that in the end times creatures with six wings will appear, and that they will be covered with eyes, even under their wings?²⁶³ These are valid questions. They are valid questions for any person to consider for themselves. It must be recognized, though, that they are questions which directly ponder the actual truth of each respective belief structure. Therefore, they are invalid questions for the judiciary to be answering in the context of Title VII, and likely far beyond.

²⁶⁰ HENDERSON, *THE GOSPEL OF THE FLYING SPAGHETTI MONSTER* at 213.

²⁶¹ Cavanaugh, *supra* note 173.

²⁶² HENDERSON, *supra* note 29. Additionally, it could be pondered: is a lengthy legal note a satire because it advocates for the wearing of pirate regalia in the workplace?

²⁶³ The Bible, *supra* note 177.

