IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SPECIALIST DUSTIN CHALKER and MILITARY RELIGIOUS FREEDOM FOUNDATION	)	
Plaintiffs,	)	
v.	)	**Case No. 08-2467-KHV-JPO**
ROBERT GATES, SECRETARY, U.S. DEPARTMENT OF DEFENSE,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

The Plaintiffs hereby respond to the Defendant's Motion to Dismiss. The motion should be denied because the Plaintiffs have standing to bring the claims in question, the claims are justiciable, there is no basis for deference to military authority in the context of this matter and the and the claims are supported by case authorities.

In ruling on a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the court must "take the well-pleaded allegations of the complaint as true[ ]," *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 493 (1986) and "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *Curley v.*

Perry , 246 F.3d 1278, 1281 (10th Cir. 2001). Under the standards that pertain to motions under Fed. R. Civ. P. 12(b)(6) the *instant* motion should be denied.

The following memorandum of points and authorities is offered for the Court's consideration.

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I. PLAINTIFFS HAVE STANDING FOR JUDICIAL REVIEW OF THEIR CLAIMS

A. Plaintiff Chalker has suffered direct injury on three separate occasions thereby satisfying the injury requirement for standing.

The standing is comprised of three elements: injury in fact, a causal connection between the injury and complained of conduct and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560(1992). Defendant raises only "injury in fact" and "redressability". Defendant's brief, pp. 6-10.

On the issue of "injury in fact" Defendant rests his entire argument on the "pattern and practice" portion of the Amended Complaint, citing numerous cases indicating generally that a plaintiff's injury must be clearly alleged. *See Warth v. Seldin*, 422 U.S. 490 (1975); *O'Shea v. Littleton*, 414 U.S. 488 (1974). The basis of the Defendant's argument is that Plaintiff has failed to allege any facts that would indicate that he has personally been subjected to the military functions enumerated in the "pattern and practice" portion of the Amended Complaint. Consequently, without Plaintiff being subjected to these practices there can be no articulable injury. Defendant's brief, pp. 10-11.

However, Defendant's analysis is based on an incomplete reading of the facts alleged in the Amended Complaint. Defendant does not address the three separate occasions on which Plaintiff was required to attend military events where sectarian prayers were presented. Each of these accounts is reflected in Plaintiff's Amended Complaint: (1) On May 16, 2008, Plaintiff was required to attend a function at which a sectarian prayer was delivered. Am. Comp. ¶ 8. (2) On February 7, 2008, Plaintiff was required to attend a ceremony that began and ended with sectarian prayer; a ceremony similar in content to ceremonies he had been forced to attend in the past. *Id*. ¶ 9.)3) On December 5, 2007, Plaintiff was required to attend a formation where a

sectarian prayer was delivered. *Id.* ¶ 10. Defendant does not controvert these allegations in his motion.

In each of the accounts alleged in the Amended Complaint, Plaintiff was denied the right to be free of sectarian prayer, a right guaranteed by the First Amendment and a right directly infringed upon by Defendant's subordinates in the United States Army. These three instances establish the particularized and specific injuries suffered by Plaintiff Chalker required for standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Raines v. Byrd*, 521 U.S. 811 (1997); *O'Shea v. Littleton,* 414 U.S. 488 (1974); *Warth v. Seldin*, 422 U.S. 490 (1975). *See also Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 821 (10th Cir. 1999) ("[T]o satisfy Article III's case or controversy requirement, a litigant in federal court is required to establish his own injury in fact."); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (To meet standing requirements the "plaintiff must do more than allege abstract injury, he must show that he " 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' "). Finally, as a member of the military community,"[t]he genuine feeling of exclusion from the community in which one resides, and the deep offense perceived from an insult to one's religious view committed by the government in one's community, satisfy the injury prong of standing." *Newdow v. Bush*, 355 F. Supp. 2d 265, 278 (D.D.C. 2005) *citing Arizona Civil Liberties Union v. Dunham*, 112 F. Supp. 2d 927, 925 (D. Ariz. 2000).

Plaintiff Chalker has, on at least three occasions sustained a cognizable injury and the abrogation of his rights. Further, as an active duty soldier, and without judicial intervention, it is

highly likely that Plaintiff Chalker is in imminent danger of future injury because formations and functions that include a sectarian prayer will continue.

B. The relief requested by Plaintiffs would redress the alleged injuries as well as insulate Plaintiff from further violations of his Constitutional rights.

In this matter, Plaintiffs seek injunctive relief providing, generally, that "[P]laintiff Chalker and those similarly situated [ ] be free of compulsory religious practices and to be free of imposition of a religious test" and specifically request injunctive relief that would "prohibit mandatory attendance by Plaintiff Chalker and those similarly situated at military functions/formations that include sectarian prayer." Am. Compl. ¶¶ 17-18.

Defendant alleges that the injunctive relief sought by Plaintiff runs afoul of the language of Rule 65(d) that requires, in pertinent part, an injunction "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P 65(d)(1)(B)-(C). In support of this position, Defendant cites *Keyes v. Sch. Dist. No. 1*, in which the court struck an injunction that essentially requested defendants to use their professional judgment in achieving compliance with constitutional requirements. *Keyes v. Sch. Dist. No. 1*, 895 F. 2d 659 (10th Cir. 1990). The distinction between *Keyes* and the present case is clear. The language of the injunction in *Keyes* lacks the specificity required by Rule 65 because it relied on a subjective measure of compliance, i.e. the defendant's "expertise."

In contrast, the injunction sought by Plaintiff Chalker is very specific. Plaintiff seeks relief, for himself and those similarly situated, from compulsory attendance at military functions at which sectarian prayer is to be delivered. Am. Complaint ¶ 17, 18. The injunction, as sought by Plaintiff, does not rely on military expertise or professional judgment; it is a rule requiring the Department of Defense and its personnel to not deliver sectarian prayer at mandatory attendance events. Plaintiff contends that such specificity satisfies Rule 65(d) and serves the

well-founded principle of "prevent[ing] uncertainty and confusion on the part of those faced with injunctive orders, and [ ] avoid[ing] the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) *citing Int'l Longshoremen v. Marine Trade Assn.,* 389 U.S. 64, 76 (1967).

Defendant also relies on *Keyes* in an attempt to categorize Plaintiff's requested relief as an inappropriate "obey the law" injunction. However, Defendant's reliance on this general rule fails to take into account that it is only applicable to subsection (d) of Rule 65.

In *Keyes,* the injunction at issue stated in part, "The duty imposed by the law and by this interim decree is the desegregation of schools and the maintenance of that condition. The defendants are directed to use their expertise and resources to comply with the constitutional requirement of equal education opportunity for all who are entitled to the benefits of public education in Denver, Colorado." *Keyes*, 895 F.2d at 668 n.5. This portion of the *Keyes* injunction does little but command the Defendant to obey the law and in doing so fails to satisfy Rule 65(d) because the injunction did not "state its terms specifically" or "describe in detail . . . the act or acts restrained or required" and essentially fails for vagueness. In sum, the Court in *Keyes* recognized that in relation to Rule 65(d), "[a]n injunction "too vague to be understood" violates the rule, and, generally, injunctions simply requiring the defendant to obey the law are too vague." *Keyes*, 895 F.2d at 668 *citing Int'l Longshoremen*, 389 U.S. at 76.

In contrast to *Keyes*, while the injunctive relief sought by Plaintiffs certainly requests that Defendant obey the law, it is the Plaintiff's position that the injunction does so with the specificity required by Rule 65(d) in that the proposed injunction describes the acts sought to be

enjoined.

II. PLAINTIFF'S CLAIMS ARE JUSTICIABLE UNDER *MINDES v. SEAMAN.*

The controlling authority for determining whether a Plaintiff Chalker's claim is justiciable is *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), later adopted by the 10th Circuit in *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981). The Court in *Mindes* came to the "conclusion that a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures. *Mindes* at 201. Given that Plaintiff Chalker did pursue his intra-military remedies, and such attempts at relief were futile and the remedies available were inadequate, Plaintiff contends that his actions satisfy the two-prong test of justicibility under *Mindes*.

A. Plaintiff's claims are justiciable in lieu of exhaustion of intra-military remedies because of recognized exceptions to exhaustion.

1. Exhaustion of remedies through intra-military channels is futile.

Plaintiff has pursued remedies through three intra-military attempts, none of which yielded satisfactory results. Am. Comp. ¶¶ 11-12. Defendant contends that Plaintiff Chalker failed to pursue his intra-military remedies, making the issue of exhaustion itself a contested issue of fact. However, for purposes of this Fed. R. Civ. P 12(b)(6) motion, the Court "must

accept all well-pleaded allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991).

Plaintiff further argues that should the Court not find that all avenues of intra-military remedy were pursued and exhausted, it is of little consequence in light of the applicable exhaustion exceptions. It is settled that the rule of exhaustion of administrative remedies is subject to the exception of futility, S*ee Honig v. Doe*, 484 U.S. 305, 326-27 (1988) and inadequacy of review. *See Coit Indep. Joint Venture v. Federal Savs. and Loan Ins. Corp*., 489 U.S. 561, 587 (1989), *Walmer v. United States Department of Defense*, 835 F.Supp. 1307 (D. Kan. 1993) citing *Hodges v. Callaway*, 499 F.2d 417 (5th Cir. 1974). "[E]xhaustion is inapposite and unnecessary when resort to the administrative reviewing body would be futile." *Hodges* at 420-21.

Plaintiff Chalker sought relief from mandatory attendance at the subject sectarian events through his chain of command, the equal opportunity process and the army's intra-military administrative process. None of these courses of action led to a satisfactory result. In a case such as this, where the events at issue are no more than a few hours in length, the extensive appeals processes available to Plaintiff could not reasonably have exhausted to finality prior to Plaintiff being subjected to the sectarian prayers at issue. Hence, exhaustion would be futile.

2. Exhaustion of remedies through intra-military channels is not necessary when, as here, such remedies are inadequate.

In addition to futility, Plaintiff asserts that the remedies available were, and are, inadequate, a longstanding exception to the exhaustion requirement. *See Greene v. United States*, 376 U.S. 149 (1964) The Court in *Walmer*, applying *Mindes*, took notice of the Fifth Circuit's inadequacy exception to exhaustion which reasons that exhaustion is not required "if the remedies do not provide an opportunity for adequate relief." *Walmer* at 1310. Plaintiff

argues that the unique facts of this case make the available remedies inadequate. From the facts presented in the Amended Complaint, Plaintiff Chalker sought relief through three different channels for three separate events. It follows that, even in the best case scenario, if relief were granted and Plaintiff were excused from an event, given the recurring nature of the sectarian prayer events, Plaintiff would be forced to assert his Constitutional rights and seek relief each and every time sectarian prayer is to be given at military functions/formations. And this assumes Plaintiff would have sufficient advance notice of a sectarian prayer event to initiate an administrative process. Moreover, an administrative exhaustion process would not prevent personnel at the mandatory sectarian prayer events from spontaneously initiating a sectarian prayer. However, if relief herein is denied and Plaintiff is forced to exhaust administrative remedies Plaintiff will likely have already been subjected to additional objectionable sectarian events.

Further, given the frequency of Constitutionally impermissible promotions of religious beliefs as enumerated in Am. Comp. ¶¶ 14(a)-(v), it is exceedingly likely that Plaintiff will be subjected to objectionable sectarianism throughout his military career necessitating repeated requests for relief. It is Plaintiff's position, in essence, that such a bandage approach to relief does not remedy the underlying ailment, and as such, the available administrative remedies are inadequate.

Finally, Plaintiff asks that the Court take notice of the reasoned approach to inadequacy of review in *Brooks v. Clifford*, 412 F.2d 1137 (4th Cir.1969). In *Brooks*, the Plaintiff, a conscientious objector, sought discharge from the military based on his beliefs. Plaintiff's request for discharge was denied and he petitioned for a writ of habeas corpus on the basis of his status as a conscientious objector. The court found that exhaustion was not required in such an

instance and that the "remedy before the ABCMR was inadequate because he would be required to litigate administratively, all the while being required to engage in conduct inimical to his conscience." *Id*. at 1141. *Brooks* draws a close parallel to the case at hand. A remedy that cannot be had in time to prevent injustice is, essentially, no remedy at all.

B. The four remaining factors of the *Mindes* test weigh in favor of judicial review.

Beyond the threshold requirements a constitutional deprivation and of exhaustion remedies, the Court must then weigh four factors to determine if a claim is reviewable. The factors to be examined are "the nature and strength of the plaintiff's challenge to the military determination, the potential injury to the plaintiff if review is refused, the type and degree of anticipated interference with the military function, and the extent to which military discretion or expertise is involved in the challenged decision." *Lindenau*, 663 F. 2d at 71.

First, Plaintiff Chalker raises a claim based on a violation of the establishment clause and argues that his challenge to mandatory attendance at sectarian prayer events, facilitated by the United States Army, is sufficient to find the first *Mindes* factor weighing in favor of judicial review. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." *Everson v. Bd. of Educ.,* 330 U.S. 1, 15-16 (1947). In

this matter, the actions taken by Defendant's subordinates in requiring Plaintiff's attendance at sectarian prayer events raise serious constitutional issues concerning the establishment clause and clearly run afoul of the principles promulgated by the Court in *Everson.* It is, therefore, Plaintiff's position that, because the issues involved are constitutional in nature, the Court should find the first *Mindes* factor weighing in favor of judicial review.

Second, Plaintiff Chalker stands to be subjected to cognizable injury if judicial review is denied. Defendant claims that the injury to Plaintiff Chalker is minimal, asserting that relief is available through intra-military channels. Def. Brief, p.15. However, as discussed above, these intra-military channels do not, and cannot provide relief adequate to prevent injury. *See supra* at 6-7. The instances of sectarian prayer and endorsements of religion are too frequent and too numerous for Plaintiff to pursue, let alone be granted, adequate relief through intra-military channels. For these reasons, Plaintiff asserts that the second *Mindes* factor should weigh in favor of review.

Third, "anticipated interference with military functions, will always be present when court review is granted." *Tufts v. Bishop*, 551 F.Supp. 1048, 1051 (D. Kan. 1982). In this matter the interference is quite minimal, and "does not appear to present any serious impairment to the performance of vital military duties." *Id.* The sole legal question is whether Plaintiff may be required to attend military functions and formations at which sectarian Christian prayer is delivered. The answer to this question lies not at the end of an "invasive and time-consuming exercise" as the Defendant proposes, but rather, the answer may be found in the Constitution, and by examination of the cases addressing establishment clause issues. To be sure, discovery may be necessary; however, it is not likely that such discovery will rise to the level of "serious impairment" as briefly discussed by the Court in *Tufts.*

The Plaintiff in *Tufts* claimed that "she was denied equal protection and due process of law in violation of the United States Constitution and 42 U.S.C. §§ 1985(3) and 1986." *Id.* at 1049. Plaintiff's claims were based on alleged actions by her "missile wing commander, the vice commander of the missile wing and wing inspector general, the commander of a combat support group, and a staff judge advocate at McConnell [Air Force Base]." *Id.* . Comparatively, the *Tufts* case dealt with issues requiring a presumably greater degree of interference than Plaintiff Chalker's claims by virtue of the nature of the claims and number of defendants, yet the Court did not find such interference to "present any serious impairment to the performance of vital military duties." *Id.* In sum, because the Court did not find the *Tufts* case to interfere with military functions to an excessive degree, Plaintiff Chalker contends that his claim should also pass the third *Mindes* factor.

Fourth, Defendant cites *Orloff v. Willoughby*, 345 U.S. 83 (1953) for the proposition that courts will not intercede to revise duty orders, and instead, rely on the expertise and discretion of the military. Defendant fails, however, to take into account the factual distinctions between *Orloff* and the present case. The plaintiff in *Orloff* was challenging his duty orders regarding his job detail arguing that he was not placed in a job duty suited to his skill. Plaintiff Chalker has raised no challenge to his duty orders. Further, "Orloff's case raised no question of deprivation of constitutional rights or action clearly beyond the scope of Army authority." *Mindes* at 199. The Court in *Mindes* went on to reason that the holding in *Orloff* was to be read restrictively, finding that "[t]he Court could not stay its hand if, for example, it was shown that only blacks were assigned to combat positions while whites were given safe jobs in the sanctuary of rear echelons." *Id.* It follows then, that the requirement that the Court stay its hand in matters of internal military affairs, as noted above, applies only so long as the matter at issue does not raise

an issue of constitutional right, or an issue of scope of Army authority. If either issue is present, the plain reading of the language in *Orloff* leaves open the possibility of judicial review presumably based on the notion that intra-military administrative bodies are unqualified to determine constitutional matters and that "[c]onstitutional issues are issues singularly suited to a judicial forum and clearly inappropriate for an administrative board." *Walmer* at 1311. In the present case there is a clear breach of the establishment clause of the U.S. Constitution. In addition, there is a clear issue of scope of Army authority, as it is inconceivable that Army officials are vested with the authority to infringe upon the rights and protections afforded by the Constitution. In sum, the extent of military discretion and expertise involved is minimal because the military has no inherent expertise in constitutional law.

Defendant points out the judiciary's "usual deference to military decision making." While this principled approach to judicial review is necessary in many cases to avoid disruption of military operations, it is Plaintiff's position that when decisions and practices touch upon constitutionally protected rights, the military has exceeded the bounds of its discretion. For this reason, and for the reasons set forth in the *Mindes* factors above, the Court should review Plaintiff Chalker's claims.

III. JUDICIAL DEFERENCE TO MILITARY JUDGMENT IS INAPPROPRIATE IN PLAINTIFF'S CASE

A. Military action that violates a constitutional right is not owed judicial deference when such action is not governed by a reasoned military regulation.

Deference to military judgment is an issue that has been judicially examined a number of times, to this point Defendant provides a summary of those cases in which the judiciary has deferred to military judgment. However, the cases provided by Defendant are all factually distinct from the present case.

Defendant first cites *Parker v. Levy*, 417 U.S. 733 (1974). The Court in *Parker* found that disrespectful speech, otherwise constitutionally protected, is not protected in the armed forces, and prohibited by the Uniform Code of Military Justice. In support of this finding, the Court cited *United States v. Priest*, 21 U.S.C.M.A 564, 45 C.M.R. 338 (1972) for the proposition that:

> "[i]n the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community. . . In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives, but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected. "

Parker at 758-59. The principle behind the holding in *Parker* is clear, constitutional protections will not apply to the conduct of service members when such conduct would tend to "undermine the effectiveness of response to command." *Id.* Defendant also cites *Greer v.* Spock, 424 U.S. 828 (1976), as well as, *Brown v.* Glines, 444 U.S. 348 (1980) in support of the position that the court should defer to military judgment. However, both of these cases are distinguishable in that they dealt with constitutionality of regulations prohibiting distribution and circulation of material on military reservations. In both cases the court found that "nothing in the Constitution . . . disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command." *Brown* at 598-99 c*iting Greer v. Spock,* 424 U.S. 828, 840. In the present case, Plaintiff Chalker's desire to be free of sectarian prayers at mandatory attendance events is not conduct that calls into question his loyalty to the Army as contemplated in *Greer* and *Brown*, nor is there anything in the record to suggest that his desire to be excused has affected his response to command as contemplated in

Parker. In fact, the record reveals that Plaintiff Chalker has conducted himself properly and with honor at all times, receiving both the Combat Medic Badge and the Purple Heart. Am. Compl. ¶ 7.

Finally, Defendant relies on *Goldman v. Weinberger*, 475 U.S. 503 (1986) in support of the Court's deference to the military. In *Goldman* the Court deferred to the military's judgment in enforcing part of a 190 page regulation prohibiting a Jewish serviceman from wearing a traditional yarmulke while in uniform finding that "the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations." G*oldman* at 509-10. In coming to this conclusion the Court considered the underlying rationale of the Air Force that "[u]niforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank." *Goldman* at 508. Plaintiff agrees that uniformity is an essential part of the military. It is well settled after *Goldman,* that the military can mandate uniformity of appearance; however, it is inconceivable that demanding uniformity of faith is in accord with the First Amendment of the Constitution.

In each of the four cases cited by Defendant, the respective plaintiffs brought constitutional challenges to military regulations; this is an important distinction. To be sure, "judicial deference ... is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). However, while requiring attendance at sectarian prayer events is presumably not arbitrary, such an order is not the end product of lengthy discussion, reasoning, or analysis to the same degree as a formally enacted 190 page military regulation found in *Goldman.* Indeed, if it is true that "review of military regulations challenged

on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society," *Goldman* at 507, Plaintiff Chalker argues that the inverse must also be true. That is, if the constitutional challenge is not one of a military regulation, then a lesser degree of deference is due.

As this is an issue of first impression, hard and fast rules are difficult to distill from the available case law. What is known is that "deference does not mean abdication." *Rostker* at 70. Further, although in some instances otherwise constitutionally protected conduct has been restricted in the military, "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind them when they enter military service." *Weiss v. United States*, 510 U.S. 163, 194 (1994). Finally, from the cases discussed above, it appears that when regulations of otherwise protected First Amendment conduct are challenged the military is owed "great deference." *Goldman* at 507. In this case, Defendant is requiring attendance at sectarian prayer events, and essentially regulating beliefs, not conduct. In addition, Defendant is doing so without the support of a formal regulation that would warrant the degree of deference sought. In sum, Plaintiff Chalker avers that deference to military judgment is not supported by existing case law, and therefore asks that the court exercise its constitutional expertise.

IV. PLAINTIFF'S CLAIMS ARE SUPPORTED, NOT FORECLOSED, BY RELEVANT CASE LAW.

A. Given that the constitutionality of chaplain-led prayer is not at issue, *Marsh v. Chambers* does not apply.

Defendant in this matter goes to great lengths to support chaplain-led prayer at military functions, recounting historic events as well as citing cases supporting his position. However, the issue of chaplain-led prayer, by itself, is not a matter that Plaintiffs take issue with, and it would appear that Defendant's discussion of chaplain-led prayer is little more than an attempt to

confuse the issues. Again, the primary issue "is whether the plaintiff . . . may be required to attend military functions and/or formations that include sectarian Christian prayers." Am. Compl. ¶ 1. Aside from avoiding the issue at hand, Defendant, in attempting to justify the military's actions, misapplies *Marsh v. Chambers*, 463 U.S. 783 (1983). The *Marsh* case concerned a specific set of facts that have no parallel in Plaintiff Chalker's case. The challenged conduct in *Marsh* was the practice of the Nebraska Legislature opening each of its sessions with a state funded, chaplain-led prayer. *Id.*

To begin, in *Marsh* no one was forced to attend legislative sessions under threat of discipline, hence the challenged conduct was prayer itself, whereas in the present case, the challenge concerns the act of requiring Plaintiff Chalker to attend sectarian Christian prayer events. Accordingly, *Marsh* is distinguishable on its face from the matter at hand. Not only is *Marsh* distinguishable, but the reach of the Court's holding falls short of application to Plaintiff Chalker's case.

A thorough reading of *Marsh* establishes that the Court considered only the constitutionality of "[t]he opening of sessions of legislative and other deliberative public bodies with prayer. . ." *Marsh* at 786. It is therefore, Plaintiff's position that *Marsh* has no bearing on the present case, in that the sectarian prayers involved here are not delivered during "sessions of legislative" or "other deliberative public bodies." *Id*. This position is buttressed by the fact that the Court in *Marsh*, rather than relying on traditional establishment clause tests, instead undertook a lengthy discourse on the tradition of prayer at deliberative sessions. *See Id*. at 786-93. More recently, the Tenth Circuit in applying *Marsh, "*read *Marsh* as establishing the constitutional principle that the genre of government religious activity that has come down to us over 200 years of history and which we now call 'legislative prayer' does not violate the

Establishment Clause." *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233 (10th Cir. 1998). In conclusion, *Marsh* has consistently been read to apply narrowly to the legislative and deliberative public bodies, not military formations and functions. In addition, the Supreme Court has made it absolutely clear that not "all accepted practices 200 years old and their equivalents are constitutional today." C*ounty of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989). As such, not only is Defendant addressing an issue not raised by Plaintiff, but does so with inapplicable law.

B. Plaintiff's case is most analogous to *Anderson v. Laird*, therefore warranting application of traditional Establishment Clause Analysis.

The issue of compulsory attendance at sectarian Christian prayer events has no precedent in this Court; however, the United States Court of Appeals for the District of Columbia has had the opportunity to pass judgment on the issue. Factually, *Anderson v. Laird*, 466 F.2d 283, 151 U.S.App.D.C. 112 (D.C. Cir 1972) is strikingly similar to the present case.

In *Anderson*, a class action suit was filed on behalf of all Cadets at the U.S. Military Academy, Midshipmen at the United States Naval Academy and the Cadets at the United States Air Force Academy. *Id.* at 284. Much like Plaintiff Chalker's claim, the suit in *Anderson* challenged the constitutionality of the military's practice of requiring attendance at chapel services. *Id.* Court in *Anderson* evaluated the issue through the framework of first amendment Supreme Court jurisprudence. The *Anderson* Court looked to, and distilled from *Torcaso v. Watkins*, 367 U.S. 488 (1961) (finding a mandatory declaration of belief in God as a prerequisite to holding state office unconstitutional), *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (finding unconstitutional school district action requiring Bible readings to be delivered at the beginning of each school day), and *Engel v. Vitale*, 370 U.S. 421 (1962) (holding New York's program of daily classroom prayer inconsistent with the first amendment) the

principle "that freedom from governmental imposition of religious activity is a core value protected by the Establishment Clause, and that therefore a government may not require an individual to engage in religious practices or be present at religious exercises." *Anderson* at 291. In coming to this conclusion, the Court declined to distinguish compulsory chapel attendance from the "overt actions" at issue in the three aforementioned cases. *Id.*

In reaching its decision, the *Anderson* court admonished the trial court for utilizing the then accepted "purpose" and "primary effect" establishment clause test as enunciated in *Schempp*, reasoning that such analysis was not necessary ". . . since the very language of the regulations reveals that the government is imposing conduct in violation of the letter and the spirit of the Establishment Clause." *Anderson* at 293. However, in Plaintiff Chalkers case no such formal regulation exists that would provide an independent basis for an establishment clause ruling. Therefore, a traditional establishment clause test must be employed in analyzing Plaintiff Chalker's claims.

In conclusion, the claims raised by Plaintiffs are not often litigated. However, as discussed above, such claims are not without merit. Indeed, such claims have been met with favorable rulings as in *Anderson v. Laird.*

CONCLUSION

The Defendant has spent much time in an attempt to refute the factual allegations in Plaintiff's complaint. However, Plaintiff asserts that in ruling on a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the court must "take the well-pleaded allegations of the complaint as true[ ]," *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 493 (1986) and "the allegations of the complaint should be construed favorably to the pleader." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Plaintiff also notes that in reviewing the sufficiency of a claim, the

Court is bound to "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id*. *citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In the present case, Plaintiff has alleged facts that taken as true, support his claim and requested relief. For this reason, Defendant's motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on Aug. 3, 2009. I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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