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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARK JANNY,

Plaintiff - Appellant,

v.

JOHN GAMEZ; JIM CARMACK; TOM KONSTANTY,

Defendants - Appellees.

MUSLIM ADVOCATES; CENTRAL CONFERENCE OF AMERICAN RABBIS; DISCIPLES OF CHRIST; GLOBAL JUSTICE INSTITUTE; HINDU AMERICAN FOUNDATION; INTERFAITH ALLIANCE FOUNDATION; MEN OF REFORM JUDAISM; NATIONAL COUNCIL OF CHURCHES; RECONSTRUCTING JUDAISM; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; SAMUEL DEWITT PROCTOR CONFERENCE; SIKH AMERICAN LEGAL DEFENSE FUND; UNION OF REFORM JUDAISM; UNITARIAN UNIVERSALIST ASSOCIATION; WOMEN OF REFORM JUDAISM; WYOMING INTERFAITH NETWORK,

Amici Curiae.

No. 20-1105

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:16-CV-02840-RM-SKC)

Charles B. Wayne, DLA Piper LLP, Washington, DC (Richard B. Katskee and Alexander J. Luchenitser, Americans United for Separation of Church and State, Washington, DC; Daniel Mach and Heather L. Weaver, ACLU Program on Freedom of Religion and Belief, Washington, DC, with him on the briefs), for Plaintiff – Appellant.

Gregory R. Bueno, Assistant Attorney General, Civil Litigation & Employment Section (Philip J. Weiser, Attorney General, with him on the brief), Colorado Attorney General's Office, Denver, Colorado, for Defendant – Appellee John Gamez.

John Lebsack (John Craver, Doug Poling and Jack R. Stokan on the brief), White and Steele, P.C., Denver, Colorado, for Defendants – Appellees Jim Carmack and Tom Konstanty.

Matthew W. Callahan, Muslim Advocates, Washington, DC, filed a brief on behalf of Amici Muslim Advocates, Central Conference of American Rabbis, Disciples of Christ, Global Justice Institute, Hindu American Foundation, Interfaith Alliance Foundation, Men of Reform Judaism, National Council of Churches, Reconstructing Judaism, Reconstructionist Rabbinical Association, Samuel DeWitt Proctor Conference, Sikh American Legal Defense Fund, Union of Reform Judaism, Unitarian Universalist Association, Women of Reform Judaism, and Wyoming Interfaith Network, in support of Plaintiff – Appellant.

Before **McHUGH**, Circuit Judge, **LUCERO,** Senior Circuit Judge, and **CARSON**, Circuit Judge.

McHUGH, Circuit Judge.

Mark Janny was released from jail on parole in early 2015. His parole officer, John Gamez, directed Mr. Janny to establish his residence of record at the Rescue Mission in Fort Collins, Colorado, and to abide by its "house rules." After arriving at the Mission, Mr. Janny learned he had been enrolled in "Steps to Success," a Christian

transitional program involving mandatory prayer, bible study, and church attendance. When Mr. Janny objected, citing his atheist beliefs, he alleges both Officer Gamez and Jim Carmack, the Mission's director, repeatedly told him he could choose between participating in the Christian programming or returning to jail. Less than a week later, Mr. Carmack expelled Mr. Janny from the Mission for skipping worship services, leading to Mr. Janny's arrest on a parole violation and the revocation of his parole.

Mr. Janny brought a 42 U.S.C. § 1983 suit against Officer Gamez, Mr. Carmack, and the Mission's assistant director, Tom Konstanty, alleging violations of his First Amendment religious freedom rights under both the Establishment and Free Exercise Clauses. The district court granted summary judgment to all three defendants, finding Mr. Janny had failed to (1) adduce evidence of an Establishment Clause violation by Officer Gamez, (2) show Officer Gamez violated any clearly established right under the Free Exercise Clause, or (3) raise a triable issue regarding whether Mr. Carmack and Mr. Konstanty were state actors, as required to establish their liability under either clause.

Exercising jurisdiction under 28 U.S.C. § 1291, we reverse the district court's order as to Officer Gamez and Mr. Carmack, and we affirm as to Mr. Konstanty. Viewed in the light most favorable to Mr. Janny, the evidence creates a genuine dispute of material fact regarding his claims under both the Establishment and Free Exercise Clauses. And because the basic right to be free from state-sponsored religious coercion was clearly established under both clauses at the time of the events, Officer Gamez is not entitled to qualified immunity on either claim. We further hold the evidence sufficient for a jury to find Mr. Carmack was a state actor, as required to impose § 1983 liability on

private parties. However, because no facts link Mr. Konstanty to Officer Gamez, the evidence is legally insufficient for a jury finding that Mr. Konstanty acted under color of state law.

I. BACKGROUND

A. *Factual History*[1]

In early December 2014, Mark Janny began 24 months' parole with the Colorado Department of Corrections. His assigned parole officer was John Gamez.

Later that month, Mr. Janny was arrested for violating curfew and failing to appear for a required parole appointment. Officer Gamez sought revocation of Mr. Janny's parole on this basis. Mr. Janny was jailed until early January 2015. Several days later, Mr. Janny was again arrested for violating curfew and again jailed, this time until early February, when the Colorado Parole Board dismissed Officer Gamez's parole revocation complaint without prejudice.

Upon Mr. Janny's release the night of February 2, 2015, his friend collected him from the jail. Mr. Janny spent that night at this friend's house in Loveland, Colorado.

The next morning, February 3, Mr. Janny's friend drove Mr. Janny to a meeting with Officer Gamez at the Fort Collins parole office. As a standard condition of parole, Mr. Janny was required to establish a "residence of record" where he would remain each night. App. 221. Having been kicked out of his parents' house, Mr. Janny proposed the

[1] Because summary judgment requires viewing the facts in the light most favorable to the nonmoving party, and drawing reasonable inferences therefrom, we adopt Mr. Janny's version of the facts for purposes of this appeal. *See* Part II.A, *infra.*

home of his friend in Loveland, who had consented to hosting Mr. Janny while on parole. Officer Gamez rejected this proposed residence because he believed Mr. Janny's friend was involved in illegal drug use.

Mr. Janny's parole agreement also required him to follow the directives of his parole officer. At the February 3 meeting, Officer Gamez issued a written parole directive for Mr. Janny to establish the Fort Collins Rescue Mission (the "Mission") as his residence of record "and abide by all house rules as established." App. 251. The directive stipulated that any violation of these "house rules" would lead to Mr. Janny "being placed at Washington County jail to address the violation." App. at 251. There was no discussion about what was meant by "house rules."

Officer Gamez explained that he was friends with Jim Carmack, the Mission's director, and that the two of them had arranged for Mr. Janny's stay at the Mission. Officer Gamez told Mr. Janny he was to stay there until Officer Gamez could reinstate the parole revocation complaint and bring Mr. Janny in front of the Parole Board. Mr. Janny objected to staying at the Mission, and asked to speak with Officer Gamez's supervisor, Lorraine Diaz de Leon. Officer Gamez said Ms. Diaz de Leon had already approved the directive and was unavailable to speak to Mr. Janny.

Both Mr. Janny and Officer Gamez signed the directive establishing the Mission as Mr. Janny's residence of record. Officer Gamez gave Mr. Janny an electronic monitoring device and scheduled a follow-up meeting for the next morning, February 4. Officer Gamez ended the February 3 meeting by telling Mr. Janny to report immediately to the Mission, where staff would be expecting him.

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The Mission is a Christian community center that provides transitional programs, emergency shelter and meal services, and agency referrals. Its motto is "Changing lives in the name of Christ." App. 281. Among the transitional programs the Mission offered in February 2015 was "Steps to Success," which the parties refer to simply as the "Program." App. 192–93, 477.

Steps to Success "is a 3 to 10 month transitional, Christian-based program that provides men and women help to become productive, self-sufficient citizens," and that "exposes [participants] to the good news of Jesus Christ in a supportive community." App. 197. It combines spirituality—including bible study and Christian worship—with life-skills workshops, "work therapy," and case management. App. at 197. Participants are required to attend a daily morning prayer service and a daily 5:00 p.m. service in the Mission's chapel, in addition to an outside church service each Sunday and several sessions of evening bible study per month. They are also required to observe dorm-style rules, including set mealtimes and curfew, and to refrain from drugs or alcohol. Among the express objectives of Steps to Success is for its participants to achieve "Full program compliance." App. 193.

The Mission also offers emergency overnight shelter services for adults not in one of its transitional programs, as well as hot breakfast and dinner. Those staying in the emergency shelter are not allowed in the Mission prior to 4:30 p.m., and must leave the dorms by 7:00 a.m. each morning.

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Mr. Janny reported to the Fort Collins parole office at 9 a.m. on February 4 for his scheduled follow-up with Officer Gamez. Officer Gamez told Mr. Janny to report immediately to the parole office if he was kicked out of the Mission, or if the parole office was closed, to report as soon as it opened. Officer Gamez gave Mr. Janny a parole revocation summons mirroring the complaint previously dismissed by the Parole Board. He also programmed Mr. Janny's electronic monitoring device for a 6:00 p.m. daily curfew.

Mr. Janny returned to the Mission at around 10:30 a.m. Upon arrival, he met with Mr. Carmack and Tom Konstanty, the Mission's assistant director. The two Mission officials told Mr. Janny he was enrolled in the Program and orientated him to its "[h]ouse rules." App. 321. They informed Mr. Janny he was required to attend daily morning prayer and evening chapel, twice weekly bible study, and an outside church service on Sunday, and would also be expected to participate in one-on-one religious counseling.

Mr. Carmack further indicated that he was good friends with Officer Gamez, who was Mr. Carmack's former parole officer. Officer Gamez and Mr. Carmack had an "informal arrangement" to house certain parolees at the Mission. App. 186. Mr. Carmack explained to Mr. Janny that while thus far, the Program had only accepted female parolees, Mr. Carmack was taking Mr. Janny on as a "guinea pig"—the first male parolee enrolled in the Program—as a favor to Officer Gamez. App. 31.

Mr. Janny explained to Mr. Carmack and Mr. Konstanty that he is an atheist and did not want to participate in any religious programming. Mr. Carmack told Mr. Janny not to express these beliefs while in the Program or to tell anyone he is an atheist.

Mr. Carmack informed Mr. Janny that regardless of Mr. Janny's beliefs, Mr. Janny would participate in the Mission's religious programming or get kicked out. When Mr. Janny protested, stating this was a violation of his religious rights, Mr. Carmack told him he had no religious rights while at the Mission. Mr. Carmack and Mr. Konstanty warned Mr. Janny that he must stay at the Mission and comply with the Program's rules, including the religious ones, or be put in jail.

Mr. Janny responded, "That's not how the United States works," as religious freedom is "the first precept of the nation." App. 166. With Mr. Janny and Mr. Konstanty present, Mr. Carmack then called Officer Gamez to tell him Mr. Janny, as an atheist, was unfit for the Program's religious component. Officer Gamez reassured Mr. Carmack that Mr. Janny would follow the Program's rules, including its religious rules, or go to jail. Officer Gamez (over the phone) and Mr. Carmack (in person) then both told Mr. Janny that regardless of his religious reservations, he was going to stay in the Program or be sent to jail—that is, that the rules of the Program, including the religious rules, were the rules of his parole.

Mr. Carmack requested a meeting at Officer Gamez's office to discuss the situation further. Around 2:30 that afternoon, Mr. Carmack drove Mr. Janny to the parole office. The subsequent meeting among Officer Gamez, Mr. Carmack, and Mr. Janny is reflected by a 2:34 p.m. entry in the chronological parole log, stating that a "case management" contact was made and that a "CVDMP" (Colorado Violation Decision Making Process) was performed. App. 239.

At this meeting on the afternoon of February 4, Officer Gamez, Mr. Carmack, and Mr. Janny discussed the Program's religious requirements, including bible study, morning prayer, and daily chapel. When Mr. Janny again objected to these activities as an affront to his atheist beliefs, Officer Gamez responded, "It doesn't matter. You're going to follow the rules of the program or you're going to go to jail." App. 167. Officer Gamez and Mr. Carmack reiterated to Mr. Janny that the rules of the Program were the rules of his parole, which meant participating in religious activities, and that Mr. Janny would comply or be sent back to jail on a parole violation.

During the meeting, Mr. Carmack requested that Mr. Janny's curfew be changed to 4:30 p.m. to accommodate his attendance at the Program's daily 5:00 p.m. chapel service. Officer Gamez called in the change while Mr. Carmack and Mr. Janny were still in his office. This adjustment to Mr. Janny's curfew is reflected in a parole log entry at 3:30 p.m. on February 4, 2015.

Over the next several days, Mr. Janny was forced to attend two Christian bible studies at the Mission led by Mr. Konstanty. On February 5 or 6, Mr. Carmack summoned Mr. Janny to his office for religious counseling. Mr. Janny made it clear he did not want to talk about religion, yet Mr. Carmack proceeded to discuss theological theories of existence and the history of the Bible. Mr. Carmack also challenged

Mr. Janny's beliefs, attempting to convert him to Christianity by means of Pascal's Wager.[2]

Mr. Janny objected to his mandated daily attendance at morning prayer and evening chapel, and he skipped several of these services. At one point, Mr. Konstanty asked Mr. Janny if the place was "growing on him," to which Mr. Janny responded, "No. I am still just as much a prisoner here as ever[.]" App. 168.

On the morning of February 8, 2015, a Sunday, Mr. Carmack took Mr. Janny aside and told him that if he broke any more of the Program's rules, he would be kicked out of the Mission. Mr. Janny nevertheless refused to attend the outside church service that Sunday morning. At around 4:30 p.m., Mr. Janny told Mr. Carmack he had skipped the morning service and would not be going to evening chapel, either. At that point, Mr. Carmack said to Mr. Janny, "You can't be here anymore," and "You have to leave," because "you're not doing what we're telling you." App. 170. Mr. Janny packed his belongings, departed the Mission, and stayed that night at his friend's house in Loveland.

Mr. Janny's electronic monitoring device registered his departure from the Mission. Officer Gamez issued an alert that Mr. Janny was "a potential escapee" who had "absconded from the shelter" "without authorization from staff." App. 240. At Officer Gamez's request, an arrest warrant was issued for Mr. Janny.

[2] Pascal's Wager is a philosophical argument for maintaining a belief in God. *See generally* Note, *Wagering on Religious Liberty*, 116 HARV. L. REV. 946, 955 (2003).

The next morning, Monday, February 9, Mr. Janny's friend helped him look for a suitable treatment center at which to establish his residence of record. When this attempt failed, Mr. Janny reported to the parole office that afternoon. He was then arrested and taken into custody.

On March 10, 2015, the Parole Board found Mr. Janny had violated his parole by failing to remain overnight at his residence of record. The Board revoked his parole and remanded Mr. Janny to a Community Return to Custody Facility for 150 days.

B. *Procedural History*

On November 21, 2016, Mr. Janny filed a pro se prisoner civil rights complaint in federal district court for the District of Colorado, naming Officer Gamez, Ms. Diaz de Leon, Mr. Carmack, and Mr. Konstanty as defendants. The operative, fourth amended version of the complaint, filed November 2, 2017, was verified by Mr. Janny under penalty of perjury. It stated four claims under 42 U.S.C. § 1983, each brought against all four defendants. Claim One alleged Mr. Janny was falsely imprisoned when forced to stay at the Mission. Claims Two and Three alleged Mr. Janny's placement in the Program violated his First Amendment religious freedom rights under the Establishment and Free Exercise Clauses, respectively. Claim Four alleged religious discrimination in violation of equal protection. Mr. Janny sought declaratory relief, as well as nominal, compensatory, and punitive damages, and requested a jury trial.

In a jointly filed motion, Ms. Diaz de Leon moved to dismiss all claims for lack of her personal participation, and Officer Gamez moved to dismiss Claims One and Four for failure to state a claim. Mr. Carmack and Mr. Konstanty (the "Program Defendants")

jointly moved to dismiss all claims, arguing Mr. Janny failed to sufficiently allege they acted under color of state law. On September 20, 2018, a magistrate judge recommended both motions be granted.

Mr. Janny objected only to the Program Defendants being dismissed from Claims Two and Three. The district court sustained this objection, finding Mr. Janny had plausibly alleged that "[Officer] Gamez and the Program Defendants acted in concert to deprive [Mr. Janny] of his First Amendment rights." App. 122.

Mr. Janny's two First Amendment claims against Officer Gamez and the Program Defendants moved to discovery, during which documentary evidence was exchanged and Mr. Janny's deposition was taken. On October 31, 2019, Officer Gamez and the Program Defendants separately moved for summary judgment. Officer Gamez argued he had not violated Mr. Janny's rights under either of the religion clauses, and also asserted entitlement to qualified immunity. The Program Defendants again argued they had not acted under color of state law. Mr. Janny, still proceeding pro se, opposed both motions. He submitted a declaration and a supplemental declaration as supporting evidence, both sworn under penalty of perjury. He also submitted the chronological parole log, Officer Gamez's parole directive, and the Mission's Program literature.

On February 21, 2020, the district court granted both summary judgment motions. The district court first rejected the argument that the Program Defendants were state actors, a prerequisite to liability under § 1983. It then granted Officer Gamez qualified immunity from both First Amendment claims. To analyze the Establishment Clause claim, the district court applied the three-part test from *Lemon v. Kurtzman*, 403 U.S. 602

(1971). It found that Mr. Janny had not shown his placement in the Program lacked a secular purpose or that its principal effect was to advance religion, and that Mr. Janny had also failed to bring forth a genuine issue as to any government entanglement with religion. It accordingly held Mr. Janny had failed to adduce evidence sufficient to show Officer Gamez violated the Establishment Clause. The district court then decided Mr. Janny's Free Exercise Clause claim on the second prong of qualified immunity, finding Officer Gamez had not violated clearly established law.

After retaining counsel, Mr. Janny timely filed a notice of appeal.

II. ANALYSIS

This appeal presents three issues: (1) whether Mr. Janny's First Amendment religious freedom rights were violated by his forced participation in a Christian program as a mandatory condition of parole; (2) whether those rights were clearly established at the time of the violation, as required to overcome Officer Gamez's claim to qualified immunity; and (3) whether Mr. Carmack and Mr. Konstanty, the Program Defendants, acted under color of state law, as required to hold private parties liable under 42 U.S.C. § 1983.

Before turning to those issues, we first dispense with various arguments made by the defendants concerning the quality of Mr. Janny's evidence on summary judgment.

A. *Threshold Factual Arguments*

We review the district court's grant of summary judgment de novo, "applying the same standard that the district court is to apply." *Singh v. Cordle*, 936 F.3d 1022, 1037 (10th Cir. 2019). Summary judgment is appropriate "if the movant shows that there is no

genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A disputed fact is 'material' if it might affect the outcome of the suit under the governing law, and the dispute is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997). "We construe the factual record and reasonable inferences therefrom in the light most favorable to the nonmovant," *id*. at 839–40, and "ordinarily limit[] our review to the materials adequately brought to the attention of the district court," *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998).

To oppose summary judgment, Mr. Janny put forth his own sworn statements, in the form of two declarations. Also before the district court were Mr. Janny's deposition and his verified complaint, which may be treated as an affidavit on summary judgment. *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1311 (10th Cir. 2010). The defendants concede these materials created factual disputes, but assert these disputes are not genuine. *See, e.g.*, Gamez Br. at 12–13; Program Br. at 7. We address their threshold factual arguments in some depth, for "[t]he first step in assessing the constitutionality of [the defendants'] actions is to determine the relevant facts." *Scott v. Harris*, 550 U.S. 372, 378 (2007).

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To serve as "an appropriate vehicle to establish a fact for summary judgment purposes, [an] affidavit must set forth facts, not conclusory statements." *BancOklahoma Mortg. Corp. v. Cap. Title Co.*, 194 F.3d 1089, 1101 (10th Cir. 1999). Moreover, the party opposing summary judgment must "designate '*specific* facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed.

R. Civ. P. 56(e)) (emphasis added). That is, to oppose summary judgment, the nonmovant must "ensure that the factual dispute is portrayed with particularity." *Cross v. The Home Depot*, 390 F.3d 1283, 1290 (10th Cir. 2004) (quotation marks omitted).

Officer Gamez argues Mr. Janny's evidence falls short of these standards, deeming it "speculative," Gamez Br. at 26, and "threadbare," *id.* at 10. The district court similarly characterized Mr. Janny's evidence, finding the "allegations that he was forced to participate in [religious] programming and refrain from discussing his atheist beliefs" to be "conclusory" and "insufficient to raise a genuine issue of material fact." App. 493.

Mr. Janny's "testimony consists of more than mere legal conclusions." *Speidell v. United States ex rel. IRS*, 978 F.3d 731, 740 (10th Cir. 2020). His statements are laden with specific facts relating to relevant transactions, dates, and persons. *Cf. BancOklahoma*, 194 F.3d at 1101 (rejecting an affidavit opposing summary judgment that "contain[ed] sweeping, conclusory statements," but that did "not mention any single transaction, date or person"). Based on his observations as a percipient witness, Mr. Janny gives a detailed account of events from February 3 to February 9, 2015, complete with a description of meetings with Officer Gamez and the Program Defendants that includes specific statements made by all three. Mr. Janny has thus carried his burden to portray the factual disputes with specificity and particularity. *See Celotex*, 477 U.S. at 324; *Cross*, 390 F.3d at 1290.

The Program Defendants claim that no "competent" record evidence supports Mr. Janny's "contentions." Program Br. at 26. But Mr. Janny's contentions—his sworn statements—are *themselves* competent evidence capable of defeating summary judgment.

Under the Federal Rules of Evidence, "[e]very witness is presumed competent to testify, unless it can be shown that the witness does not have personal knowledge." *United States v. Lightly*, 677 F.2d 1027, 1028 (4th Cir. 1982) (citing Fed. R. Evid. 601). Likewise, under the Federal Rules of Civil Procedure, an affidavit or declaration used to oppose summary judgment "must be made on personal knowledge." Fed. R. Civ. P. 56(c)(4). *See Payne v. Pauley*, 337 F.3d 767, 772 (7th Cir. 2003) (stating that affidavits must be based on personal knowledge under both Fed. R. Evid. 601 and Fed. R. Civ. P. 56). Mr. Janny satisfies this requirement, as his statements exclusively consist of a first-hand narrative. He is properly classified as a competent witness under the Federal Rules.

"Competent" evidence is also generally understood to mean admissible evidence. *See Evidence*, Black's Law Dictionary (11th ed. 2019) (defining "incompetent evidence" as "[e]vidence that is for any reason inadmissible" and defining "competent evidence" by cross-reference to "admissible evidence"). The Federal Rules of Civil Procedure require affidavits or declarations used to oppose summary judgment to "set out facts that would be admissible in evidence," and allow for objections on the basis "that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2), (4). In this vein, the Program Defendants assert that Mr. Janny's evidence consists of "inadmissible hearsay statements of [Mr.] Carmack, [Mr.] Konstanty, and [Officer] Gamez offered for the truth of the matter asserted," and argue that "[a] reasonable jury could not return a verdict in favor of [Mr.] Janny solely on his baseless and inadmissible allegations," Program Br. at 28–29.

Mr. Janny's evidence does include out-of-court statements, at least some of which were introduced for their truth. But because Mr. Carmack, Mr. Konstanty, and Officer Gamez are all defendants, the statements Mr. Janny ascribes to each are statements of a party opponent. Under the Federal Rules of Evidence, statements of a party opponent are excluded from being hearsay. *See, e.g.*, *Thomas v. Int'l Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995) (citing Fed. R. Evid. 801(d)(2)); *see also Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 667 (10th Cir. 2006) ("[A]n admission of a party opponent needs no indicia of trustworthiness to be admitted."). Mr. Janny's factual averments regarding what Mr. Carmack, Mr. Konstanty, and Officer Gamez said to him, or what he heard them say in his presence, amount to admissible (and competent) evidence.

Officer Gamez and the Program Defendants also argue Mr. Janny's evidence must be disregarded because it is "self-serving." Gamez Br. at 26; *see* Program Br. at 27 (deeming Mr. Janny's evidence to be "nothing more than baseless and self-serving allegations").

"So long as an affidavit is based upon personal knowledge and sets forth facts that would be admissible in evidence, it is legally competent to oppose summary judgment, irrespective of its self-serving nature." *Speidell*, 978 F.3d at 740 (quotation marks omitted). The self-serving nature of a sworn statement "bears on its credibility, not on its cognizability for purposes of establishing a genuine issue of material fact." *United States v. Shumway*, 199 F.3d 1093, 1104 (9th Cir. 1999). Mr. Janny's summary judgment evidence stands or falls on its specificity, competency, and admissibility. To reject

evidence satisfying those prerequisites because it was "self-serving" would cut against the very nature of litigation, as "virtually any party's testimony can be considered 'self-serving.'" *Greer v. City of Wichita*, 943 F.3d 1320, 1325 (10th Cir. 2019).

The Program Defendants further contend that Mr. Janny's factual account must be supported by competent record evidence *other* than his own sworn statements. *See, e.g.*, Program Br. at 26. This argument, too, must fail.

First, Mr. Janny's account does find support in independent record evidence. Parole log entries support his assertions that a meeting took place between himself, Officer Gamez, and Mr. Carmack at Officer Gamez's office on the afternoon of February 4, 2015, and that at this meeting, Mr. Carmack requested Mr. Janny's curfew be changed to 4:30 p.m. *See* App. 239. Furthermore, Mission literature listing mandatory 5:00 p.m. chapel service for Program participants supports Mr. Janny's assertion that this curfew change was made for religious reasons. *See* App. 367. Mr. Janny attached both the parole log and the Mission literature to his motion opposing summary judgment. And that Mr. Janny did not abscond from the Mission, as Officer Gamez claims, but was instead expelled for not following the religious rules, is supported by the Program Defendants' own admissions. *Compare* Gamez Br. at 9 (asserting Mr. Janny "absconded" from the Mission "without authorization") *with* Program Br. at 6 ("[Mr.] Janny did not follow Program rules, so [Mr.] Carmack asked him to leave the Mission.") *and id.* at 22 ("[The Mission] decided, by its own accord, to terminate [Mr.] Janny's residence for violating its house policies.").

But "[e]ven standing alone, self-serving testimony can suffice to prevent summary judgment." *Greer*, 943 F.3d at 1325; *see Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 57 (2d Cir. 1998) ("There is nothing in [Rule 56] to suggest that nonmovants' affidavits alone cannot—as a matter of law—suffice to defend against a motion for summary judgment."). "To reject testimony because it is unsubstantiated and self-serving is to weigh the strength of the evidence or make credibility determinations—tasks belonging to the trier of fact." *United States v. $100,120*, 730 F.3d 711, 717 (7th Cir. 2013).

Notwithstanding the general summary judgment standard, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott*, 550 U.S. at 380. Seizing upon the narrow *Scott v. Harris* exception, Officer Gamez argues that various of Mr. Janny's factual contentions are blatantly contradicted by the record. *See* Gamez Br. at 21–22, 31.

In *Scott v. Harris*, as here, the defendant moved for summary judgment on grounds of qualified immunity. 550 U.S. at 378. In that case, however, there was "an added wrinkle": "existence in the record of a videotape capturing the events in question." *Id.* "The videotape quite clearly contradict[ed] the version of the story told by [the plaintiffs] and adopted by the Court of Appeals." *Id.* Because the plaintiff's "version of events [was] so utterly discredited by the record" that it constituted "visible fiction," the Supreme Court departed from the typical summary judgment standard of viewing the facts in the light most favorable to the nonmovant. *Id.* at 380–81. Regarding the relevant

factual issue, "no reasonable jury could have believed" the plaintiff, and thus the court of appeals "should have viewed the facts in the light depicted by the videotape." *Id.*

In evidentiary terms, this case is a far cry from *Scott*. Here there is no recording of the relevant conversations, nor any documentary evidence refuting Mr. Janny's account. What little evidence the record contains other than the parties' competing statements is inconclusive—and, if anything, tends to validate Mr. Janny's account, as discussed above. In short, no evidence "utterly discredit[s]" Mr. Janny's version of events. *Id.* at 380.

In qualified immunity cases, the requirement that courts "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion'" "usually means adopting . . . the plaintiff's version of the facts." *Id.* at 378 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)). Because the *Scott* exception for "blatant contradiction" is inapplicable here, we apply our traditional Rule 56 summary judgment standard by adopting Mr. Janny's version of the facts. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

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Accepting Mr. Janny's version of the facts as true, and drawing all justifiable inferences therefrom, we proceed to determine whether a reasonable jury could find in his favor regarding his claims brought under the religion clauses of the First Amendment.

B. *Religious Freedom Violations*

Mr. Janny claims he was coerced into participating in Christian-oriented programming as a mandatory condition of parole, in violation of his First Amendment religious freedom rights. The First Amendment declares that "Congress shall make no law respecting an establishment of religion"—the Establishment Clause—"or prohibiting the free exercise thereof"—the Free Exercise Clause. U.S. CONST. amend. I. The religious liberty guaranteed by the First Amendment has been applied to the states via incorporation into the Fourteenth Amendment's due process clause. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

Mr. Janny is an atheist: "One who denies or disbelieves the existence of a God." *Atheist*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/12450. "Atheism is 'a school of thought that takes a position on religion, the existence and importance of a supreme being, and a code of ethics,' and it is thus a belief system that is protected by the Free Exercise and Establishment Clauses." *Kaufman v. Pugh*, 733 F.3d 692, 697 (7th Cir. 2013) (quoting *Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005)). This has been made clear by the Supreme Court, which

> has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain.

Wallace v. Jaffree, 472 U.S. 38, 53–54 (1985) (footnotes omitted).

"[A]t the heart of the Establishment Clause" is the principle "that government should not prefer one religion to another, or religion to irreligion." *Bd. of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994). Likewise, the Free Exercise Clause embodies the principle that "[g]overnment may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (internal citation omitted). Mr. Janny's freedom to deny or disbelieve in the existence of a God is therefore fully protected by both clauses.

We now explain our conclusion that Mr. Janny's evidence sufficiently establishes a genuine dispute of material fact with regard to his claims under both the Establishment and Free Exercise Clauses.

1. Establishment Clause

a. *Legal Background*

The Establishment Clause "means at least" that a state actor cannot "force nor influence a person to go to or to 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." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15–16 (1947). The Supreme Court has repeatedly affirmed these core prohibitions. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) ("[T]he State may not adopt programs or practices . . . which 'aid or oppose' any religion. This prohibition is absolute." (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963))); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)

("The government . . . . may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church . . . or to take religious instruction."). Consequently, based on "the fundamental limitations imposed by the Establishment Clause," the Court in *Lee v. Weisman* held it "beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." 505 U.S. 577, 587 (1992).

The district court did not reference *Lee* in analyzing Mr. Janny's Establishment Clause claim. Instead, it relied on the test laid out in *Lemon v. Kurtzman*. Under *Lemon*, state action must satisfy three conditions to avoid violating the Establishment Clause: it "must have a secular legislative purpose," "its principal or primary effect must be one that neither advances nor inhibits religion," and it "must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612–13 (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 674 (1970)).

The district court's exclusive focus on *Lemon* was in error. The Supreme Court has "repeatedly emphasized [an] unwillingness to be confined to any single test or criterion in th[e] sensitive area" of Establishment Clause jurisprudence. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); *see also County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 591 (1989) ("'[T]he myriad, subtle ways in which Establishment Clause values can be eroded' are not susceptible to a single verbal formulation." (quoting *Lynch,* 465 U.S. at 694 (O'Connor, J., concurring))), *abrogated on other grounds by Town of Greece v. Galloway*, 572 U.S. 565, 579–81 (2014); *Tilton v. Richardson*, 403 U.S. 672, 678 (1971) ("[W]e can only dimly perceive the boundaries of

permissible government activity in this sensitive area of constitutional adjudication."). As such, the *Lemon* test "provides 'no more than [a] helpful signpost' in dealing with Establishment Clause challenges." *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (alteration in original) (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)); *see also Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080 (2019) (plurality opinion) ("If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met.").

Thus, while the *Lemon* test remains a central framework for Establishment Clause challenges, it is certainly not the exclusive one. And claims of religious coercion, like the one presented here, are among those that *Lemon* is ill suited to resolve. *Lee* teaches that a simpler, common-sense test should apply to such allegations: whether the government "coerce[d] anyone to support or participate in religion or its exercise." 505 U.S. at 587; *see Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 850 (7th Cir. 2012) (en banc) ("Apart from how one views the coercion test in relation to the *Lemon* test . . . , it is evident that if the state 'coerce[s] anyone to support or participate in religion or its exercise,' an Establishment Clause violation has occurred." (alteration in original) (quoting *Lee*, 505 U.S. at 587)). As Justice Blackmun stated in his *Lee* concurrence, although "proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient." 505 U.S. at 604 (Blackmun, J., concurring). This is because "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another," *Larson v. Valente*, 456 U.S. 228, 244 (1982), and "[g]overnment pressure to participate in a religious activity is an

obvious indication that the government is endorsing or promoting religion," *Lee*, 505 U.S. at 604 (Blackmun, J., concurring).

Multiple federal circuits have used this elemental framework of coercion to assess whether a law enforcement official has violated the Establishment Clause by allegedly forcing a prisoner, probationer, or parolee to participate in religious programming.

In *Owens v. Kelley*, 681 F.2d 1362 (11th Cir. 1982), a pre-*Lee* case, the plaintiff alleged his religious freedom rights had been violated by a probation condition requiring participation in a rehabilitation program "pervaded with Biblical teachings." *Id.* at 1365. The district court there relied on *Lemon* in granting the state summary judgment, finding the program had "a secular purpose and a primary secular effect." *Id.* The Eleventh Circuit reversed. Ignoring *Lemon*, the court held it to be "clear that a condition of probation which requires the probationer to adopt religion or to adopt any particular religion would be unconstitutional." *Id.* "It follows that a condition of probation which requires the probationer to submit himself to a course advocating the adoption of religion or a particular religion also transgresses the First Amendment." *Id.* While recognizing a "fine line between rehabilitation efforts which encourage lawful conduct by an appeal to morality . . . , and efforts which encourage lawfulness through adherence to religious belief," the court nevertheless stressed that line "must not be overstepped." *Id.* at 1365–66.

In *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996), the Seventh Circuit addressed whether, consistent with the Establishment Clause, "a state correctional institution may require an inmate, upon pain of being rated a higher security risk and suffering adverse

effects for parole eligibility, to attend a substance abuse counseling program with explicit religious content." *Id.* at 473. The program in question, Narcotics Anonymous ("NA"), advanced a "deterministic view of God" the plaintiff deemed "in conflict with his own belief about free will." *Id.* at 474. A prison official told the objecting plaintiff he "didn't have a choice in the matter; that attendance was mandatory; that if [he] didn't go, [he] would most likely be shipped off to a medium (i.e. higher security) prison, and denied the hope of parole." *Id.* (alterations in original). As in *Owens*, the district court in *Kerr* applied the *Lemon* test in granting the state summary judgment. *Id.* at 473–74. The court of Appeals again reversed, holding the state "impermissibly coerced inmates to participate in a religious program." *Id.* at 474.

The *Kerr* court delineated two categories of Establishment Clause cases. *Id.* at 477. The first are "those dealing with government efforts to 'coerce anyone to support or participate in religion or its exercise.'" *Id.* (quoting *Lee*, 505 U.S. at 587). The *Kerr* court labeled these "the 'outsider' cases, where the state is imposing religion on an unwilling subject." *Id.* In "outsider" cases, "the essence of the complaint is that the state is somehow forcing a person who does not subscribe to the religious tenets at issue to support them or to participate in observing them." *Id.* As an example, *Kerr* cited cases where "the [Supreme] Court struck down the practice of beginning the school day with a prayer, scripture readings, or the Lord's Prayer, where some students (or their families) did not subscribe to the religious beliefs expressed therein." *Id*. It also cited *Lee* itself, which "struck down the practice of including a nondenominational religious invocation

and benediction as part of a public school graduation ceremony, where 'young graduates who object are induced to conform.'" *Id.* (quoting 505 U.S. at 599).

The second category of Establishment Clause cases delineated in *Kerr* are those "in which existing religious groups seek some benefit from the state, or in which the state wishes to confer a benefit on such a group." *Id.* This category concerns "how far the state may help religious 'insiders.'" *Id.* As an example, the *Kerr* court cited *Lemon*, which "concerned the constitutionality of Pennsylvania and Rhode Island programs designed to provide financial support to nonpublic elementary and secondary schools, including parochial schools." *Id.* Also falling within this "insider" category are "cases dealing with the availability of various kinds of public fora for religious groups or religious displays," which, like the parochial school funding cases, "are principally concerned with how far the state may assist pre-existing religious groups." *Id.* at 478 (collecting cases).

While "debate has raged among scholars and among members of the Supreme Court" as to "those elusive 'insider' cases," *id.* at 479, the *Kerr* court deemed there to be "virtually no dispute in the Supreme Court that, in principle, the first kind of case identified here, the 'outsider' case, falls within the scope of the Establishment Clause," *id.* at 478. For support, *Kerr* pointed to the fact that all nine Justices in *Lee* agreed on the proposition that the government cannot coerce participation in religious activity. *Id.* at 478–79 (citing 505 U.S. at 587; *id.* at 604 (Blackmun, J., concurring); *id.* at 638 (Scalia, J., dissenting)). Disagreement may arise over whether the state has acted, whether coercion is present, or whether the aim of the coercion is indeed religion, but "in general, a coercion-based claim indisputably raises an Establishment Clause question." *Id.* at 479.

The *Kerr* court viewed the *Lemon* test as designed for the "insider" cases, those "raising questions about the way in which the state treats existing religious groups." *Id.* But the claim in *Kerr* was of the simpler variety: the plaintiff alleged that Wisconsin prison authorities were "coercing him, under threat of meaningful penalties, to attend religious meetings." *Id.* In applying *Lemon* to that "outsider" claim, "the district court did not take into account the substantial Establishment Clause jurisprudence that the Supreme Court has developed since *Lemon*." *Id.* "[W]hen a plaintiff claims that the state is coercing him or her to subscribe to religion generally, or to a particular religion," *Kerr* held that "only three points are crucial: first, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular?" *Id.*

On the record in *Kerr*, these first two steps were easily satisfied: Wisconsin's prison authorities acted under color of state law, and the plaintiff was undisputedly subjected to penalties for refusing to attend the NA meetings: namely, "classification to a higher security risk category and adverse notations in his prison record that could affect his chances for parole." *Id.* On the third point, the court deemed the object of the NA program to be religious, because a "straightforward reading of [NA's] twelve steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being." *Id.* at 480. Thus, the Seventh Circuit held that "the program runs afoul of the prohibition against the state's favoring religion in general over non-religion." *Id.*

Around the same time *Kerr* was decided, the Second Circuit dealt with a similar challenge in *Warner v. Orange County Department of Probation*, 115 F.3d 1068 (2d Cir. 1996). There, the plaintiff claimed that a condition of his probation requiring him to

attend meetings of Alcoholics Anonymous ("AA") forced him to participate in religious activity in violation of the Establishment Clause. *Id.* at 1069. The plaintiff complained to his probation officer that, as an atheist, he found AA's religious nature objectionable, but his probation officer directed him to continue attending the meetings. *Id.* at 1070.

Relying on *Lee*, the *Warner* court held the county had violated the Establishment Clause by forcing the probationer to attend AA meetings. *Id.* at 1074. The meetings "had a substantial religious component"—they "opened and closed with group prayer," and participants "were told to pray to God for help in overcoming their affliction." *Id.* at 1075. There was also "no doubt" the probationer "was coerced into participating in these religious exercises by virtue of his probation sentence," as he was given no choice among therapy programs. *Id.* That is, the probation department "directly recommended A.A. therapy to the sentencing judge, without suggesting that the probationer might have any option to select another therapy program, free of religious content." *Id.* And once sentenced, the probationer "had little choice but to attend the A.A. sessions," because failure to attend would have led to imprisonment for a probation violation. *Id.*

The *Warner* court also rejected an invitation to analyze the case under the *Lemon* framework. *Id.* at 1076 n.8. "Whatever other tests may be applicable in the Establishment Clause context, the Supreme Court has made clear that 'at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.'" *Id.* (quoting *Lee*, 505 U.S. at 587). "Because sending [the probationer] to A.A. as a condition of his probation, without offering a choice of other providers, plainly

constituted coerced participation in a religious exercise," the condition violated the Establishment Clause. *Id.*

A decade later, in *Inouye v. Kemna*, 504 F.3d 705 (9th Cir. 2007), the Ninth Circuit addressed an allegation that a parole officer "required [a parolee] to attend a program rooted in religious faith and then recommended revoking his parole because he refused to participate." *Id.* at 713. Like *Kerr* and *Warner*, the program in question consisted of rehabilitation meetings under the banner of AA/NA, whose religious content was offensive to the Buddhist parolee. *Id.* at 709–10. The *Inouye* court found the constitutional question raised by this allegation merited little analysis, deeming it "essentially uncontested that requiring a parolee to attend religion-based treatment programs violates the First Amendment." *Id.* at 712. "For the government to coerce someone to participate in religious activities strikes at the core of the Establishment Clause of the First Amendment, whatever else the Clause may bar." *Id.*

Looking to *Warner* and *Kerr*, the *Inouye* court recognized that the "Second and Seventh Circuits have found compelling prisoners and probationers to participate in AA/NA under similar circumstances unconstitutionally coercive." *Id.* at 713. The *Inouye* court found *Kerr*'s analysis "particularly useful," and adopted its three-step test for "determining whether there was governmental coercion of religious activity." *Id.*

Running the facts of *Inouye* through *Kerr*'s test proved "straightforward." *Id.* First, the parole officer acted in his official state capacity in ordering the parolee into AA/NA. *Id.* Second, this action was "clearly coercive," because the parolee "could be imprisoned if he did not attend and he was, in fact, ultimately returned to prison in part because of his

refusal to participate in the program." *Id.* Third, the object of the coercion was religious, because AA/NA is "substantially based in religion," premised as it is on belief in "a higher power." *Id.* Therefore, the *Inouye* court affirmed the district court's finding that the parole officer's actions were unconstitutional. *Id.* at 714. "The Hobson's choice [the parole officer] offered [the parolee]—to be imprisoned or to renounce his own religious beliefs—offends the core of Establishment Clause jurisprudence." *Id.*

The Eighth Circuit also adopted *Kerr*'s test for coercion-based Establishment Clause challenges in *Jackson v. Nixon*, 747 F.3d 537 (8th Cir. 2014). The prisoner-plaintiff there, an atheist, alleged "being required to attend and complete a nonsecular substance abuse treatment program in order to be eligible for early parole violates the Establishment Clause." *Id.* at 540–41. Specifically, the treatment program in question allegedly "invoked religious tenets" and involved "religious meditations." *Id.* at 540. The district court dismissed the prisoner's complaint, but the court of appeals reversed, holding he had stated a valid coercion-based Establishment Clause claim. *Id.* at 545.

Applying *Kerr*'s three-step test, the *Jackson* court deemed it clear the state had acted (step one), and accepted the plaintiff's allegation that the treatment program contained religious content (step three). *Id.* at 542. Step two—whether the state action amounted to coercion—was also satisfied, as the plaintiff had "the right to be free from unconstitutional burdens when availing himself of existing ways to access the benefit of early parole," such that the lack of a right to early parole did "not preclude him from stating a claim of unconstitutional coercion." *Id.* at 543. The plaintiff had therefore pleaded "facts sufficient to state a claim that a parole stipulation requiring him to attend

and complete a substance abuse program with religious content in order to be eligible for early parole violates the Establishment Clause." *Id.*

As this survey indicates, *Lee*, not *Lemon*, provides the proper rubric for analyzing Mr. Janny's religious coercion-based Establishment Clause claim. Like the Eighth and Ninth Circuits, we find the Seventh Circuit's breakdown of *Lee*'s framework useful, and we now join those courts in adopting *Kerr*'s three-step test.[3]

b. *Application*

Applying *Kerr*'s three-step test to the facts, Mr. Janny's evidence is sufficient to survive summary judgment on his Establishment Clause claim.

Kerr's first step asks whether the state has acted. *See* 95 F.3d at 479. Here, the State clearly sent Mr. Janny to the Mission. Officer Gamez, representing Colorado in his position as a parole officer, directed Mr. Janny to establish his residence of record at the Mission. The salient question, however, is whether the State also acted to place Mr. Janny in the Mission's religious-oriented Program, as opposed to its secular overnight shelter.

Mr. Janny argues that Officer Gamez's written parole directive to abide by the Mission's "house rules as established," App. 251, shows the State required him to participate in the Mission's religious programming, since the Mission's only "house

[3] Officer Gamez argues the district court did not err in applying *Lemon* rather than *Lee* because "the *Lee* test, in the manner which the *Kerr* decision applied it, has not been adopted by the Tenth Circuit." Gamez Br. at 30. But as Mr. Janny points out, the lack of a Tenth Circuit opinion applying *Lee* in the same manner as *Kerr* can be explained by this circuit not yet having addressed a case "where a criminal offender has been required to take part in religious programming." Reply Br. at 5.

rules" were the Program's religion-based rules. The defendants contend the reference to "house rules" was generic and did not mandate participation in any sort of religious programming.

Even assuming the parole directive's reference to "house rules" did not equate to state-mandated participation in the Program, that inference can be drawn via other facts. Per Mr. Janny's declaration, Officer Gamez specifically arranged for Mr. Janny's Program participation with Mr. Carmack, who was Officer Gamez's friend and the Mission's director. Officer Gamez also informed Mr. Janny in the phone call on February 4, 2015, that "the rules of the Program were the rules of [his] parole," including "the religious ones." App. 322. And in the parole office meeting later that day, Officer Gamez told Mr. Janny that he was "going to follow the rules of the program," App. 167, while reiterating this meant participating in religious activities. These facts establish a genuine dispute as to whether the State, through Officer Gamez, acted not just to place Mr. Janny in the Mission, but to place him specifically into the Christian-based Program.[4]

Kerr's second step asks whether the state's action was coercive. 95 F.3d at 479. Mr. Janny avers Officer Gamez told him that if he failed to follow the Program's rules, including its religious rules, his parole would be revoked and he would be returned to jail.

[4] The *Kerr* court deemed it "of no moment" that Narcotics Anonymous, not the State, ran the treatment program, "since it is clear that the prison officials required inmates to attend NA meetings." *Kerr v. Farrey*, 95 F.3d 472, 479 (7th Cir. 1996); *accord Inouye v. Kemna*, 504 F.3d 705, 713 (9th Cir. 2007). Likewise, because Mr. Janny has sufficiently averred that a state parole official arranged for his participation in the Program, the fact the Program was run by a private party (the Mission), rather than the State itself, does not affect our Establishment Clause analysis.

A choice between participating in religious programming or being sent to jail undeniably amounts to coercion. *See Inouye*, 504 F.3d at 713 (finding coercion where the plaintiff could be imprisoned for failing to attend AA/NA meetings, and "was, in fact, ultimately returned to prison in part because of his refusal to participate in the program"); *Warner*, 115 F.3d at 1075 (finding coercion where the plaintiff "would have been subject to imprisonment for violation of probation" if he failed to attend AA meetings).

Additionally, Officer Gamez failed to provide Mr. Janny with any alternative residence options. *See Inouye*, 504 F.3d at 711 ("There is no evidence that Inouye was ever told that he had a choice of programs."); *Warner*, 115 F.3d at 1075 ("The probation department . . . directly recommended A.A. . . . without suggesting that the probationer might have any option to select another therapy program"); *Kerr*, 95 F.3d at 480 ("[T]he only choice available . . . was the NA program."); *cf. id.* (distinguishing a case where "the AA program was one of a variety of options available"). Because Officer Gamez rejected Mr. Janny's proposed residence, while directing him to stay at the Mission, Mr. Janny was given a "Hobson's choice"—to violate his religious beliefs by following the Program's rules or to return to jail. *See Inouye*, 504 F.3d at 714. It was the state's responsibility, not Mr. Janny's, to locate an alternative residence that did not involve that coercive choice.

Kerr's final step asks whether the object of the coercion is religious or secular. 95 F.3d at 479. As a "Christian Faith Based Community Placement," Program Br. at 3, the Program is more grounded in the overtly religious than AA or NA, the nondenominational twelve-step programs whose tenets were nonetheless held to violate

the Establishment Clause in *Kerr*, *Warner*, and *Inouye*. *See, e.g.*, *Kerr*, 95 F.3d at 480 (holding that because NA's twelve steps are grounded in "a religious concept of a Higher Power," "the program runs afoul of the prohibition against the state's favoring religion in general over non-religion," despite its references to a God not being tied to any particular faith). Thus, "we have no trouble deciding that the third prong of *Kerr*'s Establishment Clause test has been met as well." *Inouye*, 504 F.3d at 714.

All told, Mr. Janny has adduced evidence to show that (1) the State, through Officer Gamez, placed him in the Program; (2) this action amounted to coercion, because Mr. Janny was told he could either abide by the Program's rules or return to jail, and was provided no alternative arrangement; and (3) the object of this coercion was religious, as the Program was pervaded with Christian teachings, services, and activities. A jury could thus find Mr. Janny's participation in the Program failed the *Lee* coercion test and amounted to an Establishment Clause violation.

The district court concluded Mr. Janny "cite[d] no authority for the proposition that merely being compelled to attend religious programming violated his rights." App. 493. This was error, for Mr. Janny supported his opposition to Officer Gamez's summary judgment motion with a discussion of *Lee*'s coercion principle.

It was also error to assume that "merely being compelled to *attend* religious programming," as opposed to being "forced to *participate* in such programming," cannot suffice to establish an Establishment Clause violation. App. 493 (emphasis added). For purposes of protecting the religious freedom guaranteed by the First Amendment, no distinction is drawn between coerced attendance and coerced participation, or between

being forced to listen and being forced to convert. Under the Establishment Clause, the government can neither "force nor influence a person to go to or to remain away from church against his will." *Everson*, 330 U.S. at 15; *cf. Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 210 (1948) ("No person can be punished . . . for church attendance or nonattendance."). That is, the government violates the Constitution's religious freedom guarantee when it coerces attendance at religious events, regardless of whether that coercion extends to mandating complete participation, or successfully achieves indoctrination. Put another way, because requiring a parolee "to adopt religion or to adopt any particular religion would be unconstitutional," it follows that requiring him "to submit himself to a course advocating the adoption of religion or a particular religion also transgresses the First Amendment." *Owens*, 681 F.2d at 1365. A contrary holding would risk draining the First Amendment of its power to bar blatant governmental intrusions into the sphere of personal religious liberty.

Courts have repeatedly rejected the suggestion that being compelled to attend religious programming is insufficient to make out an Establishment Clause violation. In *Kerr*, for example, the prison warden conceded "that inmates were required to 'observe' the NA meetings, although she stated that they were not required to 'participate.'" 95 F.3d at 474. This distinction made no difference to the Seventh Circuit's analysis and ultimate holding that the plaintiff had alleged a coercion-based Establishment Clause violation sufficient to survive summary judgment. The coercion requirement was "satisfied easily," based on the fact it was "clear that the prison officials required inmates to attend NA meetings (at the very least, to observe)." *Id.* at 479. Likewise, in *Warner*,

the Second Circuit rejected the county's argument that even if the probationer "was forced to attend the [AA] meetings, he was not required to participate in the religious exercises that took place." 115 F.3d at 1075. The most important factor was that "failure to cooperate could lead to incarceration," which led to significant religious coercion. "The fact that [the probationer] managed to avoid indoctrination despite the pressure he faced does not make the County's program any less coercive, nor nullify the County's liability." *Id.* at 1076. *See also Jackson*, 747 F.3d at 543 (reasoning that compelled attendance at a treatment program may still amount to religious coercion even if the plaintiff was allowed "to sit quietly during the prayers and other religious components").

The distinction drawn by the district court between attendance and participation was also effectively rejected by the Supreme Court in *Lee*. The question there was whether a prayer delivered by a rabbi at a public middle school graduation ceremony violated a dissenting student's religious freedom. 505 U.S. at 580–81. The Court determined the prayer amounted to "creating a state-sponsored and state-directed religious exercise in a public school," in violation of the Establishment Clause. *Id.* at 587. While attendance at the graduation ceremony was not technically mandatory, the students were, "for all practical purposes, . . . obliged to attend." *Id.* at 589. And given the "public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction," *id.* at 593, "the student had no real alternative which would have allowed her to avoid the fact *or appearance* of participation," *id.* at 588 (emphasis added).

> There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. . . . It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

Id. at 593.

This reasoning transfers to attendance at a religious program imposed as a mandatory condition of parole: being part of "the group exercise" of religion can signify at least the appearance of one's participation in or approval of that exercise. *Lee* (as well as *Kerr* and *Warner*) thus indicates that for First Amendment purposes, attendance at religious study groups, prayer or worship services, or other faith-based programming cannot be untangled from participation.

In sum, *Lee* governs Mr. Janny's coercion-based Establishment Clause claim. And under *Lee*, Mr. Janny's averments are sufficient to allow this claim to reach the jury.

2. Free Exercise Clause

The Free Exercise Clause guarantees "the right of every person to freely choose his own course" in the matter of religion, "free of any compulsion from the state." *Schempp*, 374 U.S. at 222. The government may neither "compel affirmation of religious beliefs," nor "punish the expression of religious doctrines it believes to be false." *Emp. Div. v. Smith*, 494 U.S. 872, 877 (1990). We conclude Mr. Janny's evidence of a Free

Exercise violation based on his coerced participation in religious programming as a condition of parole is sufficient to survive summary judgment.[5]

"A plaintiff states a claim [his or] her exercise of religion is burdened if the challenged action is coercive or compulsory in nature." *Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 557 (10th Cir. 1997). "[L]aws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id.* at 1877. "Factors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.'" *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540 (1993)).

Mr. Janny's averments sufficiently make out a Free Exercise Clause violation based on such non-neutral coercion or compulsion. Mr. Janny was compelled to participate in the Program's Christian worship services and bible study to avoid being

[5] The district court did not assess Mr. Janny's Free Exercise claim on its merits, instead resolving it on the second prong of qualified immunity, based on a finding the law was not clearly established. We address qualified immunity in Part II.C, *infra*.

sent to jail, and he was proselytized by Mr. Carmack during a one-on-one religious counseling session. These requirements indisputably burdened Mr. Janny's exercise of his religion. *Cf. Bauchman*, 132 F.3d at 557 (finding no burden on Free Exercise where a plaintiff "had a choice whether or not to sing songs she believed infringed upon her exercise of religious freedom"). Further, because the Program's requirements were implemented "because of their religious nature," *Fulton*, 141 S. Ct. at 1877, the requirements were non-neutral. Indeed, in light of the alleged Establishment Clause violation, it is difficult to see how the Program could be viewed as neutral towards religion. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 54 n.5 (Thomas, J., concurring) ("[C]oercive government preferences might also implicate the Free Exercise Clause and are perhaps better analyzed in that framework.").

Officer Gamez argues Mr. Janny's Free Exercise claim is premised on personal religious animus, necessitating analysis under the "invidious discrimination" standard. Gamez Br. at 24. As such, Officer Gamez asserts Mr. Janny must plead and prove that Officer Gamez acted toward him with discriminatory purpose.

Mr. Janny does assert at various points that actions were taken against him based on religious animus. *See* App. 23 ("My freedom to leave the facility . . . was unfairly and overly restricted due in large part (and solely in truth) to my being an atheist."); *id.* 330 (claiming his curfew was adjusted as "punishment" for his atheism). At bottom, however, his Free Exercise claim is based on a non-neutral burden, not animus. In other words, it is grounded in *what* Officer Gamez did—forced Mr. Janny to participate in Christian activities—not on *why* he did it. This distinguishes Mr. Janny's claim from the

unpublished cases Officer Gamez cites in support of his religious animus argument, which dealt with whether purportedly neutral acts were carried out with discriminatory purpose. *See Carr v. Zwally*, 760 F. App'x 550, 555 (10th Cir. 2019) (removing of religious materials from a prisoner's jail cell); *Ashaheed v. Currington*, No. 17-cv-3002-WJM-SKC, 2019 WL 1953357, at *5 (D. Colo. May 2, 2019) (shaving of a prisoner's beard).

"[T]he Free Exercise Clause is not limited to acts motivated by overt religious hostility or prejudice," and has therefore "been applied numerous times when government officials interfered with religious exercise not out of hostility or prejudice, but for secular reasons." *Shrum v. City of Coweta*, 449 F.3d 1132, 1144 (10th Cir. 2006). Indeed, "courts have repeatedly rejected" the notion that Free Exercise Clause claims must be premised on religious animus. *Hassan v. City of New York*, 804 F.3d 277, 309 (3d Cir. 2015) (holding a defendant's "assertion that allegations of overt hostility and prejudice are required to make out claims under the First Amendment" "easily fail[s]"). Thus, Mr. Janny need not prove discriminatory purpose or religious animus to succeed on his coercion-based Free Exercise claim. The record allows Mr. Janny to reach the jury on his claim that Officer Gamez burdened his right to free exercise by allegedly presenting him with the coercive choice of obeying the Program's religious rules or returning to jail.

C. *Qualified Immunity*

The district court found Officer Gamez entitled to qualified immunity from § 1983 liability because Mr. Janny "failed to adduce evidence of an Establishment Clause violation and, with respect to his Free Exercise claim, . . . has not adduced evidence of

conduct by [Officer] Gamez that violated his clearly established rights." App. 491. We review this ruling de novo. *Maestas v. Lujan*, 351 F.3d 1001, 1007 (10th Cir. 2003).

"[T]he doctrine of qualified immunity shields government officials performing discretionary functions from individual liability under 42 U.S.C. § 1983 unless their conduct violates clearly established statutory or constitutional rights." *DeSpain v. Uphoff*, 264 F.3d 965, 971 (10th Cir. 2001) (internal quotation marks omitted). "A defendant's assertion of qualified immunity from suit under 42 U.S.C. § 1983 results in a presumption of immunity." *Bond v. City of Tahlequah*, 981 F.3d 808, 815 (10th Cir. 2020). "To overcome this presumption, [the plaintiff] must show that (1) the [official's] alleged conduct violated a constitutional right, and (2) it was clearly established at the time of the violation, such that 'every reasonable official would have understood,' that such conduct constituted a violation of that right." *Perea v. Baca*, 817 F.3d 1198, 1202 (10th Cir. 2016) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015)).

At the summary judgment stage, the first prong is met if the evidence, viewed in the light most favorable to the plaintiff, shows the defendant violated the plaintiff's constitutional rights. As discussed above, Mr. Janny's account creates genuine disputes of material fact as to whether Officer Gamez violated both the Establishment and Free Exercise Clauses by requiring Mr. Janny to follow the Program's rules as a condition of his parole. What remains is the prong two inquiry: whether, at the time Mr. Janny was directed to reside at the Mission, it was clearly established that coercing a parolee to comply with faith-based programming as a mandatory parole condition violated the First Amendment.

"A Supreme Court or Tenth Circuit decision on point or the weight of authority from other courts can clearly establish a right." *Halley v. Huckaby*, 902 F.3d 1136, 1144 (10th Cir. 2018). "[B]ut a case directly on point is not required so long as 'existing precedent has placed the statutory or constitutional question beyond debate.'" *A.N. ex rel. Ponder v. Syling*, 928 F.3d 1191, 1197 (10th Cir. 2019) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)); *see also Reavis ex rel. Estate of Coale v. Frost*, 967 F.3d 978, 992 (10th Cir. 2020) ("[A] prior case need not be exactly parallel to the conduct here for the officials to have been on notice of clearly established law." (quotation marks omitted)). And while clearly established law should not be defined "at a high level of generality," *Mullenix*, 577 U.S. at 12, "'[g]eneral statements of the law' can clearly establish a right for qualified immunity purposes if they apply 'with obvious clarity to the specific conduct in question,'" *Halley*, 902 F.3d at 1149 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). "'The salient question is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged conduct was unconstitutional.'" *Reavis*, 967 F.3d at 992 (quoting *Tolan v. Cotton*, 572 U.S. 650, 656 (2014)); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("In the light of pre-existing law the unlawfulness must be apparent.").

1. Establishment Clause

In February 2015, the time of the events at issue, a reasonable parole officer would have known that putting a parolee to the choice of participating in religious programming or returning to jail on a parole violation violated the Establishment Clause.

In 1996, the Seventh Circuit addressed whether state prison officials could claim qualified immunity for violating an inmate's Establishment Clause rights. *Kerr*, 95 F.3d at 480. As discussed, the question in *Kerr* was whether an inmate may be required, on pain of suffering adverse effects for parole eligibility, to attend a substance abuse counseling program with religious content. *Id.* at 473. At the time *Kerr* was decided, "it ha[d] been clear for many years that the state may not coerce people to participate in religious programs." *Id.* at 480. The *Kerr* court acknowledged, however, that "the particular application of this principle to prisons has arisen only recently in courts." *Id.* Determining it not yet clear the coercion test should be applied to such claims rather than the *Lemon* test, and that a reasonable prison official might have thought the program lawful under *Lemon*, the Seventh Circuit granted the officials immunity. *Id.* at 480–81.

The law on coercion-based Establishment Clause claims in the prison and parole context has since clarified, thanks largely to *Kerr* and to another 1996 decision, *Warner*, where the Second Circuit held that forcing a probationer to attend rehabilitation meetings with "a substantial religious component" violates the Establishment Clause when the only alternative is imprisonment for a probation violation. 115 F.3d at 1074–75.

In 2007, eleven years after *Kerr* and *Warner*, the Ninth Circuit addressed whether a parole officer was entitled to qualified immunity from coercion-based Establishment Clause liability. In *Inouye*, the parole officer "required [a parolee] to attend a program rooted in religious faith"—AA/NA—"and then recommended revoking his parole because he refused to participate." 504 F.3d at 713. The *Inouye* court held the parole officer was not entitled to qualified immunity because "[t]he vastly overwhelming weight

of authority on the precise question in this case held at the time of [the officer]'s actions that coercing participation in programs of this kind is unconstitutional." *Id.* at 714.

At the time of the events at issue in *Inouye*, the Ninth Circuit had not yet ruled on the precise constitutional question. Nevertheless, the parole officer "had a wealth of on-point cases putting him, and any reasonable officer, on notice that his actions were unconstitutional." *Id.* at 715. "By 2001, two circuit courts, at least three district courts, and two state supreme courts had all considered whether prisoners or parolees could be forced to attend religion-based treatment programs," and had unanimously held such coercion unconstitutional. *Id.* (citing *Kerr* and *Warner*, among other cases). The *Inouye* court further noted "that this march of unanimity has continued well past March, 2001, when [the parole officer] acted." *Id.* Finding the case law on religious coercion in the parole context "uncommonly well-settled," the *Inouye* court held "the law was clearly established, sufficient to give notice to a reasonable parole officer, in 2001." *Id.* at 716.

In the years since *Inouye*, the "march of unanimity" of courts finding participation in religious-based programs to violate the Establishment Clause when imposed as a mandatory condition of parole has continued. For example, in *Marrero-Méndez v. Calixto-Rodríguez*, 830 F.3d 38, 47 (1st Cir. 2016), the First Circuit determined that by early 2012, when the events in that case took place, "numerous courts had held that requiring prisoners to attend a program that has a religious component as a condition for parole eligibility is unconstitutional." And in 2014, a year before the events at issue here, the Eighth Circuit decided *Jackson*, holding a plaintiff had pleaded "facts sufficient to state a claim that a parole stipulation requiring him to attend and complete a substance

abuse program with religious content in order to be eligible for early parole violates the Establishment Clause." 747 F.3d at 543.

At both general and specific levels, then, the state of the law in February 2015 put Officer Gamez on notice that forcing Mr. Janny to a choice between participating in the Mission's Christian activities or violating parole was unconstitutional. At the general level, well before 2015, Supreme Court caselaw placed it "beyond dispute" that the Establishment Clause bars the government from "coerc[ing] anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587; *see also Arnold v. Tenn. Bd. of Paroles*, 956 S.W.2d 478, 484 (Tenn. 1997) ("[T]here is no debate that a government policy that requires participation in a religious activity violates the Establishment Clause."); *Griffin v. Coughlin*, 673 N.E.2d 98, 105 (N.Y. 1996) ("There is no firmer or more settled principle of Establishment Clause jurisprudence than that prohibiting the use of the State's power to force one to profess a religious belief or participate in a religious activity."). Simply put, conduct aimed at religion that amounts "to direct and tangible coercion," such as Officer Gamez's alleged conduct, represents "a paradigmatic example of an impermissible establishment of religion." *Marrero-Méndez*, 830 F.3d at 48.

And at the specific level, *Kerr*, *Warner*, *Inouye*, and *Jackson* all applied this core principle to the prison and parole context, building up a significant body of appellate caselaw. *See also Owens*, 681 F.2d at 1365 (holding, prior to *Lee*, that "a condition of probation which requires the probationer to submit himself to a course advocating the adoption of religion or a particular religion" violates the First Amendment). By 2015, these decisions had clearly established that forced participation in religious activities as a

mandatory parole condition violates the Establishment Clause. That is, when Officer Gamez acted, there was "a robust 'consensus of cases of persuasive authority'" holding his conduct unlawful, *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)), and "the clearly established weight of authority from other courts . . . found the law to be as [Mr. Janny] maintains," *Halley*, 902 F.3d at 1149 (quotation marks omitted).

Most of the cases in the parole context have dealt with forced attendance at substance abuse rehabilitation programs—specifically, AA or NA—rather than forced attendance at religious programming as a condition of maintaining a residence of record while on parole. But this minor distinction cannot prevent a determination that the law was clearly established with respect to the actions taken by Officer Gamez. Our inquiry "is not a scavenger hunt for prior cases with precisely the same facts." *Reavis*, 967 F.3d at 992 (quotation marks omitted). And the alleged conduct here was even more patently unconstitutional than the conduct in the prior cases applying *Lee* to the parole context, given that Officer Gamez expressly put Mr. Janny to an unequivocally coercive choice (participate in religious activities or return to jail), and that the Program's Christian bible study and worship services were more overtly religious than the "higher power" at the center of AA/NA recovery meetings. *See Inouye*, 504 F.3d at 713; *Kerr*, 95 F.3d at 480.

Because "the state of the law' at the time of [the] incident provided 'fair warning'" to Officer Gamez that his alleged conduct violated the Establishment Clause, *Reavis*, 967 F.3d at 992 (quoting *Tolan*, 572 U.S. at 656), the district court erred in granting him qualified immunity from that claim.

2. Free Exercise Clause

A lack of directly analogous caselaw makes the question of clearly established law closer with respect to the Free Exercise Clause. As Mr. Janny acknowledges, "most of the cases concerning coercion of criminal offenders to take part in religious programming address the Establishment Clause, not the Free Exercise Clause." Appellant Br. at 52.

But at a basic level, the Free Exercise Clause is a more natural fit for Mr. Janny's religious coercion claim than the Establishment Clause. "The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Schempp*, 374 U.S. at 223; *cf. County of Allegheny*, 492 U.S. at 628 (O'Connor, J., concurring in part) ("To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy."); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion."). That is, while there are "myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring), "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion," *Schempp*, 374 U.S. at 223.

This court considered a Free Exercise challenge in the context of religious coercion in *Bauchman ex rel. Bauchman v. West High School*. There, a Jewish student claimed public school officials "violated the Free Exercise Clause by compelling her to participate in religious exercises in a public school setting, against her expressed desires

and religious convictions." 132 F.3d at 556. Specifically, the student alleged that her choir teacher required her "to practice and publicly perform Christian devotional music containing lyrics referencing praise to Jesus Christ and God at religious sites dominated by crosses and other religious images, as part of the regular, graded, required Choir activities." *Id.*

To make out a Free Exercise Clause claim, we stated, a plaintiff "must allege facts demonstrating the challenged action created a burden on the exercise of her religion." *Id.* at 557. And a plaintiff demonstrates "her exercise of religion is burdened if the challenged action is coercive or compulsory in nature." *Id.*; *see also Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 824 (10th Cir. 1988) ("[T]he free exercise clause prohibits the government from *coercing* the individual to violate his beliefs."). Thus, the student in *Bauchman* was required to "allege facts showing she was 'coerced' into singing songs contrary to her religious beliefs." 132 F.3d at 557 (quoting *Messiah Baptist Church*, 859 F.2d at 824). This she could not do, for "she was given the option of not participating to the extent such participation conflicted with her religious beliefs," and also "assured her Choir grade would not be affected by any limited participation." *Id.* We held "the fact [the student] had a choice whether or not to sing songs she believed infringed upon her exercise of religious freedom, with no adverse impact on her academic record, negates the element of coercion and therefore defeats her Free Exercise claim." *Id.*

We subsequently applied the Free Exercise Clause's coercion principle in the prison context in *Searcy v. Simmons*, 299 F.3d 1220 (10th Cir. 2002). There, an inmate

challenged the Kansas Department of Corrections' Sexual Abuse Treatment Program, which required participants to sign a form indicating acceptance of responsibility for their crime of conviction. *Id.* at 1223. Failure to participate resulted in the withholding of good time credits carrying the potential to accelerate an inmate's release. *Id.* The plaintiff alleged "his sincerely held religious beliefs prohibit him from lying," and that, because he did not commit the offense for which he was convicted, "signing an admission of responsibility form for that crime would constitute a lie." *Id*. at 1227. "As such, under [the plaintiff]'s reasoning, punishing him for not admitting responsibility constitutes punishment for exercising his religious principles." *Id.* We rejected this claim due to our conclusion the Department of Corrections' "system of revoking privileges and withdrawing good time credit opportunities in response to an inmate's refusal to participate in the [treatment program] does not amount to compulsion." *Id.* at 1228.

As these cases make clear, it was established by 2015 that a state actor violates the Free Exercise Clause by coercing or compelling participation in religious activity against one's expressly stated beliefs. "This rule is not too general to define clearly established law because 'the unlawfulness' of [Officer Gamez's] conduct 'follows immediately from the conclusion' that this general rule exists and is clearly established." *Ponder*, 928 F.3d at 1198 (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018)). This is so because at the time Officer Gamez acted, it was clear that imposing religious programming as a mandatory parole condition amounted to coercion, as established by the holdings of *Kerr*, *Warner*, *Inouye*, and *Jackson*. *See, e.g.*, *Inouye*, 504 F.3d at 713 (participation in religion-based treatment program was coerced when parolee "could be

imprisoned if he did not attend and he was, in fact, ultimately returned to prison in part because of his refusal to participate"). And it was also clear that atheism is fully protected by the religion clauses. *See Wallace*, 472 U.S. at 52–54. Thus, the Free Exercise Clause's general prohibition of religious coercion applied "with obvious clarity to the specific conduct in question." *Hope*, 536 U.S. at 741; *cf. Ponder*, 928 F.3d at 1198 (holding "the clearly established rule prohibiting intentional, arbitrary and unequal treatment of similarly situated individuals under the law" was "not too general to define clearly established law," as it "applie[d] with obvious clarity to Defendants' alleged actions").

Our conclusion that a reasonable official in Officer Gamez's shoes would have understood his conduct violated the Free Exercise Clause is bolstered by "the specific context of the case." *Mullenix*, 577 U.S. at 12 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). This is not a Fourth Amendment challenge to an officer's split-second assessment of the "hazy border between excessive and acceptable force," where defining clearly established law with "specificity is especially important." *Brown v. Flowers*, 974 F.3d 1178, 1184 (10th Cir. 2020) (quoting *Mullenix*, 577 U.S. at 12, 18); *see Estate of Valverde ex rel. Padilla v. Dodge*, 967 F.3d 1049, 1054 (10th Cir. 2020) (holding an officer was "entitled to qualified immunity because he had only a split second to react"). Rather, the contours of the constitutional transgression at issue were well defined: "[A] violation of the Free Exercise Clause is predicated on coercion," *Schempp*, 374 U.S. at 223, which includes "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions," *see Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988). And putting an objecting parolee to a choice between

religious activities and jail is "clearly coercive." *Inouye*, 504 F.3d at 713. In other words, "what happened here involved more an egregious trespass into constitutionally well-marked terrain than an accidental inching across some vaguely-defined legal border." *Wagenmann v. Adams*, 829 F.2d 196, 209 (1st Cir. 1987). This is therefore a case where "a general rule will result in law that is not extremely abstract or imprecise under the facts . . . , but rather is relatively straightforward and not difficult to apply." *Brown*, 974 F.3d at 1184 (internal quotation marks). And as a result, "a case involving the same type of coercion . . . is unnecessary to place the unconstitutionality of [Officer Gamez's] conduct 'beyond debate.'" *Id.* at 1187 (quoting *Mullenix*, 577 U.S. at 19).

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"The Framers adopted the Religion Clauses in response to a long tradition of coercive state support for religion." *Lee*, 505 U.S. at 622 (Souter, J., concurring). Because of this, the religion clauses express "special antipathy to religious coercion." *Id.* On the averred facts, Officer Gamez forced Mr. Janny to choose between participating in Christian activities or returning to jail, over Mr. Janny's express objection. This clear violation of the fundamental anti-coercion precept enshrined in the First Amendment is enough to deny Officer Gamez qualified immunity from Mr. Janny's claims brought under both clauses.

D. *Color of Law*

"The provisions of § 1983 only apply to persons who both deprive others of a right secured by the Constitution or laws of the United States and act under color of a state statute, ordinance, regulation, custom or usage." *Carey v. Cont'l Airlines, Inc.*, 823 F.2d

1402, 1404 (10th Cir. 1987). In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982), the Supreme Court held the action under color of state law necessary to establish a § 1983 suit is equivalent to the "state action" necessary to establish a violation of the Fourteenth Amendment. Under the state action doctrine, "the conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." *Id.* at 937.

This "fair attribution" test has two elements: "a state policy and a state actor." *Roudybush v. Zabel*, 813 F.2d 173, 176 (8th Cir. 1987). To satisfy the former, "the [constitutional] deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. To satisfy the latter, "the party charged with the deprivation must be a person who may fairly be said to be a state actor," either "because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.* These elements "collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions," but "diverge when the constitutional claim is directed against a party without such apparent authority, i.e., against a private party." *Id.*

Mr. Janny directs his constitutional claims not just against Officer Gamez—clearly a state actor—but also against the Program Defendants, Mr. Carmack and Mr. Konstanty, both private parties. The district court granted the Program Defendants summary judgment on the ground neither satisfied the state actor prong of the fair attribution test.

"When a constitutional claim is asserted against private parties, to be classified as state actors under color of law they must be jointly engaged with state officials in the conduct allegedly violating the federal right." *Carey*, 823 F.2d at 1404 (footnote omitted). The Supreme Court has delineated various tests for analyzing the state actor requirement: public function, state compulsion, nexus, and joint action. *Lugar*, 457 U.S. at 939. "[N]o one criterion must necessarily be applied," *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 303 (2001), as "each test really gets at the same issue—is the relation between a nominally private party and the alleged constitutional violation sufficiently close as to consider the nominally private party a state entity for purposes of section 1983 suit?" *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 596 (10th Cir. 1999). Each test also requires a fact-specific analysis. *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1448 (10th Cir. 1995); *see Lugar*, 457 U.S. at 939 (describing the state actor assessment as a "necessarily fact-bound inquiry").

Mr. Janny argues the Program Defendants are state actors under both the joint action and nexus tests. We apply these two tests to the involvement of Mr. Carmack and Mr. Konstanty to assess whether Mr. Janny has sufficiently established either to be a state actor subject to § 1983 liability for the constitutional deprivations discussed above.

1. Joint Action

Under the joint action test, "courts examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Gallagher*, 49 F.3d at 1453. This test is satisfied by establishing that a private party "is a

willful participant in joint action with the State or its agents." *Anderson v. Suiters*, 499 F.3d 1228, 1233 (10th Cir. 2007) (internal quotation marks omitted).

"[O]ne way to prove willful joint action is to demonstrate that the public and private actors engaged in a conspiracy." *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121, 1126 (10th Cir. 2000). Mr. Janny advances this theory of joint action liability regarding the Program Defendants. To establish state action via conspiracy, a plaintiff must demonstrate the public and private actors reached agreement upon "a common, unconstitutional goal," and took "concerted action" to advance that goal. *Id*. (quotation marks omitted). "[T]he mere acquiescence of a state official in the actions of a private party is not sufficient." *Gallagher*, 49 F.3d at 1453.

The district court found Mr. Janny had not adduced any evidence to show the Program Defendants "acted in concert with the state to deprive [Mr. Janny] of his rights." App. 491. Regarding Mr. Carmack, we disagree.

First, a jury could reasonably infer from the evidence that Mr. Carmack and Officer Gamez agreed to pursue a common unconstitutional goal—coercing Mr. Janny into Program participation. The record suggests each individual defendant had this goal. For example, Mr. Carmack: (1) instructed Mr. Janny to avoid expressing his atheistic beliefs and made clear Mr. Janny lacked religious rights while in the Program; (2) requested a meeting with Officer Gamez during which Mr. Carmack explained that failing to comply with the Program's religious requirements would lead to Mr. Janny's imprisonment; (3) asked Officer Gamez to change Mr. Janny's curfew to force his attendance at daily chapel services; (4) forced Mr. Janny to attend daily chapel; and

(5) attempted to convert Mr. Janny to Christianity despite Mr. Janny's identification as an atheist.[6] Similarly, Officer Gamez: (1) specifically arranged for Mr. Janny to participate in the Program, even though the Mission offers non-religious emergency overnight shelter services; (2) rejected Mr. Janny's proposal to reside at a friend's house in Loveland, Colorado; and (3) told and directed Mr. Janny to either follow the Program's religion-based rules or go to jail.

The record also suggests Officer Gamez and Mr. Carmack agreed to work together to achieve this shared goal. The requisite "meeting of the minds," *Sigmon*, 234 F.3d at 1127, can be found in the phone call between Mr. Carmack and Officer Gamez on the morning of February 4, in addition to the meeting that afternoon. During this meeting, over Mr. Janny's objection, Officer Gamez and Mr. Carmack verified their agreement about Mr. Janny's stay at the Mission: to avoid returning to jail on a parole violation, Mr. Janny had to obey the Mission's house rules, which Mr. Carmack reiterated meant participating in the Program's religious activities.[7] Further evidence of an agreement can

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[6] From these facts, a reasonable jury could infer that Mr. Carmack used the parole process to force Christianity on Mr. Janny, as opposed to simply "want[ing] him out of the program if he was not willing to participate in the religious programming." Dissent at 7. *See Hanas v. Inner City Christian Outreach, Inc.*, 542 F. Supp. 2d 683, 688, 694 (E.D. Mich. 2008) (finding liability under § 1983 where staff of a faith-based rehabilitation program "prevented [plaintiff] from practicing Catholicism and forced him to participate in worship services and Bible studies grounded in the Pentecostal tradition" as a condition of probation). Of course, the jury need not make such an inference. At this stage of the proceedings, however, we merely conclude such an inference is among the reasonable choices available to the jury.

[7] Indeed, a jury could find evidence of a conspiratorial agreement in the very fact Mr. Carmack—a private third party—was allowed to sit in on a meeting between a parole

be found in the "informal arrangement" between Officer Gamez and Mr. Carmack to place parolees at the Mission, App. 186, and in the averment that Mr. Carmack was doing Officer Gamez a favor by enrolling Mr. Janny as a "guinea pig" meant to test the Program's suitability for male parolees, App. 31.

Second, a jury could reasonably infer from the evidence that Mr. Carmack and Officer Gamez took concerted action in furtherance of their agreement. Mr. Carmack requested the parole meeting on the afternoon of February 4 to discuss Mr. Janny's Program participation. Critically, Mr. Carmack also requested the change to Mr. Janny's curfew made by Officer Gamez at this meeting, to ensure Mr. Janny's attendance at evening chapel. Mr. Carmack then carried out his part of the agreement over the ensuing several days, going so far as to proselytize Mr. Janny during a counseling session. Finally, Mr. Carmack and Officer Gamez jointly followed through on their promise to return Mr. Janny to jail if he failed to abide by Program rules: Mr. Carmack expelled Mr. Janny from the Mission for skipping church services, and the next day, Officer Gamez had Mr. Janny arrested for violating parole.

From these facts, a jury could find Mr. Carmack was a "willful participant" with Officer Gamez in joint action aimed at an unconstitutional goal. *Anderson v. Suiters*, 499 F.3d at 1233 (quotation marks omitted). Admittedly, this is a close question. The evidence here, for example, is less compelling than that which we held sufficient to

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officer and his parolee without the latter's consent. *See* App. 330 (Mr. Janny's declaration statement that Mr. Carmack "attended the parole meeting without my consent").

conclude private defendants acted under color of state law in *Anaya*. *See Anaya*, 195 F.3d at 596 (holding a private defendant's creation of an advisory board of mostly state actors in order to increase illegal seizures for the defendant's financial gain "clearly establishes that [the defendant] acted in concert with state officials"). Unlike the dissent, however, we do not read *Anaya* as establishing an evidentiary floor in joint action cases. Nothing in *Anaya* requires a plaintiff to put forth "evidence of any financial motivation or broader policy motivation to hold parolees against their beliefs in religious facilities." Dissent at 7. Instead, *Anaya* reiterates plaintiffs need only "create a triable issue of fact" regarding a private party's alleged conspiracy with the state to survive summary judgment. 195 F.3d at 597. Importantly, at this procedural stage, we need not decide whether the record establishes conspiracy, but only whether a jury could reasonably reach that conclusion.

Mr. Janny has put forth better evidence of conspiracy than in other appeals this court has rejected. In *Sigmon*, the City of Tulsa hired a private company to identify third-party treatment programs for City employees who violated the City's drug testing policy, and to refer those employees to those programs for treatment. 234 F.3d at 1123. The private company referred the plaintiff to a treatment program he found religiously objectionable, and one of the private company's employees "may have recommended" to the City's human resources department that the City terminate the plaintiff "in the interest of maintaining consistency in [the City's] drug and alcohol disciplinary actions" for his failure to participate in the religious programs. *Id.* at 1124. The City terminated the plaintiff, and he then sued the City, the private company, and its employee under § 1983. We held the private defendants did not act under color of state law. Two facts proved

central to our reasoning: (1) the City "retained complete authority to enforce its drug policy, while the [private company and its employee] merely acted as an independent contractor in identifying and referring employees to treatment services"; and (2) the record made "clear that Tulsa acted independently in making its final decision, and therefore no meeting of the minds occurred on" the plaintiff's termination for drug use. *Sigmon*, 234 F.3d at 1127.

The circumstances here are different. First, the jury could find Mr. Carmack exercised meaningful disciplinary authority over Mr. Janny based on the totality of the following circumstances: his close relationship with Officer Gamez, success in scheduling a formal meeting with Officer Gamez to discuss the terms of Mr. Janny's parole, attendance at that meeting despite Mr. Janny's objection, success in getting Mr. Janny's curfew changed, and enforcement of his repeated threats that failure to adhere to the Program's rules would result in jailtime.[8] Mr. Carmack is not akin to the religiously-neutral middleman defendants in *Sigmon*; he directed the program that inflicted the constitutional injury and personally attempted to convert Mr. Janny to

[8] The dissent argues Mr. Carmack's warnings that Mr. Janny's failure to comply with the Program's rules would result in incarceration "simply restated the obvious and we held in *Sigmon* that nearly identical statements could not create state action." Dissent at 3. However, in *Sigmon*, we held a plaintiff's reliance on a similar statement was insufficient because "the circumstances of the conversation and the language of the [operative parole agreement] remove[d] any suggestion that the [private defendants] could discipline [the plaintiff] on their own initiative." 234 F.3d at 1127. For reasons already discussed, the circumstances surrounding Mr. Carmack's warning allow a jury to reasonably infer he exercised meaningful disciplinary authority over Mr. Janny. Indeed, it was Mr. Carmack's unilateral decision to expel Mr. Janny from the Program that resulted in his return to prison.

Christianity. Second, Mr. Carmack and Officer Gamez had a meeting of the minds on February 4, 2015, when they agreed on Mr. Janny's legal obligations and potential disciplinary outcomes.

The dissent concludes this evidence is insufficient to survive summary judgment. In doing so, it emphasizes that only Officer Gamez could change Mr. Janny's curfew or send him back to prison. This approach ignores the very nature of a conspiracy, which often enlists multiple actors with distinct roles to accomplish a shared unlawful goal. *See United States v. Daily*, 921 F.2d 994, 1007 (10th Cir. 1990) (observing co-conspirators' conduct can be "diverse and far-ranging" in service of a single conspiracy), *overruled on other grounds by United States v. Gaudin*, 515 U.S. 506 (1995); *see also United States v. Wilson*, 955 F.2d 547, 551 (8th Cir. 1992) ("Participants in complex conspiracies may have distinct and independently significant roles."). The evidence presented by Mr. Janny supports an inference that Mr. Carmack and Officer Gamez agreed to return Mr. Janny to prison as punishment for refusing to participate in the Program and its religious content. The execution of that conspiracy was joint: (1) Mr. Carmack was responsible for expelling Mr. Janny for noncompliance with the religious requirements, and (2) Officer Gamez was responsible for returning Mr. Janny to prison. Mr. Carmack was aware of the consequences of his decision to expel Mr. Janny. There is no requirement that he also have the independent power to return Mr. Janny to prison.

We view this case as falling between the facts in *Anaya* and *Sigmon*. But Mr. Janny's observation that other courts have found similarly situated defendants to be state actors persuades us that a reasonable jury could reach the same result here. In *Hanas*

v. Inner City Christian Outreach, Inc., a case cited by Mr. Janny, the plaintiff pleaded guilty to a drug charge and "had to choose between going to prison or entering a faith-based rehabilitation program run by Inner City Christian Outreach (ICCO)". 542 F. Supp. 2d 683, 688 (E.D. Mich. 2008). ICCO staff prevented the plaintiff from practicing his Catholic faith and forced him "to participate in worship services and Bible studies grounded in the Pentecostal tradition." *Id.* The district court held both ICCO and its directors acted under color of state law because they "received the [drug] court's endorsement of their authority." *Id.* at 693. The drug court judge "admonished [the plaintiff] to follow the rules of" the faith-based program, and specifically stated "the rules of [the program] are the rules of the Court." *Id.* The district court thus deemed that both ICCO and its directors "acted jointly with the Drug Court," so as to satisfy the test for state action. *Id.* As Mr. Janny points out, the facts here are similar, given that Officer Gamez, like the drug court judge in *Hanas*, stated "the rules of the Program were the rules of [Mr. Janny's] parole." App. 322.

Finally, The Program Defendants argue Officer Gamez "merely acquiesced to the fact that [the Program's] environment was a religious one with its own 'house rules' that included Christian worship." Program Br. at 16. In support, they cite this court's decision in *Gallagher v. Neil Young Freedom Concert*. There, the University of Utah entered an agreement with a private company regarding an on-campus concert. That company in turn subcontracted with another private company to provide security services for the concert. 49 F.3d at 1444–45. The security subcontractor engaged in pat-down searches of attendees, some of whom filed a § 1983 suit alleging these searches were

unconstitutional. *Id.* at 1445–46. In concluding the private companies were not state actors under the joint action test, we stressed that the university's policies "were silent as to the kind of security provided" by the contractors. *Id.* at 1455. "This silence," we held, "establishes no more than the University's acquiescence in the practices of the parties that leased the [concert venue] and is insufficient to establish state action under the joint action test." *Id.*

The Program Defendants also cite *Wittner v. Banner Health*, 720 F.3d 770 (10th Cir. 2013), a § 1983 suit brought by the relatives of a man who died after being treated with an antipsychotic drug at a private medical center, where he was being involuntarily detained under a state mental health statute. *Id.* at 771–72. In holding the medical center did not act under color of state law, we stressed the absence of any allegation "that any state officials conspired with or acted jointly in making the decision to medicate [the decedent]." *Id.* at 777. "Instead, [the] plaintiffs' theory of state action [was] one of acquiescence—that by allowing" the medical center to detain the decedent, "the state should be held responsible" for the decision by the center's doctors to medicate him. *Id.*

Here, the record establishes that the State, through Officer Gamez, had significantly greater input regarding the challenged conduct than in *Gallagher* or *Wittner*. During two occasions on February 4, Officer Gamez and Mr. Carmack conferred about Mr. Janny's objections to the Program, then both expressly told Mr. Janny that the rules of the Program were the rules of his parole—including the religious rules—and that he could either abide by them or return to jail. Far from staying silent as to the course of action undertaken by the private party, like the university in *Gallagher*, or acquiescing in

such conduct, like the state in *Wittner*, Officer Gamez took an active role in collaborating with Mr. Carmack to ensure Mr. Janny's adherence to the Program's Christian rules. Based on Mr. Janny's factual account, a jury could infer that Officer Gamez did not merely approve of the Program's religious content after-the-fact, but instead directed Mr. Janny to abide by Mission rules knowing full well they entailed a Christian regimen.

The district court also erred in relying upon its finding of "no evidence that the state played any role in the Rescue Mission's operations." App. 491. Officer Gamez did not need to play a role in the Mission's operations to conspire with Mr. Carmack to force Mr. Janny into a choice between the Program and jail. The key factual averments are that Officer Gamez ordered Mr. Janny into the Program, expressly including its religious aspects, on pain of a parole violation; that Officer Gamez and Mr. Carmack agreed on that course of conduct; and that both of them engaged in concerted action in furtherance of that goal. This is a close question, but Mr. Janny has come forward with enough evidence to let the jury decide.[9]

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[9] The dissent mischaracterizes our holding, stating, "As I see it, the majority makes it so religious nonprofits now have two options (1) they can stop requiring religious programing—perhaps defeating their core missions; or (2) they can stop accepting parolees—leaving more individuals who struggle to find a safe place to live, in jail." Dissent at 1. This is not so. A religious non-profit can continue to require religious programing and can accept parolees into such programs, so long as those parolees do not object to the religious programing. But what a jury could find here, and what a religious non-profit may not do, is to act together with the state to give a parolee who has clearly indicated his objection a Hobson's choice between offensive religious programing or incarceration.

There are two protected First Amendment rights at issue here. The religious non-profit has the right to practice its faith and to impose faith-based requirements on participants in the Program. But Mr. Janny has First Amendment rights, too; he has the

The joint action analysis differs regarding the involvement of Mr. Konstanty, the Mission's assistant director. As Mr. Janny acknowledges, "it was Carmack and Gamez[] that had a previous relationship, not [Gamez] and Konstanty." App. 168. Furthermore, it was Mr. Carmack, not Mr. Konstanty, who called Officer Gamez the morning of February 4, participated in the meeting at the parole office later that afternoon, requested the change to Mr. Janny's curfew, proselytized Mr. Janny in a personal counseling session, and ultimately expelled Mr. Janny from the Mission for violating Program rules.

To establish Mr. Konstanty as a state actor, Mr. Janny points to his averment that Mr. Konstanty was present during the Carmack–Gamez phone call on the morning of February 4 and "knew what had been said between all parties." App. 168. But Mr. Janny concedes not knowing whether Officer Gamez and Mr. Konstanty ever spoke, either on the phone or in person. App. 168. That Mr. Konstanty was in the room for the February 4 call, without more, is insufficient to establish that he joined the conspiracy. It does not show Mr. Konstanty "participated in or influenced the challenged decision," *Gallagher*, 49 F.3d at 1454—that is, the decision to force Mr. Janny to abide by the Program's religious rules on pain of a return to jail—as necessary to find joint action.

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constitutional right to be an atheist. *See Wallace v. Jaffree*, 472 U.S. 38, 53 (1985) ("[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.")).

Mr. Janny also argues that proof of a broader conspiracy can be found via his averment that Mr. Konstanty joined Mr. Carmack, during the orientation on the morning of February 4, in telling Mr. Janny he could either participate or go to jail. This fact goes toward establishing the agreement necessary to support a § 1983 conspiracy. *See Fernandez v. Mora-San Miguel Elec. Coop., Inc.*, 462 F.3d 1244, 1252 (10th Cir. 2006) (stating a plaintiff seeking to prove state action via conspiracy "must demonstrate a single plan, the essential nature and general scope of which was known to each person who is to be held responsible for its consequences" (internal quotation marks omitted)). But Mr. Janny's averments still fall short of showing Mr. Konstanty engaged in concerted action in furtherance of that agreement. *See Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 533 (10th Cir. 1998) (to establish a § 1983 conspiracy, "a plaintiff must allege specific facts showing an agreement and concerted action amongst the defendants"). Mr. Konstanty was involved in none of the steps taken jointly by Officer Gamez and Mr. Carmack, as discussed above.

In short, no evidence indicates a link between Mr. Konstanty and Officer Gamez that would establish Mr. Konstanty's involvement in the joint decision to subject Mr. Janny to the Program's Christian content, nor shows Mr. Konstanty acted in concert with Officer Gamez to carry out the shared unconstitutional plan. Rather, the reasonable inference drawn from the evidence is that Officer Gamez and Mr. Carmack conspired to mandate Mr. Janny's participation in the Program, while Mr. Konstanty, the Mission's assistant director, simply followed the orders of his superior, Mr. Carmack, the Mission's director.

2. Nexus

For a private party to qualify as a state actor under the nexus test, "a plaintiff must demonstrate that 'there is a sufficiently close nexus' between the government and the challenged conduct" by the private party "such that the conduct 'may be fairly treated as that of the State itself.'" *Gallagher*, 49 F.3d at 1448 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). "Whether such a 'close nexus' exists," the Supreme Court has stated, "depends on whether the State 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'"[10] *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). As with the joint action test, "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives." *Blum*, 457 U.S. at 1004–05.

Mr. Janny does not argue Officer Gamez coerced the Program Defendants to subject Mr. Janny to religious content. Rather, he asserts both Mr. Carmack and Mr. Konstanty are state actors under the second prong of *Blum v. Yaretsky*'s disjunctive test, in that "[Officer] Gamez provided significant, overt encouragement to the Program

[10] "We called this type of state action analysis the 'nexus' test in *Gallagher* [*v. Neil Young Freedom Concert*, 49 F.3d 1442, 1448 (10th Cir. 1995)], while other circuits have called it the 'compulsion' test." *Wittner v. Banner Health*, 720 F.3d 770, 775 (10th Cir. 2013); *see, e.g.*, *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 995–96 & n.13 (9th Cir. 2013). Regardless of the specific nomenclature used, however, the circuits agree that the framework of "coercive power/significant encouragement" is a proper test for state action.

Defendants in requiring [Mr.] Janny to participate in religious activities." Reply Br. at 25; *see Albert v. Carovano*, 824 F.2d 1333, 1341 (2d Cir. 1987) ("[A] private party becomes a state actor not only by state coercion but also when the State has provided 'significant encouragement, either overt or covert,' for the actions of the parties." (quoting *Blum*, 457 U.S. at 1004)).

In this regard, the key averment respecting Mr. Carmack is his phone call to Officer Gamez on the morning of February 4. In that call, Mr. Carmack told Officer Gamez that Mr. Janny, as an atheist, was unfit for the Program's Christian content. Per Mr. Janny's account, Officer Gamez then "reassured" Mr. Carmack that Mr. Janny would stay in the Program and follow its rules or go to jail. App. 166. Mr. Carmack then requested an in-person meeting with Officer Gamez and Mr. Janny to discuss the issue further; at this meeting, Officer Gamez reiterated that despite Mr. Janny's objections, he must participate in the religious programming or go to jail. In other words, Mr. Carmack appeared set to refuse Mr. Janny entry to the Program due to his atheism, before Officer Gamez provided significant, overt encouragement to ensure Mr. Janny's enrollment.[11] This encouragement went beyond mere approval of or acquiescence in Mr. Janny's

[11] The dissent disagrees with our assessment, stating "A state actor's assurance that a parolee will comply with program requirements should the program accept him does not constitute significant encouragement of the program requirements themselves." Dissent at 11–12. But that statement is not consistent with the facts presented here. Mr. Janny provided evidence that Officer Gamez expressly ordered him to comply with the Program's *religious requirements*, despite Mr. Janny's explicit objection based on his atheism. *See* App. 167 (stating Officer Gamez specifically reiterated to Mr. Janny that he follow the Program's rules regarding Bible studies, the morning prayer, and the daily chapel). If proved, this would establish a violation of Mr. Janny's clearly-established First Amendment rights. *See* Part II.C, *supra*.

enrollment in a Christian community living program. Under the test laid out in *Blum*, it was sufficient to transform Mr. Carmack into a state actor and qualify his choice to enroll Mr. Janny in the Mission's Christian programming as legally that of the state.

Mr. Janny has therefore adduced evidence sufficient to withstand summary judgment in regard to whether Mr. Carmack was a state actor under the nexus test. Again, however, the same cannot be said regarding Mr. Konstanty's involvement. As discussed above, no evidence shows Officer Gamez encouraged Mr. Konstanty to enroll Mr. Janny in the Program. The averred fact Mr. Konstanty was in the room during the Gamez–Carmack phone call during which Officer Gamez "reassured" Mr. Carmack is insufficient, in the absence of any showing that Officer Gamez communicated directly with Mr. Konstanty. *See* App 168 (Mr. Janny's admission that he does not know whether Officer Gamez and Mr. Konstanty ever spoke). No dispute of material fact exists as to whether Officer Gamez provided the significant encouragement to Mr. Konstanty required to render the latter a state actor under the nexus test.

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In sum, we conclude Mr. Janny has adduced evidence sufficient to show that Mr. Carmack, but not Mr. Konstanty, acted under color of state law in coercing Mr. Janny's participation in the Program.

III. CONCLUSION

For these reasons, we **REVERSE** the district court's grant of summary judgment to Officer Gamez and Mr. Carmack, **AFFIRM** summary judgment to Mr. Konstanty, and **REMAND** for a trial on Mr. Janny's First Amendment religious freedom claims.

Janny v. Gamez, 20-1105

CARSON, J., concurring in in part and dissenting in part.

Can the director of a religious nonprofit be liable as a state actor for making housing at the nonprofit's facility contingent on participation in religious programing? The majority believes so. But I disagree. Mr. Carmack, as the director of a religious nonprofit, required Mr. Janny to comply with the nonprofit's programing, including its religious rules, so long as Mr. Janny remained under the nonprofit's roof. When Mr. Janny failed to do so, Mr. Carmack asked him to leave as he would any other person.

The majority concludes Mr. Janny came forward with enough evidence "to let the jury decide" whether Mr. Carmack is liable as a state actor under the joint action and nexus tests. As I see it, the majority makes it so religious nonprofits now have two options (1) they can stop requiring religious programing—perhaps defeating their core missions; or (2) they can stop accepting parolees—leaving more individuals who struggle to find a safe place to live, in jail. If the law dictated such a result, okay. But because it does not, and because the potential consequences are severe, I respectfully dissent.[1]

I.

The majority correctly notes that this case falls between the facts in Anaya v. Crossroads Managed Care Systems, Inc., 195 F.3d 584 (10th Cir. 1999) and Sigmon v. CommunityCare HMO, Inc., 234 F.3d 1121 (10th Cir. 2000). But in my view, it falls

[1] I join Judge McHugh's thorough majority opinion insofar as it relates to Officer Gamez and Mr. Konstanty.

closer to Sigmon. In Sigmon, the City of Tulsa ("City") contracted with the defendant, a private corporation, to provide substance abuse counseling to city employees. 234 F.3d at 1122. Nothing in that contract "purported to modify [the City's] existing disciplinary policies or to transfer any authority to discipline employees from [the City] to [the defendant]." Id. at 1123. The plaintiff, a City employee, tested positive for drugs and the defendant referred him to a religious counseling program. Id. The religious programing offended the plaintiff's religious beliefs and he objected to continuing treatment. Id. One of defendant's employees mentioned that he would have to report the plaintiff's noncompliance to the City and that such a report could prompt the City to terminate the plaintiff. Id. at 1124. We held that the plaintiff failed to put forth sufficient evidence of a conspiracy or joint action. Id. at 1128.

The majority concludes the result in Sigmon rested on three key facts: (1) the defendant acted as a middleman; (2) the City maintained complete authority over plaintiff's employment; and (3) the City independently decided to terminate the plaintiff. I read Sigmon differently. As I read the case, we did not hold the defendant was not a state actor because he was a middleman. Id. at 1127. Instead, "the fundamental point" was that the City "retained complete authority to enforce its drug policy, while [the defendant] acted as an independent contractor in identifying and referring employees to treatment services." Id. We acknowledged that the defendant "could reasonably have foreseen that [its] actions might trigger [the City] to begin termination proceedings against [the plaintiff]." Id. But that fact alone did not prove the defendant "performed [its] contractual obligations with the *objective* of utilizing [the City's] employment

authority over [the plaintiff] to force [him] unconstitutionally to engage in unacceptable religious practices." Id. (emphasis added). So as I see it there are two questions here—(1) who had authority to send Mr. Janny back to jail? And (2) did the actor with authority independently decide to send Mr. Janny back to jail?

First, Mr. Carmack lacked authority to send Mr. Janny back to jail. Officer Gamez had an "informal arrangement whereby the Rescue Mission expressed a willingness to house certain parolees (because all parolees need an address upon being released on parole)." Nothing about that informal arrangement modified existing policies or transferred authority to Mr. Carmack. The majority believes the jury could find Mr. Carmack had such authority because he attended a parole meeting, requested a curfew change, and Officer Gamez made a statement that failure to comply with program rules would lead to jailtime. I disagree.

Mr. Carmack requested a parole meeting with Officer Gamez to discuss Mr. Janny's noncompliance with the program. And at that meeting, Officer Gamez told Mr. Janny that noncompliance would lead to jailtime. Mr. Carmack then reiterated that compliance required participation in the religious programing. Mr. Carmack's conduct is analogous to the conduct in Sigmon. Mr. Carmack did not threaten to send Mr. Janny back to jail. And even if he had, like the Sigmon defendant, Mr. Carmack lacked the power to do so. Still Mr. Carmack did remark to Mr. Janny that he would return to jail if he failed to comply. But that remark simply restated the obvious and we held in Sigmon that nearly identical statements could not create state action.

Of the defendants, only Officer Gamez possessed the power to discipline Mr. Janny. Mr. Carmack's request for a meeting to report noncompliance shows his authority was limited to reporting noncompliance. Officer Gamez retained actual control over Mr. Janny's fate as evidenced by his comment that Mr. Janny would go back to jail if he did not comply. He then made good on that promise when he issued an arrest warrant after Mr. Janny left the Mission.

The majority makes much of Mr. Carmack's request that Officer Gamez change Mr. Janny's curfew. But, again, this request, shows only that Mr. Carmack lacked disciplinary authority over Mr. Janny. Mr. Carmack could not unilaterally change Mr. Janny's curfew. And when Mr. Janny did not comply with the program's rules, Mr. Carmack merely reported program noncompliance and made a request to facilitate greater program compliance. Ultimately, when Mr. Janny continued to be noncompliant, Mr. Carmack exercised his only authority—which was to expel Mr. Janny from the program. Mr. Carmack had no control over the consequences of Mr. Janny's departure.

Second, Officer Gamez ultimately exercised his authority and independently decided to send Mr. Janny back to jail for parole violations. In Sigmon, the defendant's employee advised the City to terminate the plaintiff for noncompliance with the rehabilitation programming. Id. at 1127. We held that advice "at most" permitted an inference that the City "might have considered [the defendant's] advice as a factor in its ultimate decision to discipline [the plaintiff]." Id. But even still, that advice served as "simply one component leading to [the City's] ultimate decision." Id. So the City "acted independently. . ." Id. Mr. Carmack decided to expel Mr. Janny from the Mission after

multiple instances of noncompliance. And because Mr. Janny violated his conditions of parole, Officer Gamez sent him back to jail. But Mr. Carmack's conduct did not rise to the level of influence the Sigmon defendant exercised. Mr. Carmack did not advise Officer Gamez to send Mr. Janny to jail. He merely expelled a program participant for noncompliance with the Mission's programming. This expulsion led to consequences Mr. Carmack did not otherwise encourage or facilitate. If Officer Gamez wished to excuse Mr. Janny's parole violation, he could have done so. If Officer Gamez wanted to permit Mr. Janny to seek housing elsewhere, he could have done so. Mr. Carmack had no dog in that fight. The Mission was but one option that *Officer Gamez* forced upon Mr. Janny.

Anaya offers a better example of when a private defendant acted under color of state law by willfully participating in joint action with the State. 195 F.3d at 587–88. In Anaya, the plaintiffs—persons seized by police and transported to a detox facility—sued the company that operated the detox facilities. Id. They alleged that the company conspired with the local police department to execute illegal seizures. Id. at 588–90. The motivation for the defendant was simple, if numbers went up, then the defendant could reopen one of its old detox centers. Id. at 587–89.

To accomplish this objective, the defendant created an advisory board and staffed it predominately with state actors who had the power to implement policies which would lead to increased referrals. Id. at 596. The defendant created the board "for the express purpose of working toward the re-establishment of local Detox services" in another area of the state. Id. (internal quotation marks omitted). The board meetings' minutes

reflected this joint objective for state actors and the defendant to increase referrals to detox centers and reopen the old facility. Id. The defendant had clear financial motivations as it derived over ninety percent of its funding from government entities. Id. at 598. This evidence indicated to us that the defendant "had reason to collaborate" and "even initiated this effort." Id. at 596. The police department followed through on this agreement and issued an order mandating the transport of "any individual who exhibit[ed] *any potential of intoxication*" to the defendant's detox facility. Id. at 589. Referrals to the defendant went from an average of 34.6 per month to 85.5. Id.

We held that the defendant participated in the creation of an "unconstitutional detention policy that led to the allegedly illegal seizures" and that participation served as sufficient evidence from which a reasonable jury could conclude that the defendant acted under color of state law. Id. at 597. But we cautioned that a "mere lack of concern or even recklessness for causing the violation of others' constitutional rights would not seem to rise to the level of establishing [the defendant's] liability under § 1983." Id.

Mr. Carmack's conduct, in my opinion, does not rise to the level we found sufficient for state action in Anaya.[2] Yes, the record shows that Mr. Carmack did his

[2] To be clear, I do not read Anaya as establishing an evidentiary floor in joint action cases. I offer it because it is, to my knowledge, the *only* case in our circuit where we have held a private entity to be a state actor subject to a § 1983 suit because of willful participation in joint action with the state. As such it serves as the only comparator for the "sufficient evidence" side of the spectrum. So although I do not believe Mr. Janny must offer the exact type of evidence relied on in Anaya, I do believe that the evidence he offers must be sufficiently comparable.

friend a favor by taking Mr. Janny as a "guinea pig."[3] But the record contains no evidence of any financial motivation or broader policy motivation to hold parolees against their beliefs in religious facilities. In fact, Mr. Carmack made clear that he had no interest in parolees who did not wish to participate in the Christian faith.

Nor did any evidence of agreement or a shared goal exist. Officer Gamez apparently had a goal to provide all parolees with an address upon being released on parole. Mr. Carmack, on the other hand, wished to change peoples' lives through Christian ministry. By Mr. Janny's admission, Mr. Carmack wanted him out of the program if he was not willing to participate in the religious programming. This shows the differing goals—Officer Gamez desired to provide Janny with a place to live and Mr. Carmack desired to provide religious programming to the homeless.

Even if we define Officer Gamez's goal as one of coercing Mr. Janny into religious program participation, Mr. Janny offers insufficient evidence that Mr. Carmack shared that goal. At best, Mr. Carmack's request that Officer Gamez change Mr. Janny's

[3] The majority emphasizes that Officer Gamez and Mr. Carmack were "friends." But the majority offers no caselaw establishing that a personal friendship between a private actor and a state actor transforms the private actor's conduct into state action. Instead, caselaw establishes that evidence of a "symbiotic relationship" between the private actor and the State must exist. Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1447 (10th Cir. 1995) (internal citation and quotation marks omitted). Meaning there must be evidence that the "state has so far insinuated itself into a position of interdependence with a private party that it must be recognized as a joint participant in the challenged activity." Id. at 1451 (internal citation and quotation marks omitted). If "extensive state regulation, the receipt of substantial state funds, and the performance of important public functions do[es] not necessarily establish . . . [a] symbiotic relationship," then a private friendship with a state actor does not either. See id. at 1451 (internal citation and quotation marks omitted).

curfew serves as the only evidence to that effect. This one request does not rise to the level of a common, unconstitutional goal—especially when compared to Anaya where seizure statistics, financial data, and meeting minutes all memorialized a shared goal. In my view, the evidence shows at most that Mr. Carmack lacked concern or was reckless. And that is not enough for liability under § 1983.

I do not believe that Mr. Carmack's willingness to take in one parolee and his expectation that the parolee abide by house rules so long as he remained living at the Mission, transformed him into a state actor.

II.

I also cannot join the majority's conclusion that Mr. Carmack is a state actor under the "nexus" test. Under the nexus test, "a state normally can be held responsible for a private decision 'only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state.'" Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1448 (10th Cir. 1995) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)). The majority concludes Mr. Carmack is a state actor under the nexus test because he acted as a result of Officer Gamez's significant, overt encouragement that Mr. Janny participate in religious activities. Because I believe Officer Gamez, at most, approved of Mr. Carmack's programing, I respectfully dissent from the majority's application of the nexus test.

When analyzing whether state action exists under the nexus test, we have traditionally focused on whether the private party's conduct resulted from a government

policy or decision. See Gilmore v. Salt Lake Cmty. Action Program, 710 F.2d 632 (10th Cir. 1983); Gallagher, 49 F.3d at 1448–1451. In Gilmore, the plaintiff sued his former employer alleging his termination violated his due process rights. Id. at 632–33. We found that although the defendant could be fairly considered a state actor, the plaintiff failed to establish state action because no state rule, policy, or decision dictated that the defendant terminate the plaintiff. Id. at 638–39. Because the private employer decided to terminate the plaintiff independently (i.e., without reference to government rule, policy, or decision) no nexus existed. Id.

Similarly, in Gallagher, a private security company conducted pat-down searches of individuals attending a concert at a center on the University of Utah's campus. 49 F.3d at 1444–45. Some of those individuals sued arguing that three factors established the requisite nexus between the state and the private security company's allegedly violative conduct—the pat-down searches. Id. at 1449. First, the plaintiffs argued the requisite nexus existed between University policy and the security company's searches because the University operations manual and executive director job description required that the University provide security for events held at the center. Id. at 1450. But we held no "causal connection" existed because the plaintiffs could not "demonstrate that the pat-down searches directly resulted from the University's policies." Id. Instead, the evidence showed the security company conducted the searches under its own company policy. Id. And nothing in the record suggested that if the concert were held at a privately owned facility, where the University's policies and procedures did not apply, that the security company would have conducted the searches any differently. Id.

Second, the plaintiffs argued that the University center director was aware of the allegedly violative conduct and so that awareness established the requisite nexus. Id. at 1449. We disagreed, holding that "'[m]ere approval of or acquiescence to the conduct of a private person [wa]s insufficient to establish the nexus required for state action." Id. at 1450. Third, the plaintiffs argued that University public safety officers observation of the pat-down searches transformed the private company's searches into state action. Id. at 1449. Again we remained unpersuaded. Id. at 1450–51. And we held that a state employee's observation of private conduct, like a state employee's approval of private conduct, did not transform that conduct into state action. Id. at 1451.

The majority says that two interactions between Mr. Carmack and Officer Gamez established the requisite nexus here—a call and a meeting. During the call, Mr. Carmack told Officer Gamez that Mr. Janny was unfit for the Mission because Mr. Janny, as an atheist, declined to participate in the Mission's religious programming. Officer Gamez then "reassured" Mr. Carmack that Mr. Janny would "abide by the rules" or would go to jail. Mr. Carmack and Officer Gamez then met in person and Officer Gamez reiterated that Mr. Janny would follow the Mission's rules. The majority reads these interactions as Mr. Carmack refusing Mr. Janny's entry into the program and then changing his mind because of Officer Gamez's significant, overt encouragement. This significant, overt encouragement, the majority argues, transformed Mr. Carmack's conduct into state action.

But I see a disconnect here based on the object of Officer Gamez's encouragement. The interactions described by the majority show Officer Gamez's

assurances to Mr. Carmack that Mr. Janny would comply with house rules. They do not show that Officer Gamez provided significant, overt encouragement of Mr. Carmack's requirement that Mr. Janny participate in the Mission's religious programming. First, Mr. Janny has not referenced a single state rule or policy dictating that Mr. Carmack require parolees to participate in religious programming. He has offered no evidence that a state policy or decision directly resulted in Mr. Carmack's decision to require religious programing. And he has offered no evidence that Mr. Carmack required Mr. Janny to participate in religious programing but did not require the same of other Mission participants not affiliated with the state. So no causal connection exists between Mr. Carmack's conduct and a state policy or decision.

Second, as with the University director in Gallagher, the evidence here shows only that Officer Gamez—a state actor—was aware of the requirement to participate in religious programing—the complained of conduct. Officer Gamez knew Mr. Carmack required compliance with house rules and that those house rules included participation in bible studies, prayer, and chapel. But the interactions cited by the majority merely show Officer Gamez sought to motivate Mr. Carmack to accept Mr. Janny into the program. To the extent that Mr. Janny argues and the majority concludes that Officer Gamez dictated that Mr. Carmack proselytize Mr. Janny—they miss the mark. A state actor's assurance that a parolee will comply with program requirements should the program accept him does not constitute significant encouragement of the program requirements

themselves.[4] At most, Officer Gamez was aware of and approved of Mr. Carmack's program requirements. But awareness and approval do not rise to the level of significant, overt encouragement necessary to establish the nexus required for state action.

In my view, Mr. Janny has not offered evidence that the government dictated Mr. Carmack's decision that Mission members participate in religious programing. For that reason, I respectfully dissent from the majority's application of the nexus text to Mr. Carmack.

[4] The majority says this statement strays from the facts because "Officer Gamez expressly ordered [Mr. Janny] to comply with the Program's *religious requirements* . . ." Majority at 67 n.11. But this statement refers to Officer Gamez's assurance to Mr. Carmack that Mr. Janny would abide by the program's rules. It has nothing to do with communications between Officer Gamez and Mr. Janny. Even still, the record belies the majority's position. According to Mr. Janny, Officer Gamez told him "[y]ou're going to follow the rules of the program or you're going to go to jail." True, those rules included religious rules. But Officer Gamez did not select some rules that Mr. Janny had to follow to the disregard of others. He sweepingly ordered him to comply with all program rules.

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RE: 20-1105, Janny v. Gamez, et al
Dist/Ag docket: 1:16-CV-02840-RM-SKC

Dear Counsel:

Attached is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Gregory Bueno
Matthew Callahan
John P. Craver
John Lebsack
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CMW/at