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IN THE

# Supreme Court of the United States

JIM CARMACK,

*Petitioner*,

v.

MARK JANNY,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioner Jim Carmack is the former Director of the Denver Rescue Mission, a religious ministry that seeks to change lives in the name of Christ. He occasionally agreed—on an informal, *pro bono* basis—to take in parolees that the State of Colorado requires have a suitable address of record. Parole Officer John Gamez arranged with Mr. Carmack for Respondent Mark Janny to stay at the Mission because he was not welcome at his parents' home. Once there, Mr. Carmack treated Mr. Janny like any other Mission resident, enrolling him in a program that combined religion, training, and case management. When Mr. Janny, an atheist, objected to the program's religious components, Mr. Carmack found him not fit for the program. But Officer Gamez convinced Mr. Carmack to let Mr. Janny stay, promising he would comply or return to jail. Mr. Janny refused to comply, and Mr. Carmack asked him to leave the Mission, as he would anyone else, which resulted in Parole Officer Gamez having Janny arrested and returned to jail.

Mr. Janny sued Mr. Carmack and Officer Gamez, alleging they violated his First Amendment rights. The district court granted summary judgment for Mr. Carmack. But the Tenth Circuit reversed, holding that Mr. Carmack could be held liable as a state actor in conflict with this Court's precedent and the rules in five Circuits. The question presented is:

Whether the employee of a private, religious nonprofit may be held liable, as a state actor, for making *pro bono* housing and social services at the nonprofit's facility contingent on participation in religious programming.

## PARTIES TO THE PROCEEDING

Petitioner Jim Carmack is an individual and citizen of Colorado.

Respondent Mark Janny is an individual and citizen of Colorado.

Respondent John Gamez is an individual and parole officer with the Colorado Department of Corrections.

## LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Tenth Circuit, No. 20-1105, *Janny* v. *Gamez*, judgment entered Aug. 6, 2021.

U.S. District Court for the District of Colorado, No. 1:16-cv-02840-RM-SKC, *Janny* v. *Gamez*, judgment entered Feb. 21, 2020.

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The magistrate judge's unreported report and recommendation in favor of granting Petitioner's motion to dismiss is available at 2018 WL 8188008 (D. Colo. Sept. 20, 2018), and reprinted in the Appendix ("App.") at App.103a–128a.

The district court's unreported order rejecting the magistrate judge's report and recommendation and denying Petitioner's motion to dismiss is available at 2019 WL 1034587 (D. Colo. Mar. 5, 2019), and reprinted at App.95a–102a.

The district court's unreported opinion granting summary judgment in Petitioner's favor is available at 2020 WL 869859 (D. Colo. Feb. 21, 2020), and reprinted at App.86a–94a.

The Tenth Circuit's 2-1 decision reversing and remanding is reported at 8 F.4th 883 (10th Cir. 2021), and reprinted at App.1a–85a.

## STATEMENT OF JURISDICTION

On August 6, 2021, the Tenth Circuit issued its opinion reversing and remanding. Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1291. On October 25, 2021, Justice Gorsuch extended the time to file a petition for a writ of certiorari to December 4, 2021. This Court has jurisdiction under 28 U.S.C. 1254(1).

## PERTINENT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

## INTRODUCTION

The state-action doctrine defines "where the governmental sphere ends and the private sphere begins." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 620 (1991). When it comes to religious nonprofits, getting that boundary right is crucial. Drawing the line one inch too far deprives religious nonprofits of their own First Amendment rights and grants secular courts the power to regulate their internal operations. Those severe injuries are not hypothetical: the Denver Rescue Mission faces them in this very case.

The Mission is a Christian organization that has served vulnerable people in Colorado for nearly 130 years. It cares for the homeless and addicted in a wide variety of ways, all of which are designed to share the Gospel and see lives transformed by faith in Christ. In short, the Mission is a *private* religious organization engaged in *protected* nonprofit activity.

Petitioner Jim Carmack is the Mission's former director in Fort Collins. As a favor to a friend, Colorado Parole Officer John Gamez, Mr. Carmack agreed to provide *pro bono* housing and social services to a parolee, Respondent Mark Janny, but only if Mr. Janny agreed to participate in the Christian activities the Mission provides to all its residents. Neither Mr. Carmack nor the Mission had any financial or policy motivation to keep parolees against their beliefs in religious facilities. Nor was there evidence of any agreement or shared aim; whereas Officer Gamez had a goal to provide parolees with a suitable address of record, Mr. Carmack wished only to change lives through Christian ministry—and made that point clear to both Officer Gamez and Mr. Janny.

What's more, Mr. Carmack had no authority to discipline Mr. Janny. It was Officer Gamez who exercised his sole authority to send Mr. Janny back to jail when Mr. Janny failed to comply with the Mission's religious-participation requirements. Yet the Tenth Circuit exposed Mr. Carmack to liability as a state actor when Mr. Janny sued, rendering the Mission's free exercise of its faith potentially illegal.

The Tenth Circuit's ruling is unprecedented and conflicts with decisions of this Court and the First, Sixth, Seventh, Ninth, and Eleventh Circuits. Indeed, if this case had arisen in any of those Circuits, the outcome would have assuredly been different. Petitioner is aware of no other federal appellate court that has held a religious nonprofit employee even *potentially* liable as a state actor for ministering to those in need.

Unless this Court intervenes, religious nonprofits and their employees face an existential danger. Most religious nonprofits are unable to weather the costs of prolonged litigation or the threats posed by damage awards and attorney fees and costs. They will be forced to choose between their faith and their ministries. Likewise, employees will have to choose between living out their faith and potentially incurring ruinous personal liability. That helps no one and harms thousands of prisoners and parolees who voluntarily participate in religious programs, which may be their only available help.

This Court should grant review, resolve the substantial Circuit conflict, and uphold religious nonprofits' ability to work with government officials without becoming state actors themselves.

## STATEMENT OF THE CASE[1]

### A. Denver Rescue Mission's beliefs, work, and religious practices

Denver Rescue Mission's purpose is rooted in a love of Christ and sharing that love with others. The Mission is a nondenominational Christian organization with a Statement of Faith that affirms the "responsibility and duty of every believer to live a godly life in Jesus Christ and give the gospel to every creature."[2]

Everything the Mission does is designed to change lives in the name of Christ by meeting the material and spiritual needs of vulnerable people, all with the goal of returning them to society as productive, self-sufficient citizens. The Mission serves the homeless and addicted by providing emergency services, rehabilitation, transitional programs, and community outreach. Across these free programs, Mission employees come alongside people experiencing poverty and homelessness, allowing them to "empathiz[e] with their situation and speak[ ] truth into their lives—that they are worthy, valued, and created in the image of God."[3]

Jim Carmack was formerly the Director of the Denver Rescue Mission in Fort Collins. Among other things, he oversaw the Mission's emergency shelter

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[1] Because the district court granted summary judgment in Mr. Carmack's favor, the petition's factual summary accepts Mr. Janny's disputed factual allegations as true.

[2] *Our Mission*, Denver Rescue Mission, https://bit.ly/3C9yxCK.

[3] *Our Impact*, Denver Rescue Mission, https://bit.ly/3BaM8Zk.

services and "Steps to Success" program, "a 3 to 10 month transitional, Christian-based program that provides men and women help to become productive, self-sufficient citizens." Doc. 215-7 at 7. The program involves a high degree of "accountability" and instruction. Doc. 215-7 at 3. Participants are regularly tested for alcohol and drugs, Doc. 215-7 at 3, and receive training on finances, addiction, employment readiness, and healthy relationships, all while hearing "the good news of Jesus Christ." Doc. 215-7 at 7.

The "Steps to Success" program combines spirituality—including Bible study, chapel services, and church involvement—with life-skills workshops, work therapy, and case management. Doc. 215-7 at 7. Individuals desiring to enter the program generally meet with a staff member and complete a detailed application, which asks whether they are "open to participating in Bible Studies, chapels and Christian church services," in addition to secular obligations, such as doing chores, and remaining "alcohol, drug and nicotine free." Doc. 215-7 at 7.

### B. Mr. Janny's parole

Mark Janny began 24 months' parole in December 2014. Within two months, he was arrested and jailed twice for violating curfew and failing to appear for a required parole appointment. App.3a–4a. Mr. Janny also admitted to drug use. Doc. 224-2 at 1. His parole officer, John Gamez, sought to have Mr. Janny's parole revoked. But the Colorado State Board of Parole dismissed Officer Gamez's complaint without prejudice and Mr. Janny was again paroled in February 2015, although Officer Gamez immediately

restarted proceedings to have his parole revoked. App.3a–5a.

The State of Colorado required Mr. Janny to have a residence of record where he spent each night. Docs. 215-1 at 3; 215-4 at 4. And it generally ruled out any residence where Mr. Janny would associate with others with a criminal history. Docs. 215-1 at 4; 228-2 at 2. The State's parole conditions further barred Mr. Janny from abusing alcohol and possessing or using illegal drugs, Doc. 228-2 at 2, which made still other potential residences unsuitable.

Mr. Janny "did not have a residence of record," Doc. 215-4 at 3, and his parents and other family members were unwilling to provide one. Doc. 224-3 at 2. Though Mr. Janny offered the name and address of a friend, Officer Gamez rejected her proposed residence because he believed the friend was involved with illegal drugs. App.4a. Left with no other "suitable" options, Officer Gamez contacted his former parolee and friend Jim Carmack at the Denver Rescue Mission in Fort Collins. Doc. 215-4 at 3.

Officer Gamez believed that Mr. Janny required "extra supervision" and that the Mission would provide it. Doc. 224-2 at 2. The Mission had no "contract, written or implied," with the State to serve parolees. Doc. 215-5 at 3. But, on occasion, the Mission would "accept parolees as residents and/or program participants" and provide them services free of charge. Doc. 215-5 at 3. Mr. Carmack agreed to admit Mr. Janny as a favor to Officer Gamez. This was the first time the Mission had accepted a male parolee into its residential program. Doc. 224-2 at 5.

Mr. Janny's placement at the Mission was intended to be "short term," Doc. 224-3 at 3, until Officer Gamez was successful in having his parole revoked. Doc. 224-2 at 5. At a meeting with Mr. Janny, Officer Gamez issued a parole directive that required Mr. Janny to "locate housing at 316 Jefferson [S]t., Ft. Collins, Colorado (Denver Mission), and abide by all house rules as established. If said rules are violated, the violation will lead to [Mr. Janny] being placed at Washington County jail to address the violation." Doc. 215-3 at 2. This house-rules provision is a "standard requirement" that applies "whether a parolee's residence of record is a private residence or" a religious nonprofit like the Mission. Doc. 215-4 at 5. Mr. Carmack "did not play any role in the directive or choice of words for the directive." Doc. 215-4 at 5.

### C. Mr. Janny's residence at the Mission

Once Mr. Janny arrived at the Mission, Mr. Carmack treated him like any other resident. Mr. Carmack instructed Mr. Janny to let him know when he left the Mission and orientated Mr. Janny to the "Steps to Success" program. At that point, Mr. Janny told Mr. Carmack that he did not "want to hear it" because he is an atheist. Doc. 215-2 at 5. Mr. Carmack informed Mr. Janny that Bible studies, prayer, and discussing religion were integral parts of residing at the Mission. If Mr. Janny refused to participate in the Mission's religious programming, he would not be allowed to stay. Doc. 215-2 at 5.

Mr. Carmack further stated that he had been "told" (by Officer Gamez) that Mr. Janny was either "going to be here" in "the program," or he would be "going to . . . jail." Doc. 215-2 at 5. When Mr. Janny

expressed his continued objections, Mr. Carmack called Officer Gamez and told him that Mr. Janny was "not fit for the program" because he was an atheist and objected to a "religious program." Doc. 215-2 at 5. Mr. Carmack had no interest in keeping someone against their will; the problem was that Mr. Janny was not "the kind of person that the [p]rogram accepts," someone who willingly participated in Christian programming and support. Doc. 224-1 at 5; accord Doc. 224-2 at 5. Officer Gamez assured Mr. Carmack that Mr. Janny would "do whatever is necessary to stay in the program or else . . . be sent to jail." Doc. 215-2 at 5.

Later that day, Mr. Carmack took Mr. Janny to meet with Officer Gamez. Mr. Janny explained to Officer Gamez that he is an atheist and the Mission's program included Bible studies, prayer, and daily chapel. Officer Gamez responded that Mr. Janny would have "to follow the rules of the program" or "wait for [his] parole hearing in [the] Washington County" jail. Doc. 215-2 at 6. Mr. Carmack asked Officer Gamez to change Mr. Janny's curfew from 6:00 pm to 4:30 pm so that he would be present for daily chapel. Officer Gamez made this change to Mr. Janny's conditions of parole. Doc. 224-1 at 7.

Mr. Janny resided at the Mission for approximately six days. During that time, he was present for various morning prayers, daily chapel services, and two Bible studies, yet skipped others. Docs. 215-2 at 7; 224-2 at 7. Mr. Janny also attended one religious counseling session with Mr. Carmack. Doc. 215-2 at 9. Periodically, Mr. Janny would leave the building without checking in. Doc. 215-2 at 7–8.

Mr. Carmack warned Mr. Janny that if he continued to break the Mission's rules, he would have to exit the program. Doc. 215-2 at 7. On Sunday, when Mr. Janny told Mr. Carmack that he had not attended an outside church service and would not be attending evening chapel, Mr. Carmack instructed him to leave, as he would anyone who refused to follow the Mission's rules. Doc. 215-2 at 8–9.

### D. Mr. Janny's arrest and incarceration

Mr. Janny collected his things and spent the night at his friend's home. Doc. 215-2 at 8. The next day, Mr. Janny and his friend looked for other options, but "there was no place that would take" Mr. Janny free of charge. Doc. 132-2 at 1; accord Doc. 224-1 at 7. So Mr. Janny's friend delivered him to the parole office, where Officer Gamez had instructed Mr. Janny to report if he was asked to leave the Mission. Mr. Janny was arrested on arrival pursuant to a warrant Officer Gamez issued that morning after Mr. Janny's tracking device registered that he had left the Mission. Doc. 224-1 at 8. The Colorado State Parole Board subsequently revoked Mr. Janny's parole for 150 days and returned him to prison. Doc. 224-2 at 8.

### E. Lower court proceedings

Mr. Janny filed suit pro se in the United States District Court for the District of Colorado against Mr. Carmack and Officer Gamez.[4] Mr. Janny's complaint alleged that Mr. Carmack and Officer Gamez violated his constitutional rights under the First Amendment's Establishment and Free Exercise Clauses and the Fourteenth Amendment's Equal Protection Clause. Mr. Janny requested (1) declaratory relief, (2) nominal, compensatory, presumptive, and punitive damages, and (3) attorney fees and costs.

Mr. Carmack moved to dismiss the claims against him, arguing that Mr. Janny failed to "plausibly allege that [Mr. Carmack was] acting under color of state law during the time period that [Mr. Janny] stayed at the Rescue Mission." Doc. 97 at 6. The magistrate judge recommended granting Mr. Carmack's motion to dismiss because Mr. Janny's "allegations, accepted as true, do not establish that [Mr.] Carmack . . . acted under color of state law." App.120a. But the district judge rejected that recommendation and denied the motion to dismiss, concluding that "[g]iven the flexibility with which courts have approached this area of law and the posture of the case—a pro se plaintiff responding to motions to dismiss—the Court concludes the allegations are sufficient to establish a plausible claim that [Mr. Carmack] acted under color of law." App.101a.

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[4] Mr. Janny also sued Tom Konstanty, the Mission's assistant director, and Lorraine Diaz De Leon, Officer Gamez's supervisor. Because those defendants are no longer involved in this case, the petition does not discuss them.

Mr. Carmack then filed an answer and raised several affirmative defenses, including: (1) Mr. Carmack is a "private actor[ ]" and his "conduct did not amount to state action within the meaning of 42 U.S.C. § 1983;" (2) the Mission's actions "were taken in good faith and for legitimate reasons and did not violate any regulatory, statutory, common law, or other legal provision of any kind;" and (3) Mr. Janny's "alleged injuries, if any, were caused by a third person or persons over whom the Rescue Mission [and Mr. Carmack] had no control." Doc. 155 at 11–12.

After discovery, Mr. Carmack moved for summary judgment, focusing on the state-action doctrine. Mr. Carmack argued there was no evidence that he was "acting under color of state law during the time period that [Mr. Janny] stayed at the Rescue Mission." Doc. 215 at 6. Consequently, Mr. Carmack argued, Mr. Janny's § 1983 claims against him "fail as a matter of law." Doc. 215 at 6.

The district court readily agreed and granted summary judgment in Mr. Carmack's favor, concluding there was "no evidence that Defendant[ ] Carmack . . . represented the state in any capacity." App.90a. It gave three reasons for this conclusion: (1) the Mission "had complete discretion over who it allowed to reside in its facility and who it allowed to participate in its programs," and there was "no evidence that the state played any role in the Rescue Missions' operations," (2) the Mission had no "contractual relationship with the state," and (3) no evidence showed that Mr. Carmack "acted in concert with the state to deprive [Mr. Janny] of his rights or that [Mr. Carmack] shared with the state a specific goal of doing so." App.90a.

Mr. Janny appealed to the Tenth Circuit, which ruled 2 to 1 in his favor, reversing and remanding "for a trial on Mr. Janny's First Amendment religious freedom claims." App.73a. The panel majority held that Mr. Carmack could be held liable as a state actor under the joint action and nexus tests.

As to joint action, the majority reasoned that a jury could reasonably infer a conspiracy to "coerc[e] Mr. Janny into Program participation." App.59a. That Mr. Carmack instructed Mr. Janny to leave the Mission, instead of forcing him to stay, made no difference. Nor did it matter "that only Officer Gamez could change Mr. Janny's curfew or send him back to prison" because "Mr. Carmack was aware of the consequences of his decision to expel Mr. Janny" from the Mission. App.63a–64a. Mere *knowledge* of state-ordained consequences was enough to bar the Mission from treating Mr. Janny like any other resident who refused to abide by its standard (and entirely private) religious rules.

Concerning the nexus test, the panel majority blamed Mr. Carmack for *attempting to exclude* Mr. Janny from the Mission's residential program. Mr. Carmack called Officer Gamez and told him "that Mr. Janny, as an atheist, was unfit for the Program's Christian content." App.71a. Officer Gamez's reaction was to "'reassure[ ]' Mr. Carmack that Mr. Janny would stay in the Program and follow its rules or go to jail" and this "significant, overt encouragement to ensure Mr. Janny's enrollment" in the Mission's program "was sufficient to transform Mr. Carmack into a state actor and qualify his choice to enroll Mr. Janny . . . as legally that of the state." App.71a–72a.

Judge Carson dissented. "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," did not "transform[ ] him into a state actor." App.81a. "[O]nly Officer Gamez possessed the [state's] power to discipline Mr. Janny." App.76a. Mr. Carmack had only private authority to "expel Mr. Janny from the program," the same authority he possessed over every participant, and exercised "no control over the consequences of Mr. Janny's departure" from the Mission. App.77a.

As Judge Carson explained, there was no joint action because there was no conspiracy. Mr. Carmack and Officer Gamez had "differing goals." App.80a. "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." *Ibid.* Even Mr. Janny admitted that "Mr. Carmack wanted him out of the program if he was not willing to participate in the religious programming," whereas Officer Gamez wanted Mr. Janny to stay. *Ibid.*

Nor could Mr. Janny prevail under the nexus test. Mr. Janny "offered no evidence that a state policy or decision directly resulted in Mr. Carmack's decision to require religious programming." App.84a. "So no causal connection exists between Mr. Carmack's conduct and a state policy or decision." *Ibid.* Religious nonprofits in the Tenth Circuit now have two bad options: "(1) they can stop requiring religious programming—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." App.74a.

## REASONS FOR GRANTING THE WRIT

Religious nonprofits have protected First Amendment interests in sharing the Gospel and regulating their own internal affairs. The Tenth Circuit's overbroad reading of the state-action doctrine sweeps this autonomy away. Mr. Janny sued the Mission's former director, Mr. Carmack, for enforcing the Mission's standard religious rules in its own, private residential program. If the Mission cannot serve parolees *within its own four walls* without morphing into a state actor, the Mission must choose between its mission to share the Gospel and its ministry of serving parolees in need. Only this Court can protect the Mission's—and its employees'—right to the free exercise of religion.

The Tenth Circuit's ruling conflicts with this Court's holding in *National Collegiate Athletic Association* v. *Tarkanian*, 488 U.S. 179 (1988), and decisions by the First, Sixth, Seventh, Ninth, and Eleventh Circuits. And review cannot wait because the burdens of litigation, potential awards of damages and attorney fees, and skyrocketing insurance costs will force religious nonprofits to choose between sharing the Gospel and serving the vulnerable.

It helps no one, least of all parolees, to force religious nonprofits to pick faith or providing social services. Many individuals welcome religious programming, which is readily available and free. Depriving these individuals of already scarce resources merely increases the likelihood of their recidivism and return to jail. Secular courts should not leverage the state-action doctrine to punish a religious nonprofit employee like Mr. Carmack for helping parolees in keeping with his faith. Review is warranted.

## I. The state action doctrine and its purpose

The First Amendment "constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1926 (2019). Over time, this Court developed the state-action doctrine to specify the difference "between governmental and private" conduct. *Ibid.* Its purpose is to "distinguish[ ] the government from individuals and private entities" and "enforce[ ] that constitutional boundary between the governmental and the private." *Id.* at 1928. Concerned that "[e]xpanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise," *id.* at 1934, this Court has explained that "a private entity can qualify as a state actor in a few limited circumstances." *Id.* at 1928. Widening that gate any further would be inconsistent "with the text of the Constitution" and pose a severe danger to our nation's "robust sphere of individual liberty." *Id.* at 1934.

Many private actions may be "exceptionable," *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001), or even "wrongful." *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 50 (1999) (quotation omitted). But the Constitution "protects individuals only from governmental and not from private action." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 930 (1982). This "is a fundamental fact of our political order." *Id.* at 937.

As a result, plaintiffs who bring constitutional claims against a private party must satisfy a fair-attribution test comprised of two elements: (1) the alleged constitutional violation was caused by a State-

created right or a rule of conduct imposed by the State or someone "for whom the State is responsible" and (2) it is "fair[ ]" to label the particular defendant a state actor. *Ibid*. Meeting the first prong is not enough to justify § 1983 liability. Plaintiffs must satisfy "*both*" prongs of the fair-attribution test. *Sullivan*, 526 U.S. at 50.

This Court has loosely defined the scenarios in which a private party may be fairly deemed a state actor as involving a "close nexus," "coercive power," "significant encouragement," "joint activity," or "public function." *Brentwood Acad.*, 531 U.S. at 295–96. But the Court has also cautioned that the state-action inquiry is fact specific and "lack[s] rigid simplicity." *Id*. at 295; accord *Sullivan*, 526 U.S. at 58 (cautioning that state-action cases like *Lugar* "must not be torn from the context out of which it arose").

No "set of circumstances [is] absolutely sufficient" for state action, as there could be "some countervailing reason against attributing activity to the government." *Brentwood Acad.*, 531 U.S. at 295–96.

## II. The Tenth Circuit's decision squarely conflicts with this Court's holding in *NCAA* v. *Tarkanian*, 488 U.S. 179 (1988).

Most state-action cases involve the question of whether "a State . . . can be held responsible for a private decision." *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). Frequently, they involve the plaintiff naming "no public officials as defendants." *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 157 (1978). This case is the exact opposite: Mr. Janny seeks to hold the former director of the Denver Rescue Mission liable for the decisions of a Colorado parole officer who is also named as a defendant.

Special considerations apply in that scenario, as the Court explained in *Tarkanian*. There, this Court reviewed the Nevada Supreme Court's holding that the NCAA was liable as a state actor for pressuring the University of Nevada, Las Vegas (UNLV), to suspend its head basketball coach for alleged violations of NCAA rules. 488 U.S. at 187–90 Typically in state-action cases, "a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action." *Id.* at 192. But *Tarkanian* "mirror[ed] the traditional state-action case" because the "act challenged by Tarkanian—his suspension—was committed by UNLV" and "[a] state university without question is a state actor." *Ibid.*

The Court was forced to "step through an analytical looking glass" to frame the state-action issue. *Id.* at 193. Because "it was UNLV, the state entity, that actually suspended Tarkanian," the

question was "not whether UNLV participated to a critical extent in the NCAA's activity, but *whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action*." *Ibid.* (emphasis added).

This Court answered "no" for four reasons. First, the "source" of the NCAA's rules was "not Nevada" but the organization's "collective membership, speaking through an organization that is independent of any particular State." *Ibid.*

Second, simply because "UNLV engaged in state action when it adopted the NCAA's rules" did not also mean that "formulation of those . . . rules was state action." *Id.* at 194. The university "retained the authority to withdraw from the NCAA and establish its own standards" at any time. *Id.* at 194–95; accord *id.* at 198 (UNLV "could have withdrawn voluntarily from the Association").

Third, UNLV did not delegate "power to the NCAA to take specific action against any university employee." *Id.* at 195–96. Sanctions were enforceable only by "UNLV itself" and the NCAA "did not—indeed, could not—directly discipline Tarkanian or any other state university employee." *Id.* at 196–97.

Last, the final question is whether "the conduct allegedly causing the deprivation of a federal right can be fairly attributable to the State." *Id.* at 199 (cleaned up). But it would be "more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law." *Ibid.*

Because the Tenth Circuit asked the wrong state-action question and downplayed the factors this Court stressed in *Tarkanian*, it applied the wrong state-action test and reached the wrong result. No one questions that Officer Gamez, a state actor, issued a warrant for Mr. Janny's arrest and returned him to jail. So the Tenth Circuit should have asked whether Officer Gamez's actions in compliance with the Mission's religious rules turned the *Mission's* private conduct into state action. *Cf. id*. at 193. As in *Tarkanian*, the answer is "no."

It is undisputed that the Mission's standard religious practices and rules have nothing to do with the State. They are private conduct by a religious nonprofit exercising its First Amendment rights within its own four walls. Officer Gamez retained absolute discretion to remove Mr. Janny from the Mission at any time and avoid its religious rules. The State did not delegate any power to discipline Mr. Janny to the Mission; Officer Gamez imposed all parole conditions and penalties himself. The only sanction available to Mr Carmack was asking Mr. Janny to leave the Mission, the same *private* power he had over any resident. It is more accurate to say that Colorado "conducted its [parole] program under color of the policies adopted by the [Mission], rather than that those policies were developed and enforced under color of [Colorado] law." *Id.* at 199.

The Tenth Circuit's contrary ruling directly conflicts with *Tarkanian*. Because Mr. Carmack's enforcement of the Mission's preexisting religious rules is not fairly attributable to the State, state action is lacking, even under Mr. Janny's version of the facts. Review is warranted for this reason alone.

## III. The Tenth Circuit's ruling conflicts with decisions by five other Circuits.

The Tenth Circuit's state-action ruling also conflicts with decisions by five other Circuits.

1. As to decision-making authority, the Tenth Circuit held that it made no difference that "only Officer Gamez could change Mr. Janny's curfew or send him back to prison." App.63a–64a. The Seventh and Ninth Circuits take a different view, refusing to find state action when private actors like Mr. Carmack lack independent authority to make decisions and offer recommendations that state officials, such as Officer Gamez, are free to accept or reject.

In *Hu* v. *American Bar Association*, for example, a law student argued that the ABA was a state actor because "the Supreme Court of Illinois delegates to the ABA complete authority to regulate legal education." 334 F. App'x 17, 18 (7th Cir. 2009). But the Seventh Circuit rejected this claim because a court—not the ABA—decided "whether graduation from an ABA-accredited school is necessary to practice law in Illinois." *Id.* at 19. Likewise, in *Vickery* v. *Jones*, the court held that political party members were not state actors, despite recommending criteria for state officials' hiring decisions, because they "had no actual hiring authority and did not make the actual employment decision." 100 F.3d 1334, 1345 (7th Cir. 1996). In each of these cases, the court made one thing clear: private actors are not state actors when they have no final decision-making power.

The Ninth Circuit also adheres to this principle. In *Shoemaker* v. *Accreditation Council for Graduate Medical Education*, a doctor claimed that a medical

accreditor was a state actor because it set criteria that a public medical center used "to appoint and remove department chairs." 87 F.3d 1322, 1996 WL 341935, at *1 (9th Cir. 1996). But the court rejected this claim because, while the accreditor "influenced" the medical center's decision-making, nothing "suggest[ed] that [anyone] other than the" public medical center could remove the doctor from his chair. *Ibid.* Who makes the final call is key. As this Court has affirmed, "a state's response to" private action generally "does not convert" private conduct "into state action." *Ibid.* (citing *Blum* and *Tarkanian*).

Whereas the Tenth Circuit gratuitously exposed Mr. Carmack to state-actor lability, the Seventh and Ninth Circuits would deem the State "responsible for [its] own decisions" and instruct Mr. Janny to "complain against their author[ ]," *i.e.*, the corrections department, "rather than against" Mr. Carmack. *Sanjuan* v. *Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 250 (7th Cir. 1994).

2. Regarding a joint conspiracy, the Tenth Circuit held that under the circumstances presented here, a jury could infer that "Mr. Carmack and Officer Gamez agreed to pursue a common unconstitutional goal—coercing Mr. Janny into Program participation." App.59a. Yet whereas mandating religious programming may be unconstitutional for the State, it is protected First Amendment activity for the Mission. The Tenth Circuit ignored this distinction by focusing on the *Mission's* goals and the *State's* legal constraints. App.64a (wrongly declaring that Mr. Carmack and Officer Gamez were "multiple actors with distinct roles to accomplish a shared unlawful goal").

In stark contrast, the Seventh, Ninth, and Eleventh Circuits look not to a goal the State is forbidden to pursue but for a *joint intent*—by public and private parties—to violate the plaintiff's rights. In *Spiegel* v. *McClintic*, for example, the plaintiff argued that a neighbor was a state actor because she "aid[ed] or encourage[d]" state officials in depriving plaintiff of his First Amendment rights. 916 F.3d 611, 616 (7th Cir. 2019). But the Seventh Circuit rejected this claim because the complaint never alleged that the neighbor *intended* to violate plaintiff's rights. *Ibid.* Joint action, the court said, requires a mutual "understanding to deprive the plaintiff of his constitutional rights." *Ibid.* (citing *Fries* v. *Helsper*, 146 F.3d 452, 457 (7th Cir. 1998)). "'[M]ere allegations of joint action or a conspiracy do not demonstrate that the defendants acted under color of state law . . . .'" *Ibid.* (quoting *Fries*, 146 F.3d at 458).

Likewise, in *Sutton* v. *Providence St. Joseph Medical Center*, a job applicant claimed a private, nonprofit medical center was a state actor when it declined to hire him based on his refusal to give the medical center his social-security number, as required by federal law. 192 F.3d 826, 840 (9th Cir. 1999). The Ninth Circuit rejected this claim, holding that, because the medical center was seeking to comply with federal law—not to pursue an "unconstitutional end"—there was no "*joint* effort to deprive Plaintiff of his constitutional rights," and so the medical center was not a state actor. *Ibid.* Again, the court held that private parties must *intend* to violate a plaintiff's constitutional rights to trigger the state-action doctrine—not just constitute a but-for cause.

Consider also *Hadley* v. *Gutierrez*, where an arrestee claimed that officers conspired to cover up their use of excessive force, but never "explain[ed] what constitutional right the alleged cover-up infringed." 526 F.3d 1324, 1332 (11th Cir. 2008). The Eleventh Circuit rejected this claim because, while the court could "imagine" some possible violations, conspiracy claimants must prove that "defendants reached an understanding to deny the plaintiff's rights," and the *Hadley* plaintiff never showed this, *ibid.*—just like Janny here. Proving intent is key.

The Mission and Mr. Carmack sought to exercise *their own* First Amendment rights. No evidence suggests that Mr. Carmack intended to violate Mr. Janny's rights, let alone that he conspired with Officer Gamez to do so. If Mr. Carmack's *goal* was to coerce Mr. Janny into religious practice, then it made absolutely no sense for Mr. Carmack to try and exclude Mr. Janny from the residential program or ultimately expel him from the Mission. Though this fact carried no weight in the Tenth Circuit, it would bar a state-action finding in the Seventh, Ninth, and Eleventh Circuits.

3. Finally, the Tenth Circuit recognized that the Mission has the First Amendment right "to practice its faith and to impose faith-based requirements on participants in [its programs]." App.68a n.9. But those basic freedoms played no part in the court's state-action analysis. The First, Sixth, Seventh, and Ninth Circuits take the opposite tack, declining to find state action when it would impair private actors' exercise of their own constitutional rights. *Tomaiolo* v. *Mallinoff*, 281 F.3d 1, 11 (1st Cir. 2002) (no state action when it "might well chill the exercise of

[private actors'] own rights to communicate with government"); *Howell* v. *Father Maloney's Boys' Haven, Inc.*, 976 F.3d 750, 754 (6th Cir. 2020) (no state action that would "cause complications for private entities that provide secular services in the name of faith-based missions—not as easy a thing to do if the entity becomes a state actor"); *Florer* v. *Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 927 (9th Cir. 2011) (refusing to allow "[c]haplains and religious leaders [to] automatically become state actors when they provide opinions on matters of dogma . . . [to] prison officials").

The Tenth Circuit focused on Mr. Janny's rights, ignoring the Mission's constitutional freedoms and those of its director, Mr. Carmack. Yet the First, Sixth, Seventh, and Ninth Circuits would decline "to vindicate [Mr. Janny's] First Amendment rights at the expense of" the Mission's and Mr. Carmack's. *Tarpley* v. *Keistler*, 188 F.3d 788, 796 (7th Cir. 1999).

It is impossible to reconcile the Tenth Circuit's ruling with decisions by the First, Sixth, Seventh, Ninth, and Eleventh Circuits. Only this Court may resolve these conflicts and determine which understanding of the state-action doctrine is correct. Again, review is warranted.

## IV. The question presented is of national importance to religious nonprofits and to the people they serve, and it urgently requires this Court's review.

The conflict between five Circuits' precedent and the Tenth Circuit's decision is glaring and resolving that split promptly is essential. The

Constitution "constrains governmental actors and protects private actors." *Halleck*, 139 S. Ct. at 1926. But the Tenth Circuit has wrongly exposed private religious nonprofits and their employees to First Amendment liability for exercising their First Amendment rights. Its expansion of "governmental control" over religious organizations "while restricting [their] individual liberty" is precisely what this Court has disallowed. *Id.* at 1934.

If the Court declines to intervene, the Mission will be forced to go to trial under the Tenth Circuit's flawed state-action test, exhausting time and resources that *should* be dedicated to its religious work. The Constitution's "robust sphere of individual liberty" would suffer as a result. *Ibid.* Other ministries may not have the wherewithal and will be forced to settle or shut down. And religious ministries' litigation-insurance costs will skyrocket.

Parolees, too, will suffer. There are over 4 million adult probationers and parolees in the United States. Barbara Oudekerk, Bureau of Justice Statistics, PROBATION & PAROLE IN THE UNITED STATES, 2019 (July 2021), https://bit.ly/3l4FrTn. They experience a "lack of affordable housing, drug and mental health treatment, jobs, and positive role models." Jamie Yoon & Jessica Nickel, Bureau of Justice Assistance, REENTRY PARTNERSHIPS: A GUIDE FOR STATES & FAITH-BASED & COMMUNITY ORGANIZATIONS at v (2008), https://bit.ly/3cEJiCf. Many parolees have no objection to religious programming, and faith-based organizations often provide "the only resources available to help" them. *Ibid.* The Tenth Circuit's ruling, which forces religious ministries to turn parolees away or close their doors, helps no one.

The Tenth Circuit's errors are not entirely of its own making. Decisions implementing the state-action doctrine have created notoriously "murky waters." *Krynicky* v. *Univ. of Pittsburgh*, 742 F.2d 94, 97 (3d Cir. 1984) (quotation omitted). Commentators have described the relevant precedents as "a miasma, a conceptual disaster area," or worse. Stefan J. Padfield, *Finding State Action When Corporations Govern*, 82 TEMP. L. REV. 703, 716 (2009) (quotations omitted); accord, *e.g.*, Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575, 576–77 ("The only thing that is clear [about] the state action doctrine is that [it's] a mess.").

Many lower courts are perplexed. The Second Circuit has said the state-action doctrine is "slippery and troublesome." *Graseck* v. *Mauceri*, 582 F.2d 203, 204 (2d Cir. 1978). Other courts find this doctrine "difficult" to apply. *Payha* v. *Excela Health*, No. CV 18-358, 2018 WL 3618703, at *3 (W.D. Pa. July 30, 2018); accord, *e.g.*, *Snodgrass-King Pediatric Dental Assocs., P.C.* v. *DentaQuest USA Ins. Co.*, 295 F. Supp. 3d 843, 862 (M.D. Tenn. 2018). Past members of this Court have said the doctrine lacks "consistency," *Edmonson*, 500 U.S. at 632 (O'Connor, J., dissenting), and lamented its confusing criteria. *Reitman* v. *Mulkey*, 387 U.S. 369, 393 (1967) (Harlan, J., dissenting). The petition offers this Court an ideal opportunity to clarify the law.

Religious nonprofits like the Mission should not be forced to choose between sharing the Gospel and their ministry to parolees and others under state custody or control. Certiorari is warranted.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2021 *Counsel for Petitioner*

# APPENDIX

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**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**August 6, 2021**

**Christopher M. Wolpert**
**Clerk of Court**

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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| | |
|---|---|
| MARK JANNY,<br>Plaintiff – Appellant,<br>v.<br>JOHN GAMEZ; JIM CARMACK; TOM KONSTANTY,<br>Defendants – Appellees.<br>* * * * * | No. 20-1105 |

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

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* * * * *

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

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**McHUGH**, Circuit Judge.

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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

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[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*.

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 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.

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.

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

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[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).

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.

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 firsthand 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.").

***

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

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[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.

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 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. 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

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[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.

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

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[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*.

worship services and bible study to avoid being 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 preexisting 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

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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.

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 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

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[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 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").

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 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 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.

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[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.

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

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.

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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 nonprofit 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 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.")).

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.

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."

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[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.

*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 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 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

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[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*.

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 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

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

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 friend a favor by taking Mr. Janny as a "guinea

[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.

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.

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[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).

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 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.

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[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.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**Judge Raymond P. Moore**

Civil Action No. 1:16-cv-2840-RM-SKC

MARK JANNY,

Plaintiff,

v.

JOHN GAMEZ,
JIM CARMACK, and
TOM KONSTANTY,

Defendants.

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**ORDER**

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This matter is before the Court on motions for summary judgment by Defendants Carmack and Konstanty (ECF No. 215) and Defendant Gamez (ECF No. 216). The motions have been fully briefed. (ECF Nos. 224, 228, 230, 233.) For the reasons below, both motions are granted.

## I. LEGAL STANDARDS

Plaintiff proceeds pro se; thus, the Court liberally construes his pleadings. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). But the Court does not act as his advocate. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

Summary judgment is appropriate only if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed.

R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000); *Gutteridge v. Oklahoma*, 878 F.3d 1233, 1238 (10th Cir. 2018). Applying this standard requires viewing the facts in the light most favorable to the nonmoving party and resolving all factual disputes and reasonable inferences in his favor. *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013). However, "if the nonmovant bears the burden of persuasion on a claim at trial, summary judgment may be warranted if the movant points out a lack of evidence to support an essential element of that claim and the nonmovant cannot identify specific facts that would create a genuine issue." *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1143-44 (10th Cir. 2013). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted). A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable jury could return a verdict for either party. *Anderson*, 477 U.S. at 248.

Qualified immunity shields individual defendants named in § 1983 actions unless their conduct was unreasonable in light of clearly established law. *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014). "[W]hen a defendant asserts qualified immunity, the plaintiff carries a two-part burden to show: (1) that the defendant's actions violated a

federal constitutional or statutory right, and, if so, (2) that the right was clearly established at the time of the defendant's unlawful conduct." *Id.* (quotation omitted).

## II. BACKGROUND

After his arrest for a parole violation, Plaintiff's parole officer, Defendant Gamez, directed him to stay at the Denver Rescue Mission, a homeless shelter where Defendants Carmack and Konstanty ran a Christianity-based program intended to help people "become productive, self-sufficient citizens." (ECF No. 215 at 4.) "Participants in the program are expected to attend chapel and bible study, observe dorm style rules, including observing curfews, set meal times, and are not allowed to consume drugs or alcohol while in the program." (*Id.*) Plaintiff objected to having to participate in the program because he is an atheist. After Defendant Carmack called Defendant Gamez to express his concerns that Plaintiff might not be a good fit for the program, Defendant Gamez assured him that Plaintiff would abide by the Rescue Mission rules. The next day, Defendant Carmack and Plaintiff met with Defendant Gamez in his office, where Defendant Gamez reaffirmed that Plaintiff was required to abide by the Rescue Mission rules. In addition, Plaintiff alleges that at Defendant Carmack's request, Defendant Gamez changed Plaintiff's curfew, which forced him to attend additional religious programming. Days later, Plaintiff refused to attend chapel, prompting Defendant Carmack to kick him out of the program. When Plaintiff reported to the parole office, his parole was revoked, and he was sent to prison.

Plaintiff brought this action under 42 U.S.C. § 1983, asserting four claims for relief. (ECF No. 66.) The Court has dismissed two of the claims (ECF No. 151), leaving only Plaintiff's claims asserting that his placement at the Rescue Mission violated his First Amendment rights under the Establishment and Free Exercise Clauses. Defendants Carmack and Konstanty have moved for summary judgment on the basis that their conduct did not constitute state action. Defendant Gamez has moved for summary judgment on the grounds that his conduct did not violate Plaintiff's First Amendment rights and that he is entitled to qualified immunity.

## III. ANALYSIS

### A. Defendants Carmack and Konstanty

"[T]he only proper defendants in a Section 1983 claim are those who represent the state in some capacity." *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995) (quotation omitted). In this circuit, numerous tests have been used to determine whether a private entity is acting under color of state law and is thus subject to § 1983 liability, including the nexus test, the symbiotic relationship test, the joint action test, and the public functions test. *Anaya v. Crossroads Managed Care Sys, Inc.*, 195 F.3d 584, 595-96 (10th Cir. 1999). Defendants Carmack and Konstanty argue that they are not state actors under any of these tests. In response, Plaintiff argues primarily that they are state actors under the joint action test.[1]

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[1] To the limited extent Plaintiff argues that Defendant Carmack and Konstanty qualify as state actors under the public

In applying the joint action test, courts focus on "whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Gallagher*, 49 F.3d at 1453. State action may be present where "public and private actors share a common, unconstitutional goal" or "there is a substantial degree of cooperative action between state and private officials." *Id.* at 1454 (quotation omitted). However, "the mere acquiescence of a state official in the actions of a private party is not sufficient." *Id.* at 1453.

Here, there is no evidence that Defendants Carmack and Konstanty represented the state in any capacity. It is undisputed that "[t]he Rescue Mission had complete discretion over who it allowed to reside in its facility and who it allowed to participate in its programs" (ECF Nos. 215 at 3; 224 at 4). It did not have a contractual relationship with the state. (ECF No. 215 at 3.) Nor has Plaintiff cited any evidence in the record showing that these Defendants acted in concert with the state to deprive Plaintiff of his rights or that they shared with the state a specific goal of doing so. Indeed, there is no evidence that the state played any role in the Rescue Mission's operations. (*Id.*) At most, Plaintiff has adduced evidence that the state acquiesced in the actions of Defendants Carmack and Konstanty; this is insufficient to establish a genuine issue of material fact as to

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functions test, the Court is not persuaded. Plaintiff has identified no evidence showing there is a genuine issue that providing housing facilities to parolees is exclusively a public function. Nor has Plaintiff raised any factual disputes that raise a genuine issue as to whether these Defendants are state actors under the nexus and symbiotic relationship tests.

whether they were state actors. Accordingly, Defendants Carmack and Konstanty are entitled to summary judgment on the claims against them.

**B. Defendant Gamez**

Defendant Gamez contends that Plaintiff has adduced no evidence showing he violated Plaintiff's First Amendment rights and that he is entitled to qualified immunity. The Court agrees that Plaintiff is entitled to qualified immunity because Plaintiff has failed to adduce evidence of an Establishment Clause violation and, with respect to his Free Exercise claim, Plaintiff has not adduced evidence of conduct by Defendant Gamez that violated his clearly established rights.

1. Establishment Clause Claim

Government action violates the Establishment Clause if it fails to satisfy the criteria set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 796 (10th Cir. 2009). Thus, "to avoid an Establishment Clause violation, the government action (1) must have a secular legislative purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion." *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 796 (10th Cir. 2009). Plaintiff's fails to present evidence raising a genuine issue that Defendant Gamez's conduct does not satisfy each of these tests.

First, Plaintiff has not shown that his placement at the Rescue Mission did not have a secular purpose.

Plaintiff does not dispute that he was required to establish a residence of record as a condition of his parole. And he presents no evidence that he had an appropriate alternative to the Rescue Mission that was conducive to his complying with the terms of his parole. Defendant Gamez testified that he believed the two residences Plaintiff proposed were unacceptable for that reason, and Plaintiff cites no evidence to the contrary. Plaintiff does not dispute that he had previously failed to comply with the terms of his parole. His contention that Defendant Gamez "refused to investigate" other addresses (ECF No. 230) is insufficient to raise a genuine issue as to whether this placement at the Rescue Mission had a secular purpose. *See Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1118 (10t Cir. 2010) ("We will not lightly attribute unconstitutional motives to the government, particularly where we can discern a plausible secular purpose." (quotation omitted)).

Second, Plaintiff has not shown that the principal or primary effect of his placement at the Rescue Mission was either to advance Christianity or any other religion or to inhibit atheism. On the current record, the principal effect of his placement was that it gave him a residence of record that would allow him to comply with the terms of his parole. "[N]ot every governmental activity that confers a remote, incidental or indirect benefit upon religion is constitutionally invalid." *Green*, 568 F.3d at 799 (quotation omitted). Although Defendant Gamez told Plaintiff he was required to follow the house rules at the Rescue Mission, there is no objective evidence that Plaintiff was required to participate in religious programming in order to stay there. Defendant

Carmack testified that participation in the program was "entirely voluntary" and that although "[p]articipants were expected to attend chapel and Bible study at certain times, . . . they were not required to pray or study the Bible." (ECF No. 216-5 at 10.) Plaintiff cites no authority for the proposition that merely being compelled to attend religious programming violated his rights, and his conclusory allegations that he was forced to participate in such programming and refrain from discussing his atheist beliefs are insufficient to raise a genuine issue of material fact as to whether the principal effect of his placement at the Rescue Mission ran afoul of the Establishment Clause.

Third, Plaintiff has not shown that his placement fostered an excessive government entanglement with religion. Although the parties dispute whether Plaintiff informed Defendant Gamez that he was an atheist, Plaintiff has adduced no evidence that Defendant Gamez made any statements or took any action with the express purpose of endorsing Christianity or any other religion or of promoting religion over nonreligion. Nor is there any evidence that Defendant Gamez or the state had a contractual relationship with the Rescue Mission or any involvement in its operations. The Court finds Plaintiff's contention that Defendant Gamez changed Plaintiff's curfew at Defendant Carmack's request is insufficient to raise a genuine issue with respect to the level of government entanglement that would violate the Free Exercise Clause.

2. Free Exercise Clause Claim

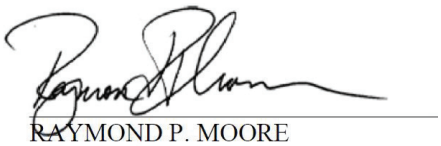
Because Defendant Gamez raises a claim of qualified immunity, Plaintiff bears the burden of establishing not only that a violation of his occurred, but that that the rights were clearly established. "[F]or a right to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Cortez v. McCauley*, 478 F.3d 1108, 1114-15 (10th Cir. 2007) (quotation omitted). Plaintiff cites no authority, nor is the Court aware of any, for the proposition that a parole officer violates a parolee's rights by requiring him to reside at a facility that provides religious programming. In the absence of such authority, Defendant Gamez is entitled to qualified immunity as to Plaintiff's claim under the Free Exercise Clause.

## IV. CONCLUSION

Accordingly, the Court GRANTS the motions for summary judgment (ECF Nos. 215, 216) and directs the Clerk to CLOSE this case.

DATED this 21st day of February, 2020.

BY THE COURT:



RAYMOND P. MOORE
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**Judge Raymond P. Moore**

Civil Action No. 1:16-cv-02840-RM-SKC

MARK JANNY,

Plaintiff,

v.

JOHN GAMEZ,
LORRAINE DIAZ DE LEON,
JIM CARMACK, and
TOM KONSTANTY,

Defendants.

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**ORDER**

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This matter is before the Court on the September 20, 2018, recommendation of Magistrate Judge S. Kato Crews (ECF No. 110) to grant Defendants' motions to dismiss several claims in this case.[1] Plaintiff objected to the recommendation (ECF No. 132), Defendants Carmack and Konstanty ("Program Defendants") filed a response (ECF No. 133), and Plaintiff filed a reply (ECF No. 145). Plaintiff is an atheist, and he asserts claims under 42 U.S.C. § 1983 for violations of his constitutional rights stemming

[1] The magistrate judge initially issued the recommendation as an order, but because Plaintiff had not consented to magistrate jurisdiction, the order was subsequently designated as a report and recommendation. (ECF No. 116.)

from his placement in a Christianity-based program as a condition of his parole. The Program Defendants were directors of the program. In their motion to dismiss they argued that their conduct of running a Christianity-based program at a homeless shelter does not constitute state action. Defendants Gamez and Diaz de Leon ("State Defendants") were Plaintiff's probation officer and supervisor, respectively. They moved to dismiss Plaintiff's claims under the Fourth and Fourteenth Amendments for failure to state a claim. In addition, Defendant Diaz de Leon moved to dismiss all the claims against her because Plaintiff failed to allege personal participation on her part. For the reasons given below, the Court sustains Plaintiff's objection, accepts in part and rejects in part the recommendation, denies the Program Defendants' motion to dismiss, and grants the State Defendants' motion to dismiss in part.

## I. LEGAL STANDARDS

When a magistrate judge issues a recommendation on a dispositive matter, the district court judge must "determine de novo any part of the magistrate judge's [recommendation] that has been properly objected to." In conducting its review, "[t]he district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3). An objection is proper if it is filed within fourteen days of the magistrate judge's recommendations and specific enough to enable the "district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *United States v. 2121 E. 30th St.*, 73 F.3d

1057, 1059 (10th Cir. 1996) (quotation omitted). The district judge need not, however, consider arguments not raised before the magistrate judge. *United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001) ("In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived.").

In the absence of a timely and specific objection, "the district court may review a magistrate's report under any standard it deems appropriate." *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991); *see also* Fed. R. Civ. P. 72 Advisory Committee's Note ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.").

In evaluating a motion to dismiss under Rule 12(b)(6), a court must accept as true all well-pleaded factual allegations in the complaint, view those allegations in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor. *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1135–36 (10th Cir. 2014); *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). Conclusory allegations are insufficient. *See Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009). Instead, in the complaint, the plaintiff must allege a "plausible" entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–556 (2007). A complaint warrants dismissal if it fails "*in toto* to render plaintiffs' entitlement to relief plausible." *Id.* at 569 n.14. "In determining the plausibility of a claim, we look to the elements of the particular cause of action, keeping in mind that the Rule 12(b)(6) standard does not require a plaintiff to set forth a prima facie case for each

element." *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 878 (10th Cir. 2017) (quotation and alteration omitted).

Plaintiff proceeds pro se; thus, the Court must liberally construe his pleadings. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). The Court, however, cannot act as Plaintiff's advocate. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

## II. BACKGROUND

Plaintiff did not object to the magistrate judge's statement of the factual and procedural background of this case, and the Court accepts and adopts it here. While on parole, Plaintiff was arrested for a parole violation. Although that complaint was ultimately dismissed, Defendant Gamez directed Plaintiff to stay at the Denver Rescue Mission in Fort Collins, wear an electronic monitoring device, and abide by the house rules implemented by the Program Defendants. Those rules required participation in Bible studies, daily prayer, daily chapel, church, and religious counseling. Upon his arrival at the Rescue Mission, Plaintiff stated his objection to having to participate in these activities because he is an atheist. Defendant Carmack directed Plaintiff not to talk about those beliefs. Concerned that Plaintiff might not be a good fit for the Christianity-based program, Defendant Carmack called Defendant Gamez, who assured him that Plaintiff would abide by the rules.

Defendant Carmack and Plaintiff met with Defendant Gamez in his office the following day, and Defendant Gamez confirmed that Plaintiff was required to abide by the rules. At Defendant Carmack's request, Defendant Gamez changed

Plaintiff's curfew, which Plaintiff alleges prevented him from getting a job. Days later, Plaintiff refused to attend church services and was kicked out of the program. Plaintiff reported to the parole office the following day, and his parole was revoked.

Plaintiff asserts four claims for relief. Claim One is based on the theory that being forced to choose between a religious program or jail violated his Fourth Amendment rights. Claims Two and Three are based on the theory that his placement in the program violated his First Amendment rights under both the Establishment and Free-Exercise Clauses. Claim Four is based on the theory that other participants in the program and the Denver Rescue Mission were permitted to do things he was not because he is an atheist, violating his right to equal protection under the Fourteenth Amendment.

The Program Defendants filed a motion to dismiss (ECF No. 97) and the State Defendants filed a motion to dismiss in part (ECF No. 99). The magistrate judge recommends granting both motions. (ECF No. 110.) With respect to the Program Defendants, the magistrate judge determined that Plaintiff's allegations did not establish that they were acting under color of state law. The magistrate judge applied the four tests used in the United States Court of Appeals for the Tenth Circuit—the nexus test, the symbiotic-relationship test, the joint-action test, and the public-functions test—and determined that the Program Defendants did not qualify as state actors under any of them. Plaintiff has objected to only the magistrate judge's application of the joint-action test.

No party objected to the magistrate judge's determinations that Plaintiff's conclusory allegations failed to state a claim with respect to Claims One and Four and that Plaintiff failed to allege sufficient personal participation by Defendant Diaz de Leon.

## III. DISCUSSION

"Application of the state action doctrine has been characterized as one of the more slippery and troublesome areas of civil rights litigation." *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995) (quotation omitted). Courts have taken a flexible approach to applying the doctrine, using a variety of tests that "apply with more or less force depending on the factual circumstances of each case." *Anaya v. Crossroad Managed Care Sys., Inc.*, 195 F.3d 584, 596 (10th Cir. 1999). Under the joint-action test, a court must determine whether "a private party is a willful participant in joint action with the State or its agents." *Gallagher*, 49 F.3d at 1453 (quotation omitted). The focus of the court's inquiry is "whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Id.* "[S]ome courts have adopted the requirements for establishing a conspiracy under Section 1983," including a requirement to show the "public and private actors share a common, unconstitutional goal." *Id.* at 1454 (quotation omitted). Thus, state action may be found if a state actor has participated in or influenced the challenged action. *Id.*

Here, the allegations state a plausible basis for concluding that Defendant Gamez and the Program Defendants acted in concert to deprive Plaintiff of his

First Amendment rights. Upon arriving at the Rescue Mission and being orientated on the house rules, Plaintiff told the Program Defendants that he is an atheist, that he was not there by choice, and that he did not want them to force their religion on him or stop him from expressing his religious beliefs. (ECF No. 95 at ¶ 25.) This led to a phone conversation between Defendants Gamez and Carmack and later a meeting in Defendant Gamez's office between him, Defendant Carmack, and Plaintiff. During the meeting and at other points during Plaintiff's participation in the program, Plaintiff was repeatedly reminded that he faced returning to prison if he did not follow the house rules. (*Id.* at ¶¶ 27, 29, 31, 35.) The complaint further alleges that Defendant Gamez changed Plaintiff's curfew at Defendant Carmack's request. (*Id.* at ¶¶ 41, 42.)

Construing Plaintiff's allegations liberally, the Court concludes Plaintiff has plausibly alleged that the Program Defendants and Defendant Gamez acted in concert to cause the alleged deprivation of Plaintiff's First Amendment rights. Given the flexibility with which courts have approached this area of law and the posture of the case—a pro se plaintiff responding to motions to dismiss—the Court concludes the allegations are sufficient to establish a plausible claim that the Program Defendants acted under color of law. Therefore, Plaintiff's objection to the recommendation is sustained, and the Program Defendants' motion to dismiss is denied.

The Court further concludes the magistrate judge's analysis was thorough and sound with respect to the determinations Plaintiff did not object to, and the Court discerns no clear error on the face of the

record. Accordingly, the recommendation is accepted in part, specifically with respect to Claims One and Four and Defendant Diaz De Leon.

## IV. CONCLUSION

The Court ORDERS that

(1) Plaintiff's objection (ECF No. 132) to the magistrate judge's recommendation is SUSTAINED;

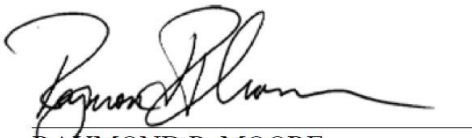
(2) the magistrate judge's recommendation (ECF No. 110) is ACCEPTED IN PART and REJECTED IN PART as set forth in this order;

(3) Program Defendants' motion to dismiss (ECF No. 97) is DENIED as to Counts Two and Three; and

(4) State Defendants' motion to dismiss in part (ECF No. 99) is GRANTED.

DATED this 5th day of March, 2019.

BY THE COURT:



RAYMOND P. MOORE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge S. Kato Crews

Civil Action No. 1:16-cv-002840-SKC

MARK JANNY,

Plaintiff,

v.

JOHN GAMEZ,
LORRAINE DIAZ DE LEON,
JIM CARMACK,
TOM KONSTANTY,

Defendants.

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ORDER ON DEFENDANTS' MOTIONS TO DISMISS [ECF. #97 & ECF. #99]

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Magistrate Judge S. Kato Crews

This matter is before the Court on Defendant Carmack and Defendant Konstanty's Motion to Dismiss Plaintiff's Fourth Amended Complaint [ECF. #97], filed on December 7, 2017. Also before the Court is Defendants Gamez and Diaz de Leon's Fourth Motion to Dismiss in Part [ECF. #99], filed on December 7, 2017. Pursuant to the Order of Reference dated April 4, 2017, this civil action was referred to the Magistrate Judge "for all purposes" pursuant to D.C.COLO.LCivR 72.2(d) and 28 U.S.C. § 636(c). [ECF. #36.] The Court has reviewed the Motions and related briefing, and the applicable law. Now being fully informed, the Court GRANTS both Motions.

## FACTUAL & PROCEDURAL BACKGROUND

Plaintiff Mark Janny, a *pro se* prisoner, filed this lawsuit pursuant to 42 U.S.C. § 1983 claiming that Defendants John Gamez and Lorraine Diaz de Leon (the "State Defendants"), and Jim Carmack and Tom Konstanty (the "Rescue Mission Defendants") violated his Fourth Amendment right against false imprisonment, his Fourteenth Amendment right to equal protection, and his First Amendment religious rights. [*See generally* ECF. #95.] Plaintiff seeks declaratory relief and monetary damages in an unspecified amount. [*Id.* at p.23.]

In his Fourth Amended Prisoner Complaint ("Fourth Complaint"), Plaintiff alleges the following, which the Court takes as true for purposes of deciding the Motions: in December 2014, Plaintiff was released from the Colorado Department of Corrections and placed on parole. [*Id.* at ¶2.] On December 30, 2014, Plaintiff was arrested for a parole violation; however, the complaint was ultimately dismissed because Plaintiff was held in custody for more than 30 days. [*Id.* at ¶¶3-4.] According to Plaintiff, the parole board ordered that Plaintiff be released back to his parole "as it was prior to [his] arrest." [*Id.* at ¶4.]

Despite this order, Defendant Gamez, with Defendant Diaz de Leon's permission, gave Plaintiff a parole directive requiring him to stay at The Denver Rescue Mission in Fort Collins ("Rescue Mission"), and wear an electronic monitoring device. [*Id.* at ¶¶7-11.] Defendant Gamez told Plaintiff that Plaintiff would be placed at the Rescue Mission (as opposed to a friend's home) because Plaintiff "needed more supervision and could not be trusted." [*Id.* at ¶7.]

Defendant Gamez also directed Plaintiff to follow all of the Rescue Mission's "house rules." [*Id.*] Plaintiff alleges the "house rules" applied only to The Program, a "Christian faith based community placement." [*Id.*] The house rules allegedly included twice-weekly bible studies, daily prayer, daily chapel, church, and one-on-one religious counseling. [*Id.* at ¶20.] Although Plaintiff is an atheist, and informed Defendant Gamez of this fact, Defendant Gamez would not consider other non-religious placements. [*Id.* at ¶¶7, 21, 26.] Further, Defendant Gamez told Plaintiff that if he refused this placement, the only other option was jail. [*Id.* at ¶8.]

Upon his arrival at the Rescue Mission on February 3, 2015, Plaintiff told Defendant Carmack that he was an atheist. [*Id.* at ¶24.] Defendant Carmack allegedly told Plaintiff that he was not permitted to talk about those beliefs while he was at the Rescue Mission. [*Id.*] After Plaintiff told Defendant Carmack that he did not want to be in The Program, Defendant Carmack stated that perhaps Plaintiff should be in jail and called Defendant Gamez to discuss. [*Id.* at ¶¶25-26.] Defendant Carmack later informed Plaintiff that it had been decided that he would stay in The Program despite being an atheist. [*Id.* at ¶26.] Defendant Carmack also said that Defendant Gamez assured him Plaintiff would abide by all of the rules. [*Id.*] In addition, Defendant Carmack informed Plaintiff that he was a "guinea pig" and that Plaintiff had been accepted into The Program as a favor to Defendant Gamez. [*Id.* at ¶28.]

On February 4, 2015, Defendant Carmack took Plaintiff to Defendant Gamez's office for an impromptu meeting. [*Id.* at ¶29.] During the meeting,

Defendant Carmack complained about Plaintiff's attitude, his being an atheist, and Defendant Carmack's concerns that Plaintiff would not participate with a good attitude. [*Id.*] Defendant Carmack had Defendant Gamez affirm that Plaintiff would follow the rules or have his parole violated. [*Id.*] In addition, Defendant Carmack had Defendant Gamez change Plaintiff's curfew, which prevented Plaintiff from getting a job. [*Id.*]

During his stay at the Rescue Mission, Plaintiff was forced to attend two Christian bible studies with Defendant Konstanty, who acknowledged that Plaintiff did not want to be there. [*Id.* at ¶31.] In addition, Plaintiff was required to attend daily prayers, chapel, and perform forced labor. [*Id.* at ¶32.] On one occasion, Defendant Carmack tried to convert Plaintiff to Christianity. [*Id.* at ¶33.] Defendant Carmack also told Plaintiff that if he broke any more rules, he would be kicked out of The Program. [*Id.* at ¶34.]

On February 8, 2015, Plaintiff refused to attend church services or chapel and, thereafter, Defendant Carmack asked Plaintiff to leave The Program. [*Id.*] Because it was a Sunday and the parole office was not open, Plaintiff went to a friend's home. [*Id.* at ¶45.] The following day, Plaintiff went to the parole office, but Defendant Gamez had already issued a warrant for Plaintiff's arrest. [*Id.* at 46.] Thereafter, Plaintiff's parole was revoked for absconding. [*Id.* at ¶48.]

After several amendments, Plaintiff was permitted to amend his complaint a fourth (and final) time. [ECF. #93.] On December 7, 2017, the Defendants filed their Motions to Dismiss [ECF. #97;

ECF. #99], which were followed by Plaintiff's Responses [ECF. #103; ECF. #104] on January 16, 2018. Defendants Carmack and Konstanty filed a Reply [ECF. #105] on January 30, 2018.

## STANDARDS OF REVIEW

### A. Fed. R. Civ. P. 12(b)(6)

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). In deciding a motion under Rule 12(b)(6), the Court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124-25 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). The Court is not, however, "bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition, this Court may consider exhibits attached to the complaint without converting the motion into one for summary judgment pursuant to Rule 56. *See Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991).

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft*, 556 U.S. at 678 (internal quotation marks omitted). A claim is plausible when the plaintiff "pleads factual content that allows the court to draw

the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard requires more than the sheer possibility that a defendant has acted unlawfully. *Id.* Facts that are "merely consistent" with a defendant's liability are insufficient. *Id.* "[T]o state a claim in federal court, a complaint must explain what each defendant did to him or her; when the defendant did it; how the defendant's actions harmed him or her; and what specific legal right the plaintiff believes the defendant violated." *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007).

The ultimate duty of the Court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007). "Nevertheless, the standard remains a liberal one, and 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely.'" *Morgan v. Clements*, No. 12-cv-00936-REB-KMT, 2013 WL 1130624, at *1 (D. Colo. Mar. 18, 2013) (quoting *Dias v. City & County of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009)).

**B. Pro Se Parties**

The Court is cognizant of the fact that Plaintiff is not an attorney; consequently, his pleadings and other papers have been construed liberally and held to a less stringent standard than formal pleadings drafted by a lawyer. *See Hall*, 935 F.2d at 1110 (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). Therefore, "if the court can reasonably read the

pleadings to state a claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper authority, his confusion of legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Id.* However, this Court cannot act as a pro se litigant's advocate. *Id.* It is the responsibility of the *pro se* plaintiff to provide a simple and concise statement of his claims and the specific conduct that gives rise to each asserted claim. *See Willis v. MCI Telecomms.*, 3 F. Supp. 2d 673, 675 (E.D.N.C. 1998).

Moreover, the Court may not "supply additional factual allegations to round out a plaintiff's complaint." *Whitney v. State of New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997). Nor may a plaintiff defeat a motion to dismiss by alluding to facts that have not been alleged, or by suggesting violations that have not been pleaded. *Associated Gen. Contractors of Cal. Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). In the end, *pro se* parties must "follow the same rules of procedure that govern other litigants." *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994).

**C. Qualified Immunity**

The State Defendants have raised the qualified immunity defense to Plaintiff's false imprisonment and equal protection claims. Qualified immunity shields "government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quotation omitted). Qualified immunity is "immunity

from suit rather than a mere defense to liability [and] it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Whether defendants are entitled to qualified immunity is a legal question. *Wilder v. Turner*, 490 F.3d 810, 813 (10th Cir. 2007).

When the qualified immunity defense is raised, the plaintiff bears the burden of showing, with particularity, facts and law establishing the inference that the defendant violated a clearly established federal constitutional or statutory right. *Walter v. Morton,* 33 F.3d 1240, 1242 (10th Cir. 1994). If the plaintiff fails to establish either (a) a violation of a federal constitutional or statutory right, or (b) that the claimed right was clearly established, the defendant is entitled to qualified immunity. *Pearson*, 555 U.S. at 236. The court has the discretion to consider these prongs in any order it chooses. *Leverington v. City of Colorado Springs*, 643 F.3d 719, 732 (10th Cir. 2011).

Regarding the first prong, if no federal constitutional or statutory right would have been violated even assuming the truth of the plaintiff's allegations, then the court's inquiry is at an end. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Regarding the second prong, whether an alleged constitutional right was "clearly established" must be considered "in light of the specific context of the case, not as a broad general proposition." *Id.* An official's conduct "violates clearly established law when, at the time of the challenged conduct, 'the contours of a right are sufficiently clear' that every 'reasonable official would have understood that what he is doing is violating that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741

(2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). To be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.*

## DISCUSSION

### A. Rescue Mission Defendants' Motion to Dismiss [ECF. #97]

In their Motion, Defendants Carmack and Konstanty argue that Plaintiff's claims against them should be dismissed pursuant to Rule 12(b)(6) because Plaintiff has failed to allege that they are state actors. The Court agrees.

"Under Section 1983, liability attaches only to conduct occurring 'under color of law.'" *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995). "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). "[M]erely private conduct, no matter how discriminatory or wrongful," is excluded from the reach of §1983. *Am. Mfrs. Mut. Inc. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (internal quotation marks and citations omitted).

The Tenth Circuit has recognized four tests to help determine whether state action exists:

> First, the close nexus test asks whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be

> fairly treated as that of the State itself. Second, the symbiotic relationship test finds state action when the State has so far insinuated itself into a position of interdependence with the private party. Third, under the joint action test, the court will find state action if a private party is a willful participant in joint activity with the State or its Agents. Finally, the public functions test finds state action when a private entity exercises powers traditionally exclusively reserved to the State.

*Anglin v. City of Aspen, Colo.*, 552 F. Supp.2d 1229, 1240 (D. Colo. 2008) (citing *Gallagher*, 49 F.3d at 1448 (further internal quotation marks and citations omitted)). In his Response, Plaintiff contends the Rescue Mission Defendants qualify as state actors under all four tests.

**1. Close Nexus**

Under the close nexus test, a plaintiff must demonstrate that "there is a sufficiently close nexus" between the government and the challenged conduct such that the conduct "may be fairly treated as that of the state itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). A private actor can become a state actor for purposes of § 1983 "if the state exercises sufficiently coercive power over the challenged action." *Wittner v. Banner Health*, 720 F.3d 770, 775 (10th Cir. 2013) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001)).

In his Response, Plaintiff argues that Defendant Gamez coerced Plaintiff in to following The Program's rules with threats of jail or parole revocation. He also argues that Defendant Carmack coerced Plaintiff into participating in religious activities with threats of prison. [ECF. #103.] This argument misses the mark, however, because the proper inquiry under the law is whether Defendant Gamez exercised coercive power over the *Rescue Mission Defendants*' alleged unlawful actions. *Wittner*, 720 F.3d at 775.

As the Court understands his Fourth Complaint, Plaintiff challenges: (1) being placed in The Program; (2) Defendant Carmack's attempts to force Plaintiff to abide by the house rules; and, (3) the Rescue Mission Defendants' attempts to convert Plaintiff to Christianity. The allegations in the Fourth Complaint, however, do not demonstrate coercion by the State Defendants over the actions of Defendants Carmack or Konstanty. Rather, according to the Fourth Complaint, Defendant Carmack made the decision to accept Plaintiff into the Program and did so only as a favor to Defendant Gamez. [ECF. #95 at ¶28.] It is also clear that it was Defendant Carmack's decision to expel Plaintiff from the Program. [*Id.* at ¶34.] Further, the allegations do not indicate that the State Defendants exercised coercive power over the Rescue Mission Defendants' alleged attempts to force Plaintiff's participation in religious activities or their attempts to convert Plaintiff to Christianity. Thus, the Fourth Complaint does not establish a close nexus between the conduct of the Rescue Mission Defendant's and the State Defendants.

**2. Symbiotic Relationship**

In *Gallagher*, the Tenth Circuit explained that when "the state 'has so far insinuated itself into a position of interdependence' with a private party 'it must be recognized as a joint participant in the challenged activity.'" 49 F.3d at 1451 (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)). In examining whether a symbiotic relationship exists, the analysis starts by asking "whether and to what extent the state's relationship with the private actor goes beyond the "mere private [purchase] of contract services." *Wittner*, 720 F.3d at 778 (quoting *Brentwood*, 531 U.S. at 299). Although payments under government contracts are insufficient to establish a symbiotic relationship, a "public-private relationship can transcend that of mere client and contractor if the private and public actors have sufficiently commingled their responsibilities." *Id.*

In the Fourth Complaint, Plaintiff alleges that the Fort Collins parole office utilizes the Rescue Mission to "rehabilitate and house parolees." He further alleges that "[t]he Program offers free bed space and parole offers The Program free labor and referrals." [ECF. #95 at ¶13.] In his Response, Plaintiff also notes that Defendant Carmack participated in Plaintiff's parole office visit and asked Defendant Gamez to change Plaintiff's curfew. [ECF. #103 at P.4.] The Court concludes that these allegations are insufficient to demonstrate a symbiotic relationship.

Plaintiff does not allege that the State Defendants have the authority to unilaterally place parolees in

the Program — indeed, as previously noted, the allegations suggest the opposite. [ECF. #95 at ¶28.] Although he suggests a *quid pro quo* arrangement, Plaintiff does not allege the State Defendants have a contract with the Denver Rescue Mission, or that the State Defendants extensively participate in running the Program or in dictating its governance. The kind of heavily interdependent relationship that typically characterizes a symbiotic relationship is not alleged here; thus, the Court concludes the Recuse Mission Defendants are not state actors under this test. *See Wittner*, 720 F.3d at 779 (citing *Milonas v. Williams*, 691 F.2d 931, 940 (10th Cir.1982), and *Brentwood* 531 U.S. at 296, as examples of qualifying symbiotic relationships).

**3. Joint Action**

In applying the joint action test, courts ask "whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Gallagher*, 49 F.3d at 1453. The Tenth Circuit has held that "one way to prove willful and 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). When a plaintiff seeks to establish state action based on a theory of conspiracy, "a requirement of the joint action charge . . . is that both public and private actors share a common unconstitutional goal." *Anaya v. Crossroads Managed Care Sys.*, 195 F.3d 584, 596 (10th Cir. 1999). Furthermore, "the pleadings must specifically present facts tending to show agreement and concerted action." *Hunt v. Bennett*, 17 F.3d 1263, 1268 (10th Cir. 1994).

In his Response, Plaintiff contends he alleged three separate "meeting of the minds" between the State Defendants and Rescue Mission Defendants: (1) Defendants Carmack and Gamez's agreement to place Plaintiff in The Program; (2) Defendant Carmack's call to Defendant Gamez wherein Defendant Gamez confirmed that Plaintiff would abide by the house rules; and, (3) the parole office visit when Defendant Carmack had Defendant Gamez both affirm that Plaintiff would abide by the house rules and agree to change Plaintiff's curfew. [ECF. #103 at p.8-9.] The Court is not persuaded that these alleged agreements sufficiently establish joint action.

First, Plaintiff must allege more than a general meeting of the minds. *See Gallagher*, 49 F.3d at 1453-55. His allegations must show that the Defendants shared a common unconstitutional goal. For example, in *Gallagher*, the Tenth Circuit held that a concert promoter who rented a state university's stadium and then conducted illegal patdown searches of concert-goers did not act under the color of state law. 49 F.3d at 1455. Although the Circuit Court accepted that the private and state parties likely shared a common goal of hosting a successful event, it held that this alone was insufficient to establish a conspiracy to violate patrons' civil rights. *Id.* Instead, the plaintiffs needed to show that the concert promoter and the university shared the specific common goal to conduct the pat-downs. *Id.*

Here, although Defendants Gamez and Carmack may have had a common goal of placing Plaintiff at the Denver Rescue Mission and having him follow the house rules, the Fourth Complaint does not allege they shared a common goal to force Plaintiff to engage

in religious activities and convert him to Christianity. Indeed, according to the Fourth Complaint, Defendant Gamez's intent in placing Plaintiff at the Rescue Mission (as opposed to with a friend) was to provide Plaintiff with the supervision he required. [ECF. #95 at ¶7.] And, according to Plaintiff's allegations, "Defendant Gamez did no independent investigations of what happened at The Program." [ECF. #95 at ¶46.] Thus, the allegations do not establish that Defendant Gamez had an unconstitutional goal. At best, Plaintiff's allegations indicate that Defendant Gamez acquiesced to Defendant Carmack's conduct. This, however, does not constitute state action. *Wittner*, 720 F.3d at 778-79 ("[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action.").

Plaintiff cites *Hanas v. Inner City Christian Outreach, Inc.*, 542 F. Supp. 2d 684, 693-94 (E.D. Mich. 2008), and argues that the facts there are very similar to the facts in this matter. In *Hanas*, the plaintiff was placed in a faith-based rehabilitation program after pleading guilty to drug charges. During sentencing, the judge admonished the plaintiff to follow the rules of the program and expressly stated that "the rules of Pastor Rottiers' Program are the rules of the Court. It's just the same. You screw up that, you screw up this." *Id.* at 690. On that basis, the court found that the drug court acted jointly with the private rehabilitation program. *Id.*

Although the Court acknowledges similarities between *Hanas* and this case, it concludes that *Hanas* is distinguishable from the present facts. In that case, the district court reached its conclusion on the basis

that the private rehabilitation program received the endorsement of the drug court's authority. *Id.* By contrast, Plaintiff's Fourth Complaint does not allege facts showing any similar endowing of state authority to private actors, or adopting of private rules as state mandates. Moreover, the district court in *Hanas* did not analyze whether there was a common unconstitutional goal between the state and the private defendants, as the Court analyzes here.

As discussed above, in the Tenth Circuit, the focus is on whether the parties have acted in concert in effecting a particular deprivation of constitutional rights. *Gallagher*, 49 F.3d at 1453. Furthermore, Defendant Gamez, unlike the drug court in *Hanas*, did not expressly adopt The Program's rules as rules of the state. Although Defendant Gamez allegedly told Plaintiff to abide by The Program's rules, the Fourth Complaint does not contain sufficient factual allegations to establish that Defendant Gamez either understood what these rules included, or adopted these rules as state authority. In fact, according to the Fourth Complaint, Plaintiff only became acquainted with the house rules when he arrived at the Rescue Mission. [ECF. #95 at ¶24.] Thus, the Court does not find *Hanas* applicable and concludes that the allegations in the Fourth Complaint fail to establish joint action on the part of the State Defendants and the Rescue Mission Defendants.

**4. Public Function**

Finally, in a single sentence, Plaintiff offers the conclusory argument that the Rescue Mission Defendants are state actors under the public functions theory because "[i]t is the exclusive public

function of the state to hold pre parole revocation detainees until they are seen by the parole revocation board." [ECF. #103 at p.14.] First, it is not entirely clear what Plaintiff means by "pre parole revocation detainee." Second, to the extent Plaintiff relies on his contention that he was unlawfully imprisoned at the Rescue Mission, as explained below, the allegations do not establish an unlawful restraint on Plaintiff's person. *See infra* Sec.C.1. Further, Plaintiff has cited no law to support his proposition, and the Court has found none. For that reason alone, the Court rejects this argument.

Even if Plaintiff had presented more than an undeveloped argument and legal conclusions, Defendants aptly observe that courts in other jurisdictions have concluded that the provision of transitional housing is not a function traditionally provided by the state. *Byng v. Delta Recovery Servs., LLC*, No. 6:13-cv-377 (MAD/ATB), 2013 WL 3897485, at *9 (N.D. N.Y. July 29, 2013) ("the provision of transitional housing to former inmates under parole supervision is not a function that has traditionally been the exclusive prerogative of the state") (collecting cases). The Court also notes that other private providers of transitional housing have not been found to be state actors. *See Allen v. Dawson*, No. 11-cv-02251-CMA-MJW, 2012 WL 2878031, at *1 (D. Colo. July 12, 2012) (rejecting plaintiff's argument that employees of private halfway houses are always state actors and noting that "[c]ourts often find that employees of private halfway houses were not acting under the color of state law."). Consequently, the Court is not persuaded that the Rescue Mission Defendants are state actors under the public

functions test.

Because Plaintiff's allegations, accepted as true, do not establish that Defendant Carmack or Defendant Konstanty acted under color of state law, Plaintiff has failed to state a cognizable claim for relief against them. Consequently, the claims against the Rescue Mission Defendants shall be dismissed with prejudice, and the Rescue Mission Defendants' Motion is GRANTED.[1]

**B. State Defendants' Motion to Dismiss [ECF. #99]**

The State Defendants seek to dismiss Plaintiff's false imprisonment (Claim One) and equal protection (Claim Four) claims for failure to state a claim upon which relief can be granted. They also seek to dismiss all of the claims against Defendant Diaz de Leon on the basis that Plaintiff has failed to sufficiently allege her personal participation. The Court agrees with the State Defendants.

**1. False Imprisonment**

"To maintain a . . . false imprisonment claim under § 1983, [Plaintiff] must demonstrate the elements of a common law claim and show that [his] Fourth Amendment right to be free from unreasonable search and seizure has been violated." *Trimble v. Park Cty. Bd. Of Com'rs*, 242 F.3d 390, *3 (10th Cir. Dec. 4, 2000) (Table). In this case, Plaintiff must establish that "an unlawful restraint" was

[1] The Court allowed Plaintiff to amend his complaint on four separate occasions. On November 16, 2017, the Court ordered that there would be no further amendments in this case. [ECF. #93.]

placed upon his freedom to come and go as he pleased. *Blackman for Blackman v. Rifkin*, 759 P.2d 54, 67 (Colo. App. 1988); *see also Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996) (Colorado tort law provides the starting point for determining the elements of a § 1983 claim for violation of the Fourth Amendment).

Here, Plaintiff contends that he was falsely imprisoned when Defendant Gamez altered Plaintiff's conditions of parole and required him to establish residence at the Rescue Mission. [ECF. #95 at ¶¶1-15.] As the Court understands his allegations, Plaintiff also challenges the time of his curfew and the type of electronic monitoring device he was required to wear. [*Id.* at ¶¶ 11, 27.]

These allegations do not establish that Defendant Gamez placed an unlawful restraint on Plaintiff. It is well-settled that there is no constitutional or inherent right to any particular type of parole. *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 7 (1979) ("[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence"). Indeed, "[t]he traditional view is that one who is on parole is granted a special privilege to be outside the wall of the institution while serving his sentence . . . . At the same time the parolee remains in the constructive custody and is subject to be returned to the enclosure at any time." *People v. Lucero*, 772 P.2d 58, 60 (Colo. 1989) (quoting *Hutchison v. Patterson*, 267 F.Supp. 433, 434 (D. Colo. 1967)).

Plaintiff — citing *Goetz v. Gunter*, 830 P.2d 1154 (Colo. App. 1992) — contends that Colorado law

required Defendant Gamez to return Plaintiff to the same conditions he was in prior to his December 2014 arrest. [ECF. #95 at ¶15; *see also* ECF. #104 at pp.11-13.] The Court disagrees. Though Goetz discussed the parole board's duty to return the parolee to the same status he possessed at the time his parole was improperly revoked, the court discussed "status" in terms of the length of parole, not the conditions placed on parole. *Id.* at 1156.

Plaintiff has no constitutional right to any specific form of parole or release before the completion of his sentence. *Greenholtz*, 442 U.S. at 7. Further, Plaintiff had the option of refusing the conditions of parole. *See White v. People*, 866 P.2d 1371, 1374 (Colo. 1994) (stating that if a parolee does not want to participate in the terms of parole, he is denied the alternative of parole and will serve his sentence). Consequently, he has not asserted a valid constitutional claim for false imprisonment and Defendants Gamez and Diaz de Leon are entitled to qualified immunity on Claim One. This claim shall be dismissed.[2]

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[2] The State Defendants also argue that a common law tort claim based on false imprisonment would be barred by the statute of limitations and Plaintiff's failure to comply with the Colorado Governmental Immunity Act. However, Plaintiff's Fourth Complaint clearly asserts violations of his constitutional rights. In his Response, Plaintiff does not address any of Defendants tort arguments, but persists in his contention that the Defendants violated his constitutional rights. Further, the Court has already concluded that Plaintiff failed to allege any unlawful restraint, which would preclude a common law claim of false imprisonment. Thus, the Court need not address these arguments.

**2. Equal Protection**

The Equal Protection Clause of the Fourteenth Amendment prohibits the government from treating similarly situated individuals differently. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). To prevail on an equal protection claim, Plaintiff must make a threshold showing that he was treated differently from others who were similarly situated to him. *Taylor v. Roswell Ind. Sch. Dist.*, 713 F.3d 25, 53 (10th Cir. 2013); *Brown v. Montoya*, 662 F.3d 1152, 1172-73 (10th Cir. 2011); *Templeman v. Gunter*, 16 F.3d 367, 371 (10th Cir. 1994) (prisoner asserting an equal protection violation must show he was treated differently than other prisoners who are similar to him "in every relevant respect"). Even "slight differences in [inmates'] histories" render them not "similarly situated" for purposes of an equal protection analysis. *Templeman*, 16 F.3d at 371.

Here, Plaintiff contends that he was given an earlier curfew because he is an atheist, while other Christian parolees were permitted more time in the community. [ECF. #95 at ¶¶40-41.] At the threshold, Plaintiff has not shown he was similarly situated in all material respects to others on parole at the Rescue Mission. His vague and conclusory assertions are insufficient to state a claim for relief under the Equal Protection Clause. *See Straley v. Utah Bd. Of Pardons*, 582 F.3d 1208, 1215 (10th Cir. 2009) ("[B]are equal protection claims are simply too conclusory to permit a proper legal analysis."); *Ketchum v. Cruz*, 775 F. Supp. 1399, 1403 (D. Colo. 1991) (a pro se litigant's vague and conclusory allegations that his federal constitutional rights have been violated do not entitle him to a day in court

regardless of how liberally the court construes such pleadings), *aff'd*, 961 F.2d 916 (10th Cir. 1992). Moreover, given the inherently individualized nature of parole decisions, any "claim that there are no relevant differences between [Plaintiff] and other inmates that reasonably might account for their different treatment is not plausible or arguable." *Templeman*, 16 F.3d at 371.

The Court finds the allegations in the Fourth Complaint fail to plausibly allege that Plaintiff is similarly situated to other parolees, beyond conclusory allegations and legal conclusions [*Id.*; *see also* ECF. #104 at p.18]. Therefore, the Fourth Complaint fails to state a claim, and the State Defendants are also entitled to qualified immunity on this claim.

**3. Personal Participation**

Personal participation is an essential allegation in a civil rights action. *See Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976). To maintain a § 1983 claim, the plaintiff must allege facts showing the defendant was "personally involved in the decisions leading to [the plaintiff's] mistreatment." *Escobar v. Reid*, 668 F.Supp.2d 1260, 1290 (D. Colo. 2009). A plaintiff must establish an affirmative link between the alleged constitutional violation and each defendant's participation, control, or direction. *Serna v. Colo. Dept. of Corr.*, 455 F.3d 1146, 1152-53 (10th Cir. 2006). "Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft*, 556 U.S. at 676.

"Supervisors are only liable under § 1983 for their own culpable involvement in the violation of a person's constitutional rights." *Serna*, 455 F.3d 1146 at 1151. To establish supervisor liability, a plaintiff must establish "a deliberate, intentional act by the supervisor to violate constitutional rights." *Jenkins v. Wood*, 81 F.3d 988, 994-95 (10th Cir. 1996). In demonstrating such liability, the plaintiff must show that the subordinate violated the constitution, and must also show an "affirmative link between the supervisor and the violation." *Serna*, 455 F.3d at 1151. This requires "more than a supervisor's mere knowledge of his subordinate's conduct." *Estate of Booker v. Gomez*, 745 F.3d 405, 435 (10th Cir. 2014) (citing *Schneider v. City of Grand Junction Police Dept.*, 717 F.3d 760, 767 (10th Cir. 2013)). Further, negligence is insufficient; a plaintiff must demonstrate the "supervisor acted knowingly or with deliberate indifference that a constitutional violation would occur." *Serna*, 455 F.3d 1146 at 1151.

A careful review of the allegations in the Fourth Complaint demonstrates that Plaintiff has failed to sufficiently allege personal participation on behalf of Defendant Diaz de Leon. In the Fourth Complaint, Plaintiff alleges that Defendant Diaz de Leon approved Plaintiff's placement at the Rescue Mission. [ECF. #95 at ¶¶9, 28, 36.] There are no allegations that she knew, or acted with deliberate indifference to the fact, that Plaintiff would be forced to participate in religious activities or that the Rescue Mission Defendants would try to convert him to Christianity.

In his Response, Plaintiff repeats the allegations regarding Defendant Diaz de Leon's approval of his placement, and argues that "Defendant Diaz de Leon

wouldn't speak with [him]." [ECF. #104 at p.23.] Citing *Jones v. Wilhelm*, 425 F.3d 455 (7th Cir. 2005), Plaintiff argues that Defendant Diaz de Leon "cannot create a defense based on willful ignorance." [ECF. #104 at p.23.] This argument is problematic for two reasons. First, Plaintiff's argument is inconsistent with the allegations in his Fourth Complaint. There, he alleged that Defendant Diaz de Leon was unavailable, whereas the argument in his Response insinuates that she refused to see him. Plaintiff may not amend his Fourth Complaint via arguments made in his Response. *See In re Quest Commc'ns Intern., Inc.*, 396 F.Supp.2d 1178, 1203 (D. Colo. 2004) (plaintiffs may not further amend their complaints by alleging new facts in response to a motion to dismiss).

Second, Plaintiff's citation to *Jones v. Wilhelm* is misplaced. There, in discussing the two-part qualified immunity test, the defendant officer asked the court to impute the defendant's actual knowledge to the hypothetical, reasonable officer. 396 F.3d at 461. The Seventh Circuit rejected this argument, concluding that this "would enable state agents to trample on the constitutional rights of citizens by maintaining willful ignorance of what reasonable officers should have known." *Id.* Here, the two-part qualified immunity test is not implicated; rather, the question is whether Defendant Diaz de Leon had the requisite state of mind to sufficiently garner her personal participation. The allegations In the Fourth Complaint simply do not establish that she knew a constitutional violation would occur, or acted with deliberate indifference to the same.

Plaintiff also seems to argue that Defendant Diaz de Leon must have known about the constitutional

violation based on a widespread pattern of placing parolees at the Rescue Mission. [ECF. #104 at pp. 24-25.] Plaintiff relies on his allegation that "several other parolees" had been placed at the Rescue Mission by Defendants Gamez and Diaz de Leon. This threadbare allegation, however, lacks any specificity and is not sufficient to demonstrate a pattern of behavior. *Iqbal*, 556 U.S. at 678. Consequently, the Court concludes that the allegations in the Fourth Complaint do not establish personal participation on the part of Defendant Diaz de Leon and dismisses Plaintiff's claims against her.

**ORDERS**

For the above-reasons, Defendant Carmack and Defendant Konstanty's Motion to Dismiss [ECF. #97] pursuant to Rule 12(b)(6) is GRANTED, and the claims against these Defendants are dismissed with prejudice. It is further ORDERED that these Defendants are dismissed as parties to this action.

It is further ordered that Defendant Gamez and Defendant Diaz de Leon's Motion to Dismiss [ECF. #99] pursuant to Fed. R. Civ. P. 12(b)(6) is GRANTED and Claim One and Claim Four are dismissed with prejudice, and all claims against Defendant Diaz de Leon are dismissed with prejudice. It is further ORDERED that Defendant Diaz de Leon is dismissed as a party to this action.

This Order does not affect the remaining claims in the Fourth Complaint (Claims Two and Three) asserted against Defendant Gamez, which shall proceed to be litigated.

It is further ORDERED that a Scheduling Conference is set for October 23, 2018, at 10:00 a.m. to set discovery deadlines and discuss what discovery, if any, is needed regarding Plaintiff's remaining claims. Plaintiff and his case manager shall arrange for his participation in this conference by calling 303.335.2124 at the scheduled time.

DATED: September 20, 2018.

BY THE COURT:

S. Kato Crews
United States Magistrate Judge
District of Colorado