**No. 20-1105**

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

MARK JANNY,

*Plaintiff-Appellant,*

v.

JOHN GAMEZ, JIM CARMACK, and TOM KONSTANTY,

*Defendants-Appellees.*

On Appeal from the United States District Court
for the District of Colorado
(No. 16-cv-02840-RM-SKC (Moore, J.))

# APPELLANT'S OPENING BRIEF

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## STATEMENT OF RELATED APPEALS

There are no prior or related appeals.

## JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983. The district court entered an amended summary judgment order and a final judgment on February 21, 2020. Appellant's Appendix, Vol. II ("II App.") 487-95.[1] Plaintiff, through counsel, filed a timely notice of appeal on March 18, 2020, and, *pro se*, filed an amended notice of appeal on March 26, 2020. *Id*. 496-500. This Court has jurisdiction under 28 U.S.C. § 1291.

## ISSUES PRESENTED

In February 2015, Colorado parole officer John Gamez ordered parolee Mark Janny to (1) stay at the Denver Rescue Mission in Fort Collins operated by his friend, Jim Carmack; and (2) participate fully in a Christianity-based community at the facility known as "the Program." Janny is an atheist and made that known. Gamez, Carmack, and Carmack's colleague, Tom Konstanty, all threatened Janny with being returned to jail if he refused to participate in Christian worship and other religious activities. After several days in the Program, Janny refused to attend an outside church service and the daily chapel service, and

[1] Appellant's Appendix consists of two consecutively-paginated volumes. For ease of reference, the amended order and judgment attached hereto are paginated as in the Appendix as well as independently.

Carmack expelled him from the facility. Gamez had a warrant issued for Janny's arrest, and Janny was incarcerated and later had his parole revoked for "absconding" from the facility. Janny, who was *pro se*, sued Gamez, Carmack, and Konstanty under 42 U.S.C. § 1983, alleging violations of his First Amendment religious freedoms. The issues presented are:

1. Whether the district court erred in granting summary judgment to Defendants on Janny's Establishment Clause claim where the court disregarded (a) Janny's competent evidence that the three Defendants forced Janny to choose between Christian worship and jail; and (b) numerous genuine disputes of material fact.

2. Whether the district court erred in granting summary judgment to Defendants on Janny's Free Exercise Clause claim where the court disregarded (a) Janny's competent evidence that the three Defendants coerced Janny to abandon his atheist beliefs and adopt Christian ones; and (b) numerous genuine disputes of material fact.

3. Whether the district court erred in ruling that Carmack and Konstanty did not act under color of state law.

4. Whether the district court erred in ruling that Gamez was entitled to qualified immunity.

## STATEMENT OF THE CASE

### A. Factual Background

#### 1. Gamez's Assignment of Janny to the Rescue Mission

Defendant-appellee John Gamez, an employee of the Colorado Department of Corrections, became Plaintiff-appellant Mark Janny's parole officer in December 2014. I App. 289-90. On December 30, Gamez had Janny arrested for allegedly violating his curfew and failing to appear for a required appointment. *Id.* 231-32. Gamez also sought revocation of Janny's parole on the same basis. *Id.* 232. Janny was jailed until January 2, 2015, when he was released into Gamez's supervision. *Id.* 233. Janny was re-arrested on January 7 for another curfew violation and remained in jail until February 2, *id.* 234-35, 237, when he was released as a result of the Colorado State Board of Parole's dismissal, without prejudice, of the parole revocation complaint filed by Gamez. *Id.* 25, 26; II App. 407.

The following day, Gamez met with Janny and gave him a written parole "directive" that related to his required "residence of record." I App. 238, 251; II App. 359. The directive required Janny to (1) reside at the Denver Rescue Mission located in Fort Collins; and (2) "abide by all house rules as established." I App. 251. Moreover, "[i]f said rules are violated, the violation will lead to [Janny] being placed at Washington County jail to address the violation." *Id.*

Gamez further explained the directive, saying that his friend, Jim Carmack, was the Director of the Rescue Mission and that he was expecting Janny. *Id.* 26, 165 (p. 54); II App. 408. Gamez and Carmack had "an informal arrangement" that allowed Gamez to place "certain parolees" at the Rescue Mission. I App. 264. Gamez told Janny that he was required to live at the Rescue Mission until Gamez "could bring [Janny] in front of the parole board on the complaint that had been dismissed without prejudice." *Id.* 26. There was no discussion as to the meaning of the directive's phrase "all house rules as established." *Id.* 165 (p. 55).

Janny told Gamez that he did not want to stay at the Rescue Mission and suggested an alternative residence of record, the home of family friends. *Id.* 26. Gamez refused to investigate this option and rejected Janny's suggestion. *Id.* Janny asked to speak to Gamez's supervisor, but Gamez said that the supervisor had already approved the placement and the parole conditions. *Id.* Gamez ended the meeting by giving Janny an ankle monitor and monitoring box, telling Janny to report immediately to Carmack at the Rescue Mission, and scheduling another meeting with Janny the next day at 9:00 a.m. *Id.* 27, 166 (p. 71); II App. 408.

Janny reported to the Rescue Mission and stayed there the first night. I App. 27-28. He was familiar with the building, as it previously housed a homeless shelter called "Open Door" where he had stayed in the past. *Id.* 165

(pp. 55-56). Janny met with the Rescue Mission staff, who did not mention any sort of religious program or activity at the facility. *Id.* 165 (pp. 56), 166 (p. 70).

**2. Events of February 4**

**a. First Meeting at Parole Office**

As scheduled, Janny met with Gamez at the parole office shortly after 9:00 a.m. on February 4. *Id.* 238. During this meeting, Gamez set Janny's daily curfew at 6:00 p.m. *Id.* Gamez also told Janny that if he was kicked out of the Rescue Mission, he should report immediately to the parole office if open, or if closed, as soon as it reopened. II App. 409. Finally, Gamez gave Janny a parole-revocation complaint identical to the one that the Parole Board had dismissed without prejudice, *i.e.*, based on the curfew violations and the missed appointment. *Id.* 409-10, I App. 231-32.

**b. Orientation to "the Program"**

Janny returned to the Rescue Mission at approximately 10:30 a.m. II App. 410. At that time, he met with Carmack and Defendant-appellee Tom Konstanty, the Rescue Mission's Assistant Director and Program Manager. *Id.*; I App. 200. They explained that the Rescue Mission is a "Christian Based Transitional Community" that, among other things, "operate[s] a program known as 'Steps to Success'" or, simply, "the Program." II App. 477. The Rescue Mission's literature described the Program as a "transitional, Christian-based program" that is intended to "expose[] [a participant] to the good news of Jesus

Christ in a supportive community." *Id.* 438. Out of all those staying at the Rescue Mission, only ten to twelve people were in the Program. I App. 169 (p. 108).

Carmack and Konstanty informed Janny of the Program's mandatory "house rules," which included twice-weekly Bible studies, one-on-one religious counseling, daily morning devotions, daily chapel services, and attendance at an outside church service each Sunday morning. II App. 410, 434, 477. It was not until this orientation session that Janny learned that the Program was Christian-based and that he was required to participate in religious activities. I App. 166 (p. 70).

Carmack further explained to Janny that (1) Gamez and he were "good friends"; (2) when Carmack was on parole, Gamez had been his parole officer; and (3) Janny was a "guinea pig," as the Program had thus far accepted only female parolees, and Carmack was doing Gamez "a favor" as a first step to accepting male parolees. *Id.* 31; II App. 418.

Janny responded that he is an atheist and would not participate in religious activities. I App. 30. Carmack's reaction was extreme and unambiguous:

- While in the Program, Janny would be prohibited from "tell[ing] people [he] was an atheist or express[ing] [his] religious thoughts, views, and beliefs." II App. 411.
- "[Y]ou're going to still do these Bible studies and these prayers and talk with me about religion." I App. 166 (p. 72).

- "[Y]ou don't have religious rights here." *Id.* (p. 73).
- If Janny refused, he would be "kicked out" and he would "go to jail." *Id.*; II App. 410.

Konstanty similarly reacted to Janny's atheism by saying that "you're going to be here and you're going to do the [P]rogram, or you're going to go to jail." I App. 166 (p. 73).

Janny replied that "they were violating [his] rights, that [his] parole [officer] forced [him] to be in the Program, that [he] did not want to be there, and they could not force their religion upon [him] or stop [him] from expressing [his] religious beliefs." I App. 30. When Konstanty told Janny that he could choose between following the Program's rules or going back to jail, Janny responded: "That's not how the United States works. . . . [Religious freedom is] the first precept of the nation." *Id.* 166 (p. 73).

**c. Carmack's Call to Gamez**

At that point, Carmack telephoned Gamez with Konstanty and Janny present. I App. 30, 166 (p. 73); II App. 411. Carmack told Gamez that Janny "[is] an atheist," that he refuses "to do a religious program," and that "[he is] not fit for the [P]rogram." I App. 166 (p. 73). Carmack then handed the phone to Janny, and Gamez told him that "despite [his] objections [, he] was going to stay in the Program and still be required to follow all the rules or [he] would go to jail."

II App. 418. Gamez specifically stated that "the rules of the Program were the rules of [Janny's] parole," including "the religious ones." *Id.* 411. Carmack told Gamez that he wanted to bring Janny to Gamez's office so that all three of them could discuss Janny's refusal to cooperate. I App. 31; II App. 411. Gamez agreed, and the meeting was set for that afternoon. I App. 31; II App. 411.

After the call ended, Carmack reiterated to Janny that he "would remain in the Program, follow all the rules including the religious ones, [and] that the rules of the Program were the rules of [Janny's] parole." *Id.* Carmack also said that Gamez had "assured" Carmack that Janny "would follow all the rules and participate in all the activities or [he] would go to jail and prison." I App. 30. Janny once more stated that he "would not participate in Christian activities." *Id.*

Carmack then told Janny that he would not be permitted to get a job outside the Rescue Mission and assigned him a job in the facility that would keep him busy until 4:30 p.m. five days a week. *Id.* 31; II App. 418. Finally, Carmack said that he would ask Gamez to change Janny's daily electronic monitoring curfew to 4:30 p.m. so that Janny could not leave the facility after that time and would be forced to attend chapel services at 5:00 p.m. I App. 31, 32.

**d. Second Meeting at Parole Office**

Carmack drove Janny to the meeting in an official Rescue Mission vehicle, arriving at the parole office between 2:30 p.m. and 3:00 p.m. *Id.* 31, 239. Janny

objected to Carmack's presence at a meeting with the parole officer, II App. 419, but the meeting nevertheless proceeded with Carmack attending.

Janny stated that, as an atheist, he should not be forced to participate in religious activities. I App. 167 (p. 83). Gamez responded, "It doesn't matter. You're going to follow the rules of the [P]rogram or you're going to go to jail." *Id*. The three of them discussed the specifics of the religious "house rules," including "the Bible studies, the morning prayer, [and] the daily chapel." *Id.* Carmack "reiterated that . . . participating in religious activities" was mandatory, and Gamez told Janny that he had a simple choice: "You're either going to be in the [P]rogram [and be] supervised under Jim [Carmack] or you can choose to go to Washington County [jail]." *Id.* (pp. 83-84); II App. 419. Gamez also rejected Janny's suggestion that he simply stay in the homeless shelter area of the Rescue Mission—not part of the Program—until Gamez found him other acceptable housing. II App. 26.

As promised, Carmack asked Gamez to change Janny's electronic monitoring curfew to 4:30 p.m. to assure Janny's attendance at the 5:00 p.m. daily chapel service. *Id.* 32, 167 (p. 83). And Gamez and Carmack also agreed that Janny would not be permitted to get a job outside the facility. *Id.* 32; II App. 419.

After the meeting, Gamez formally changed Janny's curfew to 4:30 p.m., entering the change on the electronic log that documented all the events related to

Janny's parole. I App. 239. Although that log includes Gamez and Janny's first parole-office meeting on February 4, describing it as "offender FTF [face-to-face] contact," *id.* 238, the log does not fully or accurately reflect the afternoon meeting that included Carmack, describing it only as "case management" and "CVDMP [Colorado Violation Decision Making Process] performed." *Id.* 239 (entry for 2:34 p.m.).

### 3. Forced Participation in Religious Activities

After the afternoon meeting ended, Janny was returned to the Program. *Id.* 32; II App. 420. From that day through February 7, Janny was forced to attend two Christian Bible studies led by Konstanty or face expulsion from the Program and parole revocation. I App. 32; II App. 420. At one point, Konstanty asked Janny, "[I]s the place growing on you?" Janny replied, "No. I am still just as much a prisoner here as ever." I App. 168 (p. 104).

On February 5 or 6, Carmack had Janny come to his office for individual "religious counseling," which Janny saw as part of an effort to convert him to Christianity. *Id.* 32-33, 170 (p. 113); II App. 420. Carmack asked Janny why he was an atheist, challenged his beliefs, and used the philosophical argument known as "Pascal's Wager"[2] to try to convince Janny to abandon atheism and embrace

[2] Blaise Pascal, a 17th-century French philosopher, posited that a rational person should believe in God and live as though God exists. The smart wager, the argument goes, is that if God exists, the person will win a huge reward—eternity in

Christianity. *Id.* 32-33, 170 (p. 113); II App. 420. Konstanty and other Program staff had similar conversations with Janny throughout his stay at the Program. I App. 32-33; II App. 420.

Janny objected to the mandatory attendance at daily morning prayers and chapel services, made his feelings about them known, "skipped a few times[,] and was reprimanded by" Carmack and Konstanty. I App. 32. Janny once missed a meal while Carmack scolded him. *Id.*

**4. Events of February 8 and 9**

Matters came to a head on Sunday, February 8, when Janny was required to attend an outside church service. *Id.* 33. That morning, Carmack reminded Janny that his church attendance was mandatory and told him that if he broke any more rules, Carmack would expel him from the Program. *Id.* 33, 169 (p. 109), 170 (p. 112); II App. 412.

Janny did not attend church, intended to skip chapel services that evening, and so informed Carmack at 4:30 p.m. that day. I App. 169 (p. 109). Carmack told Janny that "[y]ou have to leave. . . . [Y]ou're not doing what we're telling you . . . so you have to go." *Id.* 33, 169 (p. 109), 170 (p. 111); II App. 412. Janny

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heaven rather than hell; if God does not exist, having acted unnecessarily as though God exists without a "payout" at the end is only a comparatively small loss. *See generally* Note, *Wagering on Religious Liberty*, 116 Harv. L. Rev. 946, 955-67 (2003).

did as ordered, staying that night at the home of family friends. I App. 169 (p. 109).

Janny was required to take the ankle monitor box with him, and when he unplugged it just prior to leaving the Rescue Mission, the parole office system was automatically notified. *Id.* 240. Gamez then issued an alert that Janny had "absconded from the shelter," had "left without authorization from staff," and was "a potential escapee." *Id*. At Gamez's request, an arrest warrant was issued. *Id*., 240-41. On Monday, February 9, Janny attempted to find a treatment residence that Gamez might find suitable; when he was unable to do so, he reported to the parole office, where he was arrested and sent to jail. *Id.* 240; II App. 412-13.

**5. Parole Revocation Hearing**

On March 10, the Parole Board found Janny guilty of a parole violation and revoked his parole for 150 days. I App. 288. The Board did not find Janny guilty of the charges (curfew violations and missing an appointment) that had precipitated Gamez's placing Janny at the Rescue Mission. *Id.* 231-32. Rather, the Board found Janny, who had been expelled from the Rescue Mission late on a Sunday afternoon, guilty of violating "Condition 2" of his parole agreement: failing to "remain at the residence of record each night unless otherwise authorized by the Parole Officer." *Id.* 288; II App. 359. As a result, Janny was incarcerated and spent the next 150 days in jail. I App. 288.

### B. Proceedings Below

#### 1. Motions to Dismiss

Janny was *pro se* in the district court. The operative complaint—the fourth amended complaint, which Janny verified (I App. 18-41)—contained four claims under 42 U.S.C. § 1983: Claim One alleged that forcing Janny to choose between a religious program and jail constituted false imprisonment and violated his Fourth Amendment rights. Claims Two and Three alleged that Janny's placement in the Program violated his First Amendment religious-freedom rights under the Establishment Clause and Free Exercise Clause. Claim Four alleged that Janny's Fourteenth Amendment right to equal protection was violated by the disparate treatment that he suffered at the Program and Rescue Mission because he is an atheist. The original defendants included Gamez; his supervisor, Lorraine Diaz de Leon; and Carmack and Konstanty. Janny sought declaratory relief and money damages in an unspecified amount.

Diaz de Leon moved to dismiss the complaint because it failed to sufficiently allege her personal participation. Diaz de Leon and Gamez both moved to dismiss Claims One and Four for failure to state a claim. ECF 99. Carmack and Konstanty ("Program Defendants") moved to dismiss all claims against them, ECF 97, arguing that Janny's allegations failed to establish that they were acting under color of state law. The magistrate judge's report and

recommendation (I App. 59-81, as amended by *id.* 82-85) granted these motions in their entirety.

Janny did not object to the dismissal of Claims One and Four or to the dismissal of Diaz de Leon as a defendant. He did object to the dismissal of the Program Defendants from Claims Two and Three. I App. 86-102. The district court sustained Janny's objection, holding that he had "plausibly alleged" that Gamez and the Program Defendants "acted in concert to deprive [Janny] of his First Amendment rights" and that "the Program Defendants acted under color of law." *Id.* 122. In particular, the district court held that Janny's verified complaint properly alleged:

> - "Upon arriving at the Rescue Mission and being orientated on the house rules, [Janny] 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." *Id.*
>
> - "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 [Janny]. During the meeting and at other points during [Janny's] participation in the program, [he] was repeatedly reminded that he faced returning to prison if he did not follow the house rules." *Id.*
>
> - "Defendant Gamez changed [Janny's] curfew at Defendant Carmack's request." *Id.*

The surviving claims—for violations of Janny's religious-freedom rights under the First Amendment's Establishment and Free Exercise Clauses—proceeded to discovery.

**2. Motions for Summary Judgment**

After the discovery period in the *pro se* proceedings—during which only Janny's deposition was taken—Gamez and the Program Defendants each moved for summary judgment. Janny's oppositions to these motions (II App. 302-14, 377-403) were supported by, among other evidence, statements of fact in his verified complaint (I App. 18-14), his declaration (II App. 317-24, 406-13), and his supplemental declaration (II App. 325-33, 414-22), all made under penalty of perjury. The record evidence in these filings is extensively described and cited above.

The summary judgment briefing process identified a significant number of disputed material facts. For example, Gamez asserted in his summary judgment reply brief that the following material facts were disputed by his sworn declaration and other evidence:

> - "While Defendant Gamez directed [Janny] to establish a residence of record at the Denver Rescue Mission, Defendant Gamez did not at any point require [Janny] to participate in 'the Program.'" II App. 455.
>
> - Janny "was [never] forced to participate in any religious programming or activities. Defendant

> Gamez was not aware of and did not direct or come to an agreement with the [Program] Defendants to force [Janny] to participate in any religious programing or activities." *Id*. 456.
>
> - Gamez "did not find out that [Janny] was an atheist while [Janny] was under his supervision." *Id.*
> - "Defendant Gamez did not make [Janny's] participation in religious programming a requirement for him to stay out of jail and/or prison." *Id.*
> - The alleged second parole visit on February 4 at which Carmack was present did not occur. *Id.*
> - Janny "absconded from the Denver Rescue Mission; he was not expelled or kicked out." *Id*. 457.

Similarly, the Program Defendants argued at length that there was "no competent evidence suggest[ing]" that Gamez and the Program Defendants "acted in concert to deprive [Janny] of [constitutional] rights." *Id.* 342-46. They also denied the following in sworn affidavits:

> - Carmack denied that "Gamez . . . instruct[ed] [him] or any other Rescue Mission employee or volunteer to indoctrinate to any religious beliefs or otherwise supervise [Janny] in a religious capacity." I App. 180.
> - Carmack denied "discuss[ing] [with Janny] the Rescue Mission's religious programming generally or as it related to [Janny]." *Id.*

- Konstanty denied "any interaction with Defendant John Gamez, [or] any other . . . Parole Officer, about Mr. Janny." *Id.* 200.[3]

**3. Summary Judgment Ruling**

The district court granted Defendants' motions for summary judgment. II App. 487-94 (amending ECF 239). The court attempted to avoid the issues created by the numerous disputes of material fact by initially adopting Janny's version of events, as described above. The court accepted that (1) Gamez directed Janny to stay at the Rescue Mission, operated by Carmack and Konstanty, and participate in the Christianity-based Program, which included religious services and Bible study; (2) Janny objected because he is an atheist; (3) Carmack called Gamez to express his concerns about Janny, and Gamez assured Carmack that Janny would follow the Program rules; (4) this phone conversation was followed by a meeting at the parole office among Gamez, Carmack, and Janny during which

[3] Although the Program Defendants attempted in their summary judgment briefing to limit the disputed material facts relating to their interactions with Gamez and Janny, their responses to Janny's requests for admissions—attached by Gamez as an exhibit to his summary judgment motion (I App. 252-83)—tell a different story. In those responses, the Program Defendants, individually and collectively, deny virtually every material fact in Janny's verified complaint and sworn declarations, including (a) Janny told them he was an atheist; (b) Gamez arranged Janny's placement at the Rescue Mission through Carmack; (c) Carmack requested the February 4 afternoon meeting at the parole office; (d) Carmack attended that meeting with Gamez and Janny; (e) Carmack requested that Gamez change Janny's curfew; (f) Carmack spoke individually with Janny about religion one or more times; (g) Janny told Carmack and Konstanty that they were violating his First Amendment rights; and (h) Carmack and Konstanty told Janny that he would abide by the Program's rules or be sent to jail. I App. 262-65, 267.

Gamez told Janny that he was required to follow the Program rules; (5) at "Carmack's request, Gamez changed [Janny's] curfew, which forced him to attend additional religious programming"; (6) "[d]ays later, [Janny] refused to attend chapel, prompting Defendant Carmack to kick him out of the [P]rogram"; and (7) "[w]hen [Janny] reported to the parole office, his parole was revoked, and he was sent to prison." *Id.* 489.

In its legal analysis, however, the court held that these facts were insufficient to support any of the claims against any of the Defendants. With regard to Gamez, the court held that the Establishment Clause claim was governed by the three-pronged test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and that Janny had failed to show a violation of any of the prongs, *i.e.*, that Janny had not demonstrated that (1) "his placement at the Rescue Mission did not have a secular purpose"; (2) "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"; and (3) "his placement fostered an excessive government entanglement with religion." II App. 491-93. The court also held that Gamez was entitled to qualified immunity on the Establishment Clause claim because Janny "failed to adduce evidence of an Establishment Clause violation . . . ." *Id.* 491.

As to the Free Exercise Clause claim, the court held that Gamez was entitled to qualified immunity because Janny did not demonstrate that his rights were violated or that those rights were "clearly established" in law. *Id.* 494.

The court disposed of both claims against the Program Defendants by holding that Janny cited no "evidence in the record showing that these Defendants acted in concert with the state to deprive [Janny] of his rights or that they shared with the state a specific goal of doing so." *Id.* 491. The court further held that (1) there was "no evidence that the state played any role in the Rescue Mission's operations"; and (2) "at most, [Janny] has adduced evidence that the state acquiesced in the actions" of the Program Defendants, and that this showing was "insufficient to establish a genuine issue of material fact as to whether they were state actors." *Id.*

The district court dismissed the case, *id.* 494, and this appeal followed.

## STANDARD OF REVIEW

This Court "review[s] the district court's summary-judgment order de novo, applying the same standard that the district court is to apply." *Singh v. Cordle*, 936 F.3d 1022, 1037 (10th Cir. 2019). A party is entitled to summary judgment if "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 fact is material if, under the governing law, it could [affect] the outcome of the lawsuit." *Cillo v. City of*

*Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013) (internal quotation marks and citation omitted). "A factual dispute is 'genuine if a rational jury could find in favor of the nonmoving party on the evidence presented.'" *Id.* (citation omitted). The Court "view[s] the facts, and all reasonable inferences those facts support, in the light most favorable to the nonmoving party . . . ." *Simmons v. Sykes Enters., Inc.*, 647 F.3d 943, 947 (10th Cir. 2011). And because Janny proceeded *pro se* below, the Court liberally construes his filings in the district court. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

## SUMMARY OF ARGUMENT

The district court, in granting summary judgment to Defendants on Janny's Establishment Clause claim, engaged in the functional equivalent of impermissible fact-finding and usurped the jury's function. Contrary to Fed. R. Civ. P. 56, the court disregarded numerous disputes of material fact, including disputes over whether the foundational events—evidenced by Janny's sworn, competent testimony as well as documentary proof—ever occurred. The court compounded this procedural error with a substantive error: It failed to apply the coercion analysis mandated by *Lee v. Weisman*, 505 U.S. 577 (1992), focusing instead only on the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Under the coercion test that must be applied in cases like this one, Janny's sworn, detailed evidence established that (a) the state acted through Gamez, a

parole officer; (b) Gamez's actions—forcing Janny to choose between the Program at the Rescue Mission or a return to jail—constituted coercion; and (c) the object of the coercion was plainly religious, given the Christian content of the Program. Moreover, and contrary to the court's conclusion, Janny's evidence satisfied the *Lemon* test as well, for coercion to attend religious events is barred by the *Lemon* test's second prong, which requires that a government action not have a primary effect of advancing religion.

The district court's grant of summary judgment on Janny's free-exercise claim was erroneous for similar reasons. A free-exercise claim is predicated on coercion, and Janny's evidence demonstrated coercion in matters of religion.

Janny's evidence also showed that for both the Establishment Clause claim and Free Exercise Clause claim, the Program Defendants acted under color of state law. That evidence demonstrated that they may fairly be said to be state actors under both the joint action test and the nexus test. The Program Defendants were intimately involved in the process that led Janny to be placed in a Christian program in which they, together with Gamez, violated Janny's right to be free from religious coercion.

Finally, the district court erred in ruling that Gamez is entitled to qualified immunity on both First Amendment claims. His conduct not only violated Janny's constitutional rights, but it was also clearly established at the time of the violation

that any reasonable official would have understood that such conduct constituted a violation of those rights.

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON JANNY'S ESTABLISHMENT CLAUSE CLAIM.

More than 70 years ago, the Supreme Court made clear that the Establishment Clause "means at least" this:

> Neither a state nor the Federal Government can . . . force nor influence a person to go to . . . 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.*, 330 U.S. 1, 15-16 (1947). *Accord 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."). Since that time, the Court has consistently emphasized this fundamental principle: "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . ." *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (citing *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). Moreover, "[a]lthough . . . proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient." *Id.* at 604 (Blackmun, J., concurring).

In granting summary judgment for Defendants on Janny's Establishment Clause claim, the district court erred in four distinct ways: The court (a) improperly disregarded Janny's sworn, competent evidence under Fed. R. Civ. P. 56; (b) failed to apply the correct legal test by using only the *Lemon* test, not the coercion standard adopted in *Lee*; (c) mischaracterized Janny's evidence and legal authorities, which supported an Establishment Clause claim under the *Lee* coercion standard; and (d) improperly applied the *Lemon* test and reached an erroneous result.

### A. The District Court Improperly Disregarded Janny's Sworn, Competent Evidence.

Summary judgment is appropriate when "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). When there is competent, competing evidence on a material fact, it is "impermissible" for the district court to usurp the jury's function by engaging in fact-finding. *Stanko v. Maher*, 419 F.3d 1107, 1112 (10th Cir. 2005). Here, the district court engaged in the functional equivalent of impermissible fact-finding by disregarding Janny's sworn evidence that supported his First Amendment religious-freedom claims and ruling that Janny failed to adduce evidence in support of those claims. The conclusion that Janny lacked evidence of his claims not only mischaracterized the evidence that he had put forth, but also conflicted with the court's earlier ruling reversing the magistrate judge's dismissal of Janny's claims.

It is well-settled that a court may consider only admissible evidence on summary judgment. *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1541 (10th Cir. 1995). "While an affidavit is certainly an appropriate vehicle to establish a fact for summary judgment purposes, the affidavit must set forth facts, not conclusory statements." *BancOklahoma Mtg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1101 (10th Cir. 1999). Moreover, an affidavit must state facts with a sufficient "degree of specificity . . . to be admissible." *Id.* A "verified complaint may be treated as an affidavit for purposes of summary judgment if it satisfies the standards for affidavits set out in Rule 56[(c)(4)]." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1311 (10th Cir. 2010) (citation and internal quotation marks omitted).

Janny's oppositions to Defendants' motions for summary judgment were supported by his verified complaint (I App. 18-41), his sworn declaration (II App. 317-24, 406-13), and his sworn supplemental declaration (II App. 325-33, 414-22). As described above, each sets forth a detailed chronology of the events of February 3-8, as well as comprehensive descriptions of Janny's interactions with each Defendant, including dates, times, and places. Janny's deposition testimony, attached as exhibits to Defendants' summary judgment papers (I App. 162-70; II App. 293-301) and cited above, is entirely consistent.

Through this evidence, Janny established several key facts supporting his Establishment Clause claim: (1) Gamez required Janny, an atheist, to reside at the

Rescue Mission and participate in the Christian Program, which included worship services, Bible study, and religious counseling; (2) Carmack and Konstanty were willing participants in this endeavor; (3) there were coordinated efforts among them and Gamez, including phone calls, a meeting at the parole office, changing Janny's curfew to ensure his attendance at chapel services, and threats of a return to jail if Janny refused to cooperate; and (4) Janny's refusal, as an atheist, to adopt the Program's religious practices and beliefs resulted in expulsion from the Program, parole revocation, and prolonged re-incarceration.

As would be expected, the bulk of Janny's evidence consists of statements made by Defendants to him or in his presence. Those statements are, of course, admissible as admissions of a party opponent under Fed. R. Evid. 801(d)(2)(A). Indeed, "an admission of a party opponent needs no indicia of trustworthiness to be admitted." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 667 (10th Cir. 2006). And although the Defendants have denied virtually every statement attributed to them by Janny, credibility determinations are for the jury, not for the judge on summary judgment. *Hansen v. PT Bank Negara Indonesia (Persero)*, 706 F.3d 1244, 1251 (10th Cir. 2013).

Janny's documentary evidence was entirely consistent with his sworn statements. The Program's Christian orientation and religious requirements are set forth in the Rescue Mission's own literature. II App. 433-34, 438. Gamez's parole

directive to Janny (1) required him to "abide by all house rules as established" and (2) set forth the punishment if he "violated" the "said rules": "place[ment] at Washington County jail to address the violation." *Id.* 432.

The electronic log maintained by the parole office also supports Janny's sworn statements. As described above, those statements explained that (1) Carmack told Janny during the February 4 morning orientation that he would ask Gamez to change Janny's daily curfew to 4:30 p.m. so that his attendance at chapel services would be ensured; (2) Carmack made the request to Gamez that afternoon at the parole office meeting; and (3) that day, Gamez changed Janny's curfew from 6:00 p.m. to 4:30 p.m. The electronic log reflects the change. *Id.* 337, 426; I App. 239. Similarly, the entry for 2:34 p.m.—the time of Janny's parole office meeting with Gamez and Carmack—shows activity, but Gamez, inadvertently or purposefully, gave an incomplete description of the meeting as "case management" and "CVDMP [Colorado Violation Decision Making Process] performed." II App. 337, 426; I App. 239.

Despite Janny's detailed testimony and documentation, the district court inexplicably decided that he had proffered only "conclusory allegations" and had not presented any "objective evidence" that Defendants forced him to participate in religious activities. II App. 493. The court also held that Janny had "adduced no

evidence" to support any aspect of his claims against any Defendant. *Id.* 491-93. Not so.

The quantum and quality of Janny's evidence was absolutely sufficient to defeat Defendants' summary judgment motions. His sworn statements were the antithesis of "sweeping conclusory statements . . . [that] do[] not mention any single transaction, date or person." *BancOklahoma*, 194 F.3d at 1101. And, as set forth below, his evidence, even without the liberal construction afforded *pro se* litigants, provided substantive support for each element of his religious-liberty claims.

**B. The District Court Failed to Apply the Required Coercion Test.**

When a government official in the criminal-justice system forces a prisoner, parolee, or probationer to participate in religious activities or observance, the case must be analyzed—first and foremost—under the coercion test set forth in *Lee*, 505 U.S. 577. For example, four years after the Supreme Court decided *Lee*, the Seventh Circuit considered a prisoner's 42 U.S.C. § 1983 claim that mandatory religious narcotics rehabilitation meetings violated his First Amendment rights. *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996). The district court had applied *Lemon's* three-part test, granting summary judgment for the defendants and concluding that the rehabilitation program "[1] had a secular purpose, [2] that it neither advanced nor inhibited religion, and [3] that there was no state

entanglement 'in terms of economic support.'" *Id.* at 475. But the Seventh Circuit reversed, holding that the district court had failed to "take into account the substantial Establishment Clause jurisprudence that the Supreme Court has developed since *Lemon*[.]" *Id*. at 479.

As the Seventh Circuit held, courts must apply the *Lee* coercion analysis to cases "dealing with government efforts to coerce . . . a person who does not subscribe to the religious tenets at issue to support them or to participate in observing them." *Id*. at 477 (internal quotation marks omitted) (collecting cases). That analysis involves a three-step inquiry: "[F]irst, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular?" *Id.* at 479. In *Kerr*, the court answered these questions in the affirmative, holding that requiring a prisoner to attend the program in issue (Narcotics Anonymous or "NA") ran "afoul of the prohibition against the state's favoring religion in general over non-religion." *Id.* at 480.

The four other courts of appeals that have considered claims and factual circumstances similar to those presented in *Kerr*—and here—likewise focused on the coercion prohibition as articulated in *Lee* and applied in *Kerr*, holding that state action by criminal-justice authorities forcing a person to attend religious programs is *per se* unconstitutional.

In *Warner v. Orange County Department of Probation*, 115 F.3d 1068, 1074-75 (2d Cir. 1996), *reinstated*, 173 F.3d 120 (2d Cir. 1999), the Second Circuit held that requiring a probationer to attend Alcoholics Anonymous ("AA") meetings, which are organized around and emphasize religious beliefs, violates the Establishment Clause. Similarly, in *Inouye v. Kemna*, 504 F.3d 705, 712-14 (9th Cir. 2007), the Ninth Circuit held that a parole officer's requirement that a parolee attend religion-infused AA/NA meetings "strikes at the core of the Establishment Clause[.]" In *Jackson v. Nixon*, 747 F.3d 537, 541-43 (8th Cir. 2014), the Eighth Circuit found an Establishment Clause violation where eligibility for early parole was conditioned on participation in a religion-based substance abuse program. And, the Eleventh Circuit held—well before the Supreme Court had even articulated the coercion test—that "a condition of probation which requires the probationer to submit himself to a course advocating the adoption of religion or a particular religion . . . transgresses the First Amendment." *Owens v. Kelley*, 681 F.2d 1362, 1365 (10th Cir. 1982). *See also State v. Morgan*, 459 So. 2d 6, 10 (La. Ct. App. 1984) (church attendance as condition of probation violates Establishment Clause).

Consistent with these cases, the lower federal courts and state courts have repeatedly applied the *Lee* coercion test to Establishment Clause claims similar to

Janny's, including claims brought by prisoners,[4] prisoners seeking parole,[5] and parolees.[6] All these cases concluded that coercing criminal offenders to take part in religious programming violated the Establishment Clause. The vast majority ruled in favor of the plaintiffs, the exceptions being cases where coercion was not proven or the program at issue was not religious.

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[4] *E.g.*, *Vukonich v. Havil*, 2014 WL 12796824, at *7-8 (D.N.M. 2014) (unpublished) (plaintiff permitted to proceed on allegation of punitive segregation for refusal to attend religious services); *Zapata v. Torres*, 2007 WL 9729051, at *2-3 & n.4 (D.N.M. 2007) (unpublished) (rejecting religious liberty claims because inmate was not coerced to take part in program at issue and discussing *Lee* coercion test's relationship to *Lemon* factors); *Nusbaum v. Terrangi*, 210 F. Supp. 2d 784, 787-89 (E.D. Va. 2002) (conditioning of good time credits on participation in religion-based treatment program held impermissible); *Warburton v. Underwood*, 2 F. Supp. 2d 306, 317-19 (W.D.N.Y. 1998) (same); *Alexander v. Schenk*, 118 F. Supp. 2d 298, 301, 303 (N.D.N.Y. 2000) (granting agnostic inmate summary judgment against prison officials who forced him to attend religious substance abuse program); *Ross v. Keelings*, 2 F. Supp. 2d 810, 817-18 (E.D. Va. 1998) (religious drug rehabilitation program could not be compulsory condition of obtaining good conduct allowances); *Griffin v. Coughlin*, 673 N.E.2d 98, 106-08 (N.Y. 1996) (forced attendance at AA meetings for additional visitation rights violated Establishment Clause).

[5] *E.g.*, *Armstrong v. Beauclair*, 2007 WL 1381790, at *5 (D. Idaho 2007) (unpublished) (participation in religiously-oriented rehabilitation program could not be required to achieve parole eligibility); *Turner v. Hickman*, 342 F. Supp. 2d 887, 895-97 (E.D. Cal. 2004) (same); *Rauser v. Horn*, 1999 WL 33257806, at *3-5 (W.D. Pa. 1999) (unpublished) (same); *Arnold v. Tenn. Bd. of Paroles*, 956 S.W.2d 478, 483-84 (Tenn. 1997) (same).

[6] *E.g.*, *Hazle v. Crofoot*, 2010 WL 1407966, at *5 (E.D. Cal. 2010) (unpublished), (atheist's Establishment Clause rights were violated when he was forced into substance-abuse-rehabilitation program with "religious components" as parole condition), *rev'd in part on other grounds*, 727 F.3d 983 (9th Cir. 2013); *Bausch v. Sumiec*, 139 F. Supp. 2d 1029, 1033-34 (E.D. Wis. 2001) (plaintiff's allegation of similar violation held sufficient to survive summary judgment).

Here, the district court not only failed to apply the coercion test, but it also erroneously asserted that Janny had not cited any relevant authority and had failed to marshal any evidence of coercion.

### C. Under the Coercion Test, Janny's Sworn, Detailed Evidence Demonstrated a Violation of the Establishment Clause.

In granting summary judgment for Defendants on the Establishment Clause claim, the district court asserted that Janny (1) "cite[d] no authority for the proposition that merely being compelled to attend religious programming violated his rights"; and (2) failed to set forth supporting evidence that would "raise a genuine issue of material fact," instead offering only "conclusory allegations that he was forced to participate in such programming and refrain from discussing his atheist beliefs." II App. 493. The court's first assertion is directly contradicted by the record. Janny's summary judgment opposition states (*id.* 396-97):

> Courts have addressed claims similar to this case [and] have applied what has been referred to as the "coercion test" emanating from *Lee v. Weisman*, 505 U.S. 577 (1992). "Although our precedents make clear proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient." [*Id.* at 604] (Justice Blackmun concurring in *Lee*). ["]It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise [. . . .]" *Lee* at 587.

That statement of the law would be quite clear for a plaintiff represented by counsel, and is even more so for a *pro se* plaintiff like Janny. And Janny also cited

a number of leading lower court decisions concerning religious coercion of criminal offenders, including the Second, Seventh, and Ninth Circuit decisions in *Warner*, *Kerr*, and *Inouye*. See II App. 397-98.[7]

As for the district court's second assertion, far from offering only "conclusory allegations," Janny submitted three detailed written statements under oath—his verified complaint, declaration, and supplemental declaration—setting forth a comprehensive account of the relevant events, complete with dates, times, places, and descriptions of oral statements made by each defendant. This admissible evidence was consistent with Janny's deposition testimony, which was placed in the record by defendants. When considered collectively and construed in Janny's favor, as it must be on summary judgment, this evidence more than demonstrates that a reasonable fact-finder could have determined that Janny was impermissibly coerced based on the record before the district court.

[7] To the extent that the district court was drawing a distinction between being compelled merely to *attend* religious programming, as opposed to *participate* in it, that argument has been rejected as contrary to *Lee*: "The fact that [the plaintiff-probationer] managed to avoid indoctrination despite the pressure he faced does not make the [religious] program any less coercive[.]" *Warner*, 115 F.3d at 1076; *see also Griffin*, 673 N.E.2d at 106 (a prisoner's "enforced attendance at [religion-based] meetings . . . violates the Establishment Clause in that '*an audience gathered by state power* is lent * * * to a religious cause'") (citation omitted). *Lee* itself supports the point. *See* 505 U.S. at 593 ("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.").

As stated above, the Seventh Circuit adopted a three-step inquiry in *Kerr* for analyzing the evidence in religious coercion cases: "first, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular?" 95 F.3d at 479. The Ninth Circuit's *Inouye* decision and the two parolee cases cited *supra* in note 6 (*Bausch v. Sumiec*, 139 F. Supp. 2d 1029, 1033-34 (E.D. Wisc. 2001), and *Hazel v. Crofoot*, 2010 WL 1407966, at *5 (E.D. Cal. 2010) (unpublished)) all engaged in this same inquiry.[8] Applying the test to Janny's evidence underscores the error here.

**Has the state acted?** In all those cases, the parole officer was determined to have "acted in his official state capacity" when ordering the plaintiff into "a program that contained religious components." *Hazle*, 2010 WL 1407966, at *5 (atheist parolee); *accord Inouye*, 504 F.3d at 713 (Buddhist parolee); *Bausch*, 139 F. Supp. 2d at 1033-34 (atheist parolee). "That the state did not run the program itself is 'of no moment,' as the state ordered participation." *Inouye*, 504 F.3d at 713 (citation omitted); *accord Hazle*, 2010 WL 1407966, at *5. Here, the same is true: Gamez was Janny's parole officer—a state official—so it was

[8] So did the Eighth Circuit in *Jackson*, 747 F.3d at 542, a case involving a prisoner.

irrelevant the Program at the Rescue Mission in which he ordered Janny's participation was not itself operated by the state.[9]

**Does the action amount to coercion?** In all three cases, the action was plainly coercive, as the parole officer told the parolee to "continue to participate in the . . . Program or he would be returned to prison." *Hazle*, 2010 WL 1407966, at *5; *accord Inouye*, 504 F.3d at 713 (parolee "could be imprisoned if he did not attend and he was, in fact, ultimately returned to prison"); *Bausch*, 139 F. Supp. 2d at 1034 ("so far as [parolee] knew, the penalty for declining [to participate] was being returned to prison"). So it was with Janny. Gamez, Carmack, and Konstanty all repeatedly threatened Janny with jail if he did not participate in the Program and follow all the "house rules," including religious ones.

**Is the object of the coercion religious or secular?** All three cases focused on the content of the program at issue, and all three programs were unquestionably religious in character. *Inouye*, 504 F.3d at 713-14 (AA/NA program was "fundamentally based on a religious concept of a Higher Power"); *Hazle*, 2010 WL 1407966, at *5-6 (same); *Bausch*, 139 F. Supp. 2d at 1031 & n.2, 1033 (same). So, too, was the Program at the Rescue Mission, which was a "Christian-based

[9] The question of whether the Program Defendants acted under color of state law is addressed *infra*.

program" with mandatory attendance at Bible study, religious counseling, and daily worship services, among other religious requirements, as described above.

Because Janny's evidence demonstrated a violation under the *Kerr* three-step religious-coercion inquiry, it was error for the district court to grant summary judgment to Defendants on his Establishment Clause claim.

**D. Janny's Evidence Satisfied the *Lemon* Test as Well.**

A finding of religious coercion often informs courts' secondary analysis under *Lemon*. Indeed, as the Seventh Circuit has recognized, a showing of religious coercion under *Lee* necessarily demonstrates an impermissible effect of advancing religion under *Lemon's* second prong. *See Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849-50 (7th Cir. 2012) (en banc). Thus, the district court erred here by conducting a *Lemon* analysis that did not consider coercion.

Under *Lemon*, governmental action that has a "principal or primary effect" that either "advances [or] inhibits religion" violates the Establishment Clause. 403 U.S. at 612. An order from a government official—such as a parole officer threatening imprisonment—"to attend religious or religion-based events is clearly barred by the second prong of *Lemon*," because such coercion always violates the Establishment Clause. *Inouye*, 504 F.3d at 713 n.7 (citing *Kerr*, 95 F.3d at 478-79); *accord Lee*, 505 U.S. at 604 (Blackmun, J., concurring) ("[P]roof of

government coercion is not necessary to prove an Establishment Clause violation, [but] it is sufficient.").[10]

Otherwise stated, "the Supreme Court will not allow a public agency to force religion on people even if the agency honestly and indeed correctly believes that it is the best way of achieving a secular end that is within government's constitutional authority to promote[.]" *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 882 (7th Cir. 2003) (citing *Lee*, 505 U.S. at 587-89). Indeed, "the state may not require [parole violators] to enroll in a [religious treatment center] even if it is the best [facility available] for any or even all offenders." *Id.* (citing *Kerr*, 95 F.3d at 479-80).

Unlike the parolees in *McCallum*, who had the option of a secular facility, *id.* at 881-82, Janny had no choice in the matter. For him, it was the Christian Program or jail—the unconstitutional choice "to be imprisoned or to renounce his own religious beliefs[, which] offends the core of Establishment Clause jurisprudence." *Inouye*, 504 F.3d at 714.

Finally, in its *Lemon* analysis, the district court held that Janny "presents no evidence that he had an appropriate alternative to [the Program at] the Rescue Mission that was conducive to his complying with the terms of his parole."

[10] *See also Nusbaum*, 210 F. Supp. 2d at 788 ("[W]here coercion is present, the program will inevitably fail the *Lemon* test."); *Ross*, 2 F. Supp. 2d at 817 (same).

II App. 492. There are two problems with this holding, one legal and one factual. As a legal matter, the state may not constitutionally place on the parolee the obligation to find a secular alternative. Rather, "it is government's obligation always to comply with the Constitution, rather than to do so only upon request." *Bausch*, 139 F. Supp. 2d at 1035. If the state presents a religious program as an option, it is required to present the parolee with a secular alternative also, and "[t]he choice must be private, to provide insulating material between government and religion. . . . It [must be] the offender's choice." *McCallum*, 324 F.3d at 882; *see also Owens*, 681 F.2d at 1365 (government's provision of secular option "is the task which must be accomplished").

As a factual matter, Janny did propose to Gamez an appropriate alternative, and one that was readily and easily available: the homeless-shelter area of the Rescue Mission, rather than the Program. I App. 26. There is nothing in the record to rebut Janny's evidence that this alternative would have satisfied the terms of his parole. At worst, that would have been a question for the trier of fact to resolve. And even if the homeless-shelter portion was found inadequate, that would not change the requirement that the *state* must supply a secular alternative regardless.

## II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON JANNY'S FREE EXERCISE CLAUSE CLAIM.

The district court granted Defendants summary judgment on the Free Exercise Clause claim because, according to the court, Janny "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." II App. 494. That characterization cannot be squared with Janny's actual claim and supporting evidence: Janny did not complain that the Rescue Mission provided religious programming; rather, he complained that he was coerced into participating in that religious programming, and he provided ample evidence thereof to present a jury question.

"[A] violation of the Free Exercise Clause is predicated on coercion," and a plaintiff making a claim under that clause must "show the coercive effect of the [conduct] as it operates against him in the practice of his religion." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963). Moreover, the Free Exercise Clause bars government from "compel[ling] affirmation of religious belief." *Employment Division v. Smith*, 494 U.S. 872, 877 (1990); *accord Sherbert v. Verner*, 374 U.S. 398, 402 (1963) ("Government may [not] compel affirmation of a repugnant belief"). For example, in *Torcaso v. Watkins*, 367 U.S. 488, 492-96 (1961), the Supreme Court held that a state could not require people seeking commissions as notaries to declare a belief in God. And the Supreme Court

subsequently clarified that the law at issue violated the Free Exercise Clause in addition to the Establishment Clause. *See McDaniel v. Paty*, 435 U.S. 618, 626-27 (1978) (four-Justice plurality opinion); *id.* at 634–35 (Brennan, J., concurring); *id.* at 642–43 (Stewart, J., concurring).

Atheism is a belief system that is protected by both Religion Clauses. As the Supreme Court has explained:

> [T]he 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 … to encompass tolerance of the disbeliever and the uncertain.

*Wallace v. Jaffree*, 472 U.S. 38, 52-54 (1985). Thus, the courts of appeals have recognized that atheists' freedom of conscience is protected not only by the Establishment Clause but also by the Free Exercise Clause. *See, e.g.*, *Kaufman v. Pugh*, 733 F.3d 692, 697 (7th Cir. 2013) ("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."); *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1215 (5th Cir. 1991) (Free Exercise Clause protects atheists from being coerced to make affirmations that they consider religious).

Contrary to these constitutional strictures, Janny was coerced to abandon his atheist beliefs and to adopt Christian ones in the Program. He was required to attend Christian worship services and other religious activities. And the Program Defendants proselytized him and pressured him to adopt a belief in Jesus. I App. 32-33, 170 (p. 113); II App. 420.

Though most cases in the parole and probation context are decided under the Establishment Clause, those that address the Free Exercise Clause are to the same effect. In *State v. Evans*, 796 P.2d 178 (Kan. App. 1990), the court found a violation of the Clause where the conditions of probation "require[d] church attendance at a specific church" and maintenance work at the same church. *Id.* at 178-79. The *Evans* court relied on a decision of this Court, *Porth v. Templar*, 453 F.2d 330 (10th Cir. 1971), which set as a "standard for evaluating a restriction of constitutional freedoms as a condition of probation" that the restriction must "have a reasonable relationship to the treatment of the accused and the protection of the public." 796 P.2d at 179 (quoting *Porth*, 453 F.2d at 333).

Similarly, in *Jones v. Commonwealth*, 38 S.E.2d 444, 448-49 (Va. 1946), the court held that a state judge violated the Free Exercise Clause by making a defendant's probation contingent on him attending Sunday school and church. The court in *Hanas v. Inner City Christian Outreach, Inc.*, 542 F. Supp. 2d 683, 694 (E.D. Mich. 2008), reached the same conclusion where a faith-based rehabilitation

program forced on a Catholic probationer refused to allow him to practice his religion. *See also Trisvan v. Annucci*, 284 F. Supp. 3d 288, 299-300 (E.D.N.Y. 2018) (court held that parolee "may have a viable claim based on a violation of the Free Exercise Clause" where he asserted that the curfew condition of his parole "had prevented him from meaningfully partaking in Ramadan, 'an integral part of Islam.'").

The district court thus erred in granting summary judgment on Janny's Free Exercise Clause claim.

## III. THE PROGRAM DEFENDANTS ACTED UNDER COLOR OF STATE LAW.

In granting summary judgment to Carmack and Konstanty, the district court held that they were not state actors because Janny failed to "cite[] any evidence in the record showing that [they] acted in concert with the state to deprive [Janny] of his rights or that they shared with the state a specific goal of doing so." II App. 491. On the contrary, Janny put forth significant evidence of both, and under the applicable law both Carmack and Konstanty are proper defendants for a 42 U.S.C. § 1983 claim.

### A. Legal Standards

The state-action doctrine and resulting liability under § 1983 require that (a) the constitutional deprivation "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"; and (b) "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). To implement these requirements, "[t]he Supreme Court has outlined four tests to determine whether private actors . . . should be considered state actors: (1) the public function test, (2) the nexus test, (3) the symbiotic relationship test and (4) the joint action test." *Anderson v. Suiters*, 499 F.3d 1228, 1233 (10th Cir. 2007) (citation and internal quotation marks omitted). The tests applicable here are the joint-action test and the nexus test. Dismissal was improper under both.

The joint-action test will be satisfied by a private party if that party is a "willful participant in joint action with the State or its agents." *Id.* (citations and internal quotation marks omitted). "This circuit has held that one way to prove willful joint action is to demonstrate that the public and private actors engaged in a conspiracy" to achieve "a common, unconstitutional goal." *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121, 1126 (10th Cir. 2000) (citations and internal quotation marks omitted).

As for the 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 fairly be treated as that of the State itself.'" *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1448 (10th Cir. 1995) (quoting

*Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). "Under this approach, 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.'" *Id.* (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

**B. Janny's Evidence**

Janny's evidence at least raises a genuine issue whether Gamez and the Program Defendants entered into an agreement—more precisely, a conspiracy—to force Janny to participate in the Christian Program. In the language of the nexus test, Gamez "overtly encouraged" the Program Defendants to ensure Janny's participation, so their conduct in doing so "was also action under state law [that] will support a suit under § 1983." *Lugar*, 457 U.S. at 935. As explained above (pp. 4-12), the evidence included:

- Gamez and Carmack had an "informal arrangement" that allowed Gamez to place "certain parolees" at the Rescue Mission.

- When Janny objected to the Program's Christian foundation and religious observance requirements at the February 4 morning orientation, that objection led to (a) threats of jail from Carmack and Konstanty if Janny refused to follow the "rules," including those requiring religious observance; (b) a phone call from Carmack to Gamez in the presence of Janny and Konstanty and more threats from all three defendants; and (c) a specific statement by Gamez that "the rules of the Program

were the rules of [Janny's] parole," including "the religious ones."

- When Janny continued to object, Carmack arranged a meeting that afternoon at the parole office, which Carmack attended, and at which Gamez once more threatened Janny with jail if he did not follow the Program rules, including the religious ones.

- At the parole-office meeting, Carmack asked Gamez to change Janny's curfew to 4:30 p.m. to ensure his attendance at daily chapel services. Gamez did so.

- Carmack and Konstanty forced Janny to participate in religious activities from February 4-7.

- On February 8, Carmack expelled Janny from the Program and the Rescue Mission for refusing to attend outside church services and chapel.

- Gamez had an arrest warrant issued, and Janny was sent to jail.

- Janny's parole was revoked for 150 days for "absconding" from the Rescue Mission.

Other courts have held, based on similar facts, that operators of private, religious programs were state actors and proper § 1983 defendants as a matter of law. In *Hanas, supra*, the Catholic plaintiff was forced by the county drug-court judge to choose between prison and a "faith-based rehabilitation program" that included mandatory "worship services and Bible studies grounded in the Pentecostal tradition." 542 F. Supp. 2d at 688. When the plaintiff objected to the religious aspects of the program and the staff's refusal to let him practice

Catholicism, the drug-court judge and a court staff member "admonished [the plaintiff] to follow the rules of [the] program," saying "the rules of [the] Pastor['s] program are the rules of the Court." *Id.* at 693. The plaintiff refused, and the judge sent him to jail. *Id.* at 692. The federal district court, on the plaintiff's motion for summary judgment, held the program's director to be a state actor and liable under § 1983 for violations of the Establishment Clause and the Free Exercise Clause. *Id.* at 688, 694.

The atheist plaintiff-parolee in *Hazle v. Crofoot*, 727 F.3d 983 (9th Cir. 2013), was likewise forced into a religious program. The Ninth Circuit, in reversing the grant of summary judgment for the defendant company responsible for the program, concluded that the evidence showed that the company (1) "was intimately involved in the process that led [the parolee] to be placed in a religion-based facility"; (2) "was responsible for [the parolee's] being referred to the religious treatment facility where his First Amendment rights were violated"; and (3) was a proper § 1983 defendant. *Id.* at 997, 999.

The facts here are strikingly similar to the ones in those cases. Just as the drug-court judge and staffer in *Hanas* said that "the rules of the Pastor's program are the rules of the Court," so, too, did Gamez say that "the rules of the Program were the rules of [Janny's] parole," including "the religious ones." II App. 411. And just as the private defendant in *Hazle* "was intimately involved" in placing the

parolee in a "religious treatment facility," so, too, were Carmack and Konstanty deeply involved in placing Janny in religious programming. They viewed Janny as a "guinea pig," *id.* 418, in Defendants' collective effort to expand the Program to male parolees and, to further their experiment, they collaborated with Gamez to alter Janny's curfew and assure his attendance at daily worship services. And, ignoring Janny's repeated objections to the religious aspects of the Program, Carmack and Konstanty refused to simply let him stay in the Rescue Mission like many shelter users who were not enrolled in the Program.

Further, the district court's emphasis on the fact that the "state played [no] role in the Rescue Mission's operations, *id.* 491, is misplaced. What is key is that the state—Gamez—ordered Janny to participate fully in the Program, including the religious aspects. That the state did not itself design the Program's content "is 'of no moment,' as the *state ordered participation*" in the Program. *Inouye*, 504 F.3d at 713 (quoting *Kerr*, 95 F.3d at 479) (emphasis added); *accord Hazle*, 2010 WL 1407966, at *5.

Finally, the district court's conclusion that Gamez, at most, only "acquiesced" in the Program Defendants' actions, II App. 491, is contrary to the evidence presented by Janny. Far from merely acquiescing, the evidence was that Gamez took multiple affirmative and intentional acts to enforce and impose mandatory religious worship and other religious activities on Janny. Gamez was

no stranger to the Program; he was personally familiar with it, as his friend, Carmack, had been his parolee. Indeed, that is why Gamez sent Janny to the Program. He did not merely acquiesce but instead knew the Program's requirements and repeatedly reinforced them when Janny resisted.

In short, Janny's evidence established the agreement (*i.e.*, conspiracy) and willful conduct required by the joint-action test, as well as the "significant encouragement" by Gamez to Carmack and Konstanty needed to prove the "sufficiently close nexus." Carmack and Konstanty are properly regarded as state actors and § 1983 defendants for both the Establishment Clause claim and the Free Exercise Clause claim.

## IV. GAMEZ IS NOT ENTITLED TO QUALIFIED IMMUNITY.

Gamez asserted the affirmative defense of qualified immunity to both of Janny's First Amendment claims.[11] The district court agreed, holding that "Gamez is entitled to qualified immunity because [Janny] has failed to adduce evidence of an Establishment Clause violation and, with respect to his Free Exercise claim, [Janny] has not adduced evidence of conduct by Defendant Gamez that violated his clearly established rights." II App. 491.

[11] The Program Defendants pled the qualified-immunity defense in their answer, I App. 135, but did not argue it on summary judgment. As a result, they waived the defense. *Summe v. Kenton County Clerk's Office*, 604 F.3d 257, 269-70 (6th Cir. 2010) (qualified immunity pled as affirmative defense in answer but not raised on summary judgment).

For the reasons set forth below, the district court erred in ruling that Gamez is entitled to qualified immunity.

**A. Legal Standards**

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citations and internal quotation marks omitted). A § 1983 defendant's "assertion of qualified immunity creates a presumption that [he or she is] immune from suit." *Perea v. Baca*, 817 F.3d 1198, 1202 (10th Cir. 2016). "To overcome this presumption, [a 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." *Id.* (quoting *Mullenix*, 136 S. Ct. at 308).

This Court's analysis of the second factor is not, however, "a scavenger hunt for prior cases with precisely the same facts . . . ." *Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) (citations and internal quotation marks omitted). Rather, "[t]he 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." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014)

(citation and internal quotation marks omitted). This requirement is satisfied when, at the time of the conduct in issue, there was "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." *Halley v. Huckaby*, 902 F.3d 1136, 1149 (10th Cir. 2018) (citations and internal quotation marks omitted). Moreover, '"[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.'" *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

This Court "review[s] grants of summary judgment based on qualified immunity de novo." *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014). The Court will reverse such rulings if "the plaintiff can show (1) a reasonable jury could find facts supporting a violation of a constitutional right, which (2) was clearly established at the time of the defendant's conduct." *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014).

### B. State of the Law in February 2015

#### 1. Establishment Clause

As a general matter, it is clearly established law that forcing "an objecting individual" to observe or take part in religious exercise and then punishing him for "non-conformance" violates the Establishment Clause. *See Marrero-Mendez v.*

*Calixto-Rodriguez*, 830 F.3d 38, 48 (1st Cir. 2016). More specifically, as discussed above, courts have repeatedly "found coercion where the government required conformance to a religious belief as a condition for a benefit, such as parole eligibility for prisoners[.]" *Id.* at 47. The law is so well-established in this area that the First Circuit relied, in part, on *Kerr* and similar cases in denying qualified immunity to police supervisors who punished an officer for refusing to take part in compulsory prayer. *See id.* ("Indeed, before March 2012, numerous courts had held that requiring prisoners to attend a program that has a religious component as a condition for parole eligibility is unconstitutional.").

The relevant case law is robust and longstanding. In 1996, the Seventh Circuit stated in *Kerr* that "[a]lthough it has been clear for many years that the state may not coerce people to participate in religious programs," citing Supreme Court cases dating back to 1943, "the particular application of this principle to prisons has arisen only recently in the courts." 95 F.3d at 480. As a result, the court could not "say that a reasonable prison official should have known that her actions were unlawful" at that time, so the court held that qualified immunity was appropriate. *Id.* at 481.

By the time the Ninth Circuit decided *Inouye* some eleven years later, the court had no trouble concluding that a reasonable parole officer who forced a parolee to attend a religion-based drug treatment program "would know that his or

her conduct was illegal[.]" 504 F.3d at 714. The court held that 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. The court stated:

> By 2001 [the year of the conduct in issue], 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. Their unanimous conclusion was that such coercion was unconstitutional.

*Id.* (collecting cases). The court further noted that "this march of unanimity has continued well past" 2001. *Id.* (collecting cases).

In fact, as discussed *supra* at pp. 27-30 and notes 4-6, the "march of unanimity" has continued through 2015 and today—at least five circuit court decisions, twelve district court decisions, and two state supreme court decisions, among others. And, although this Court has not had the occasion to rule on this precise issue, two district courts in this circuit had already issued three decisions even before the 2015 events here, recognizing that, under the *Lee* coercion standard, state officials may not force prisoners or probationers to attend or participate in religious activities. *See Vukonich v. Havil*, 2014 WL 12796824, at *7-8 (D.N.M. 2014) (unpublished) (denying jailer's summary judgment motion based on qualified immunity defense); *Zapata v. Torres*, 2007 WL 9729051, at *3 n.4 (D.N.M. 2007) (unpublished) (applying *Lee* coercion test to prison official's conduct); *Malipurathu v. Jones*, 2012 WL 3822206, at *7-8 (W.D. Okla. 2012)

(unpublished) (finding no evidence of coerced "religious-based activities" in substance-abuse probation program).

**2. Free Exercise Clause**

As described above, most of the cases concerning coercion of criminal offenders to take part in religious programming address the Establishment Clause, not the Free Exercise Clause. Nevertheless, the Supreme Court made it clear long before 2015—in cases such as *Smith*, *Schempp*, *Sherbert*, *and Torcaso*, all cited *supra*—that the Free Exercise Clause prohibits the state from coercing a person to adopt or participate in a religion to which he does not subscribe. It was also plainly established well before 2015, as demonstrated by cases such as *Kerr*, *Warner*, *Inouye*, and *Jackson*, all cited *supra*, that forcing or pressuring a criminal offender to take part in a religious program constitutes such improper coercion.

* * * * *

It was clearly established in 2015 that both the Establishment Clause and the Free Exercise Clause prohibit coercion of criminal offenders to take part in religious programming. Janny's evidence showed that he was coerced to do just that, and it was error for the district court to grant summary judgment for Gamez on the basis of qualified immunity.

## CONCLUSION

The Court should reverse the grant of summary judgment to Defendants and remand for further proceedings, including a trial on the merits.

## STATEMENT CONCERNING ORAL ARGUMENT

This case implicates First Amendment religious-freedom rights under both the Establishment Clause and the Free Exercise Clause. The questions presented are of abiding public concern, and this Court has not yet considered them in the context of the criminal justice system. Oral argument would aid the Court's decisional process.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief, submitted under Fed. R. App. P. 32(a)(7)(B), complies with the type-volume limitation and contains 12,489 words, exclusive of the exempted portions. It has been prepared in proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Charles B. Wayne

## CERTIFICATE OF PRIVACY REDACTION, DIGITAL SUBMISSION, AND ANTI-VIRUS SCAN

I hereby certify that (1) there is no information required to be redacted pursuant to Fed. R. App. P. 25(a)(5) and Tenth Circuit Rule 25.5; (2) the submitted hard copies delivered to the Clerk of Court are exact copies of the PDF version filed via CM/ECF; and (3) the digital submissions have been scanned for viruses with Windows Defender Antivirus Version 1.293.527.0, and no viruses were detected.

/s/ Charles B. Wayne

## CERTIFICATE OF SERVICE

I certify that on this 8th day of June, 2020, I have electronically filed Appellant's Opening Brief by the CM/ECF system, which will then accomplish service to all counsel of record.

/s/ Charles B. Wayne

# ATTACHMENTS

**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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**AMENDED[1] 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).

[1] This Amended Order corrects a typographical error on page 5 by replacing "Plaintiff" with "Defendant Gamez" in the second sentence of section III.B; otherwise, it is identical to the Order issued on February 21, 2020. (*See* ECF No. 239.)

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.[2]

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.

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

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 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 **Defendant Gamez** 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**

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

MARK JANNY

Plaintiff,

v.

JOHN GAMEZ,
JIM CARMACK, and
TOM KONSTANTY,

Defendant.

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**FINAL JUDGMENT**

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In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order (Doc. 239) by Judge Raymond P. Moore entered on February 21, 2020, it is

ORDERED that summary judgment is entered in favor of Defendants, John Gamez, Jim Carmack, and Tom Konstanty, and against Plaintiff Mark Janny. It is

FURTHER ORDERED that this case is closed.

Dated this 21st day of February, 2020.

FOR THE COURT:
JEFFREY P. COLWELL

By: s/C. Pearson
C. Pearson, Deputy Clerk