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 REPLY BRIEF

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INTRODUCTION

Defendant-appellee John Gamez and Defendants-appellees Jim Carmack and Tom Konstanty ("Program Defendants") each take the same approach: (1) they ignore or discount the competent, admissible evidence that Plaintiff-appellant Mark Janny adduced on summary judgment, wrongly contending that he put no such evidence before the district court; and (2) they avoid discussing the relevant case law, which is thoroughly contrary to their positions. Their briefs make plain that there are issues of material fact that must be resolved by a jury and that the district court erred in granting summary judgment.

ARGUMENT

I. JANNY'S EVIDENCE IS COMPETENT AND ADMISSIBLE, AND CREATES ISSUES OF MATERIAL FACT THAT CAN BE RESOLVED ONLY BY A JURY.

Defendants repeatedly argue that Janny has "no competent evidence" to support his claims because his sworn statements submitted on summary judgment are "conclusory" and "self-serving."[1] But a sworn statement is not "conclusory" or "self-serving" merely because it supports a litigant's position. Rather, sworn statements are generally competent evidence; they are inadequate to defeat summary judgment only if they are "generalized, unsubstantiated, non-personal,"

[1] *E.g.*, Answer Brief of Appellees Carmack and Konstanty ("Program Defs. Br.") at 12-13, 15, 17, 19, 27, 28, 29; Answer Brief [of Gamez] ("Gamez Br.") at 26; *see also id.* at 10, 12, 26, 31.

"without specific supporting facts," and "lack[ing in] probative value." *Thomas v. Int'l Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995) (citations and internal quotation marks omitted). For example, an affidavit that does not "provide any factual bases for the inference" of disparate treatment under Title VII cannot save a plaintiff from summary judgment.[2] Nor is an affidavit adequate when it fails to identify "complications associated with [the plaintiff's] illness, . . . let alone describe[] how those complications prevented . . . timely compl[iance] with the prison grievance procedure,"[3] or when it proffers only non-specific, "generalized comments" made "every other day" to "management" that the plaintiff claimed were "protected opposition to sex discrimination."[4]

In contrast to these flawed affidavits, Janny's sworn statements on summary judgment—the verified complaint, declaration, and supplemental declaration—are based on his observations as a percipient witness and are detailed as to date, time, place, and event. As such, they satisfy the requirements of Federal Rule of Civil Procedure 56(c)(4) that an affidavit or declaration must (1) "be made on personal knowledge"; (2) "set out facts that would be admissible in evidence"; and

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[2] *Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir. 1995).

[3] *Thomas v. U.S. Bureau of Prisons*, 282 F. App'x 701, 704 (10th Cir. 2008) (unpublished).

[4] *Wolff v. United Airlines, Inc.*, 2020 WL 1138517, at *10 (D. Colo. 2020) (unpublished).

(3) "show that the affiant or declarant is competent to testify on the matters stated." Thus, Janny's sworn statements do not contain "threadbare assertions" as Gamez asserts (Gamez Br. at 10), but admissible evidence.

And, contrary to the Program Defendants' claim, Janny's sworn statements do not present inadmissible hearsay in the form of "statements of Carmack, Konstanty, and Gamez offered for the truth of the matter asserted." Program Defs. Br. at 28. Because they are "admission[s] by a party opponent," statements by a defendant to Janny or heard by Janny are not hearsay. *Thomas*, 48 F.3d at 485 (citing Fed. R. Evid. 801(d)(2)).

Gamez, too, misinterprets a fundamental summary judgment principle when he repeatedly states that Janny's evidence is "blatantly contradicted" by the remainder of the record and, as a result, must be disregarded. Gamez Br. at 17, 21, 22, 31. This language comes from *Scott v. Harris*, 505 U.S. 372, 380 (2007), where the non-movant's version of events so conflicted with a videotape that "no reasonable jury could believe it" and the trial court "should not [have] adopt[ed] that version of the facts for purposes of ruling on a motion for summary judgment." This Court has explained how the principle is to be applied:

> Here, [unlike *Scott*,] there is no videotape or similar evidence to blatantly contradict [the plaintiff-arrestee's] testimony. There is only other witnesses' testimony to oppose his version of facts, and our judicial system leaves credibility determinations to the jury.

Rhoads v. Miller, 352 F. App'x 289, 291 (10th Cir. 2009) (unpublished) (§ 1983 action for use of excessive force).

In short, both the Program Defendants and Gamez invite this Court to engage in fact-finding that is prohibited on summary judgment. But the resolution of conflicts in the evidence is for the jury.

II. JANNY'S EVIDENCE ESTABLISHES A VIOLATION OF THE ESTABLISHMENT CLAUSE.

A. This Court Has Applied the *Lee* Coercion Test in Other Contexts, and It Is the Appropriate Standard Here.

Gamez argues that this Court "has not . . . adopted" the coercion test set forth in *Lee v. Weisman*, 505 U.S. 577 (1992), and, as a result, the district court properly ignored *Lee* and correctly applied the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This argument misstates Establishment Clause jurisprudence both generally and in this Circuit.

First, the key principle held to be "beyond dispute" in *Lee*—"that government may not coerce anyone to support or participate in religion or its exercise" (505 U.S. at 587)—is deeply rooted in First Amendment jurisprudence. Appellant's Br. at 22. Since *Lee*, the Supreme Court has repeatedly recognized that the prohibition on religious coercion is "an elemental First Amendment principle." *Town of Greece v. Galloway*, 572 U.S. 565, 586 (2014) (controlling plurality opinion of Kennedy, J., joined by Roberts, C. J., and Alito, J.); *see*

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310-12 (2000) (holding that "delivery of a pregame prayer" at public-school football games violates Establishment Clause because it "has the improper effect of coercing those present to participate in an act of religious worship"); *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (plurality opinion of Rehnquist, C.J., joined by Scalia, Kennedy, and Thomas, JJ.) (governmental "institutions must not press religious observances upon their citizens"); *Zelman v. Simmons-Harris*, 536 U.S. 639, 655-56 (2002) ("The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools . . . .").

Second, this Court has applied the *Lee* coercion test in a variety of contexts. *See, e.g., Bauchman ex rel. Bauchman v. West High Sch.*, 132 F.3d 542, 552 n.8, 557 (10th Cir. 1997) (choir student not unconstitutionally coerced where public school gave her choice of opting out of religious songs); *Pryor v. Coats*, 203 F.3d 836, 2000 WL 147388, at *7 (10th Cir. 2000) (unpublished) (public law school's policy concerning religious messages "falls far short of coercing [plaintiff] into supporting and participating in religion"); *Sledge v. Cummings*, 69 F.3d 548, 1995 WL 628137, at *1 (10th Cir. 1995) (unpublished) (prison's procedures for scheduling of religious activities did not constitute coercion). And as this Court has not yet issued any opinions (to counsel's knowledge) in cases where a criminal offender has been required to take part in religious programming, it is misleading

to argue—as Gamez does—that the Court has failed to "adopt" the *Lee* coercion test for such settings.

Third, as discussed in Janny's opening brief, every other Circuit to consider the religious coercion of criminal offenders has applied *Lee* as the principal test, as has nearly every federal-district-court and state-court decision. *See* Appellant's Br. at 27-30.

B. Whether Under *Lee* or *Lemon,* Janny's Evidence Demonstrates the Requisite Coercion.

As explained in Janny's opening brief, courts considering coercion-based Establishment Clause claims sometimes engage in a secondary analysis under *Lemon* in addition to the *Lee* test. Under *Lemon*—like *Lee*—an order from a government official to participate in religious activities violates the Establishment Clause. Such coercive action has an impermissible effect of advancing religion, which violates the second prong of the *Lemon* test. Appellant's Br. at 35-36; *see also Summum v. City of Ogden*, 297 F.3d 995, 1010 (10th Cir. 2002) ("[O]ur consideration of the *Lemon* factors demands sensitivity to any 'coercive pressure' imposed upon the relevant community on account of the challenged policy." (citations omitted)).

Janny, as fully set forth in his opening brief, has adduced ample evidence to support an Establishment Clause claim under both *Lee* and *Lemon*. Gamez's response is simply to state his version of events as fact and ignore Janny's

competing evidence. For example, Gamez asserts that Janny "was free to establish a different residence of record." Gamez Br. at 21. But Janny's evidence shows that he was forced to reside at the Rescue Mission: Janny told Gamez on February 3 that he did not want to stay there, and Gamez replied that Janny could choose between the Rescue Mission and jail. I App. 26. Janny suggested an alternative residence of record, the home of family friends, but Gamez refused to investigate this option. *Id.* During the second parole-office meeting on February 4, after Janny had learned of the Program's religious requirements, Gamez refused to allow Janny to stay in the homeless-shelter area of the Rescue Mission, which was not part of the Program. *Id*. In that same meeting, Gamez again told Janny that he could agree to be in the Program or "choose to go to Washington County [jail]." I App. 167 (pp. 83-84); II App. 419. Gamez may dispute this evidence, but that only further highlights that Janny's claims must be put before a fact-finder, not resolved via summary judgment for Gamez.

As another example, Gamez argues that there is no "support in the motion record" of an "agreement" between him and the Program Defendants "to require [Janny] to attend religious programming or else face arrest and imprisonment . . . ." Gamez Br. at 22. That is simply false: The record contains detailed evidence of an agreement. At the February 4 orientation, Carmack told Janny that Gamez had been his parole officer, that the two were "good friends," and that Carmack was

doing Gamez "a favor" by accepting Janny as the first male parolee for the Program, with the intent of accepting male parolees on a regular basis. I App. 31; II App. 418. During the orientation, the phone call to Gamez, and the second parole-office meeting (with Carmack in attendance)—all on February 4—Gamez, Carmack, and Konstanty each threatened Janny with a return to jail if he did not participate in the religious programming. I App. 30-32, 166 (pp. 72-73), 167 (pp. 83-84); II App. 410-11, 419. At the parole-office meeting, Carmack asked Gamez to change Janny's parole curfew to 4:30 p.m. so that he would be in the facility for daily chapel services, and Gamez did so. I App. 32, 167 (p. 83), 239.

Gamez acknowledges, as he must, that he changed Janny's curfew, but asserts that there is no evidence that this change was "motivated by animus toward Mr. Janny for being an atheist." Gamez Br. at 10. Gamez's effort at misdirection here must fail. To demonstrate a violation of the coercion test, it is sufficient for a plaintiff to show that he was coerced to take part in a religious activity or program (*see, e.g.*, *Lee*, 505 U.S. at 587); the plaintiff need not show that the government acted with a religion-related motive in coercing him (*see Kerr v. Farrey*, 95 F.3d 472, 474, 479-80 (7th Cir. 1996) (prison's policy of requiring inmates to attend religious drug-treatment program violated coercion test even though prison used program because it was free and successful, and there was no suggestion that prison picked program for religious reasons); *Berger v. Rensselaer Cent. Sch.*

Corp., 982 F.2d 1160, 1164, 1171 (7th Cir. 1993) (public school's practice of allowing private group to distribute Bibles in classrooms violated coercion test, notwithstanding that school's conduct was "not aimed at promoting the religious values" of the group)).[5]

Gamez again ignores the extensive record evidence when he asserts that it is undisputed that his "[parole] directive did *not* require" Janny "to participate in religious programming" and that "Janny was not required to participate in the . . . Program or other faith-based programming." Gamez Br. at 21, 22. In fact, the evidence proffered by Janny shows that the parole directive required Janny to reside at the Rescue Mission and "abide by all house rules as established." I App. 251. The directive also stated that "[i]f said rules are violated, the violation will lead to [Janny] being placed at Washington County Jail to address the violation." *Id.* During the February 4 telephone call, Gamez specifically stated that "the rules of the Program were the rules of [Janny's] parole," including "the religious ones." II App. 411. During the second parole-office meeting on February 4, Gamez, Carmack, and Janny all discussed the specifics of the mandatory religious "house rules," the same phrase used in the parole directive. I App. 167 (p. 83); II App. 411-12. Thus, there is ample record evidence that Janny, under threat of expulsion

[5] In any event, questions of motive and intent are generally understood to be within the province of the jury. *See Randle v. City of Aurora*, 69 F.3d 441, 453 (10th Cir. 1995).

from the Program and a return to jail, was forced to attend Christian Bible studies, religious counseling, and daily chapel, all of which were required by the Program's rules. I App. 32-33, 166 (pp. 72-73), 170 (p. 113); II App. 410-12, 420, 434, 477. Indeed, the Program Defendants' brief corroborates Janny's evidence on these matters. *See* Program Defs. Br. at 3, 6, 16.

As discussed above, Gamez repeatedly attempts to dismiss the evidence proffered by Janny, presumably recognizing that he is not entitled to summary judgment if Janny's evidence is deemed competent and admissible. In one instance, disputing Janny's assertion that Gamez knew he was an atheist, Gamez argues that "there is no evidence *save for Mr. Janny's testimony* that Officer Gamez had any conversation with the [Program] Defendants regarding Mr. Janny's atheism . . . ." Gamez Br. at 10 (emphasis added). In another, Gamez argues that Janny's "claim that he was forced out of the Mission is uncorroborated in the record." *Id.* at 9.

But Janny's testimony—through his sworn statements and his deposition testimony—is competent, admissible evidence on summary judgment, as discussed above. That evidence shows that Gamez learned of Janny's atheism during the February 4 phone call and discussed his atheism at length during that phone call and during the second parole-office meeting on the same day. I App. 166 (p. 73), 167 (pp. 83-84); II App. 411, 418. It also shows that Janny told Carmack on

Sunday, February 8, at 4:30 p.m., that he had not attended an outside church service as required and intended to skip evening chapel services. I App. 169 (p.109). Carmack immediately expelled Janny from the facility, telling him that "[y]ou have to leave. . . . [Y]ou're not doing what we're telling you . . . so you have to go." I App. 33, 169 (p. 109), 170 (p. 111); II App. 412. Janny's sworn testimony about these events need not be corroborated by *other* evidence in the summary judgment record to warrant denial of summary judgment. *See Jones v. McHugh*, 604 F. App'x 669, 672 (10th Cir. 2015) (unpublished) (rejecting argument that declaration was ineffective as summary judgment evidence because it was uncorroborated). But in any event, the Program Defendants' brief agrees with Janny's testimony about these matters. Program Defs. Br. at 6, 16.

C. Gamez Is Not Entitled to Qualified Immunity.

To overcome a state official's assertion of qualified immunity, a plaintiff must satisfy a two-part test: (1) the alleged conduct violated a constitutional right; and (2) the right was clearly established at the time of the violation such that a reasonable official would have known that the conduct was a violation. *See* Appellant's Br. at 48.

Although Gamez asserts that Janny "cannot satisfy either prong" (Gamez Br. at 13, 23), the record shows otherwise. As fully discussed in Janny's opening brief and above, Janny's evidence demonstrates a violation of his rights under the

Establishment Clause. Nor does the record support the statement made by the district court (II App. 494) and repeated by Gamez on appeal (Gamez Br. at 23-24), that Janny "cited to 'no authority . . . for the proposition that a parole officer violates a parolee's rights by requiring him to reside at a facility that provides religious programming.'"

As an initial matter, the court below misstated the issue. The problem was not that the Rescue Mission "provide[d] religious programming," but rather that Gamez (and the Program Defendants) required Janny to participate in that programming, as the evidence shows. And although a *pro se* litigant's ability to find and cite a particular legal authority is hardly dispositive of an issue, Janny did cite authority standing for the proposition that such a requirement violates the Establishment Clause, including *Lee* and a number of leading appellate decisions. *See* II App. 396-98.

Further, Gamez fails to address, in any way, the state of Establishment Clause jurisprudence at the time of his actions. As discussed in Janny's opening brief, the law was clearly established long before 2015 that a state official coercing a criminal offender to engage in religious observance violates the Establishment Clause. *See* Appellant's Br. at 49-51.

III. JANNY'S EVIDENCE ESTABLISHES A VIOLATION OF THE FREE EXERCISE CLAUSE.

A. Janny's Claim Is Not Based on Any Allegation of Religious Animus.

As fully discussed in Janny's opening brief, (1) the Free Exercise Clause, like the Establishment Clause, prohibits coercion to affirm a religious belief or participate in religious activity (Appellant's Br. at 38-41; *accord Bauchman*, 132 F.3d at 556-57); and (2) Janny's evidence demonstrates that he was coerced to abandon his atheist beliefs and adopt and participate in Christian beliefs and activities in the Program (Appellant's Br. at 40).

Rather than address these points, Gamez argues that Janny's Free Exercise Clause claim is really a claim based on religious discrimination—Gamez's "personal religious animus"—and thus "necessitate[s] an analysis under the 'invidious discrimination' standard . . . ." Gamez Br. at 24.

Gamez misstates Janny's free-exercise claim. Janny asserts that he was coerced to profess religious beliefs to which he does not subscribe and to take part in religious practices reflecting those beliefs. The difference between this claim and a religious-discrimination claim is demonstrated by the two decisions that Gamez cites. In *Carr v. Zwally*, 760 F. App'x 550, 554 (10th Cir. 2019) (unpublished), the prisoner-plaintiff alleged that a deputy sheriff took and discarded the plaintiff's "Bibles and religious materials not for a neutral . . . reason but for the purpose of discriminating on account of . . . religion." (citation and

internal quotation marks omitted). Similarly, in *Ashaheed v. Currington*, 2019 WL 1953357, at *2, 5 (D. Colo. 2019) (unpublished), the prisoner-plaintiff, a Muslim, alleged that a state correctional officer, motivated by religious animus, forced the plaintiff to submit to having his beard shaved.

Janny's coercion claim is entirely different from these religious-discrimination, animus-based claims. It is grounded on what Gamez did to Janny, not on why Gamez did it. And Janny does not need to show that Gamez acted with religious animus to prevail on a religious-coercion claim under the Free Exercise Clause. The prohibition against religious coercion set forth in the Supreme Court's Free Exercise Clause cases is unqualified and does not depend on motive. *See Sherbert v. Verner*, 374 U.S. 398, 402 (1963) ("Government may *neither* compel affirmation of a repugnant belief . . . *nor* penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities" (emphasis added)); *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) ("government may not compel affirmation of religious belief"). Thus, without inquiring about whether any religious animus motivated the government, courts have struck down, under the Free Exercise Clause, probation conditions requiring church attendance. *See State v. Evans*, 796 P.2d 178, 178-79 (Kan. App. 1990); *Jones v. Commonwealth*, 38 S.E.2d 444, 448-49 (Va. 1946).

B. Gamez Is Not Entitled to Qualified Immunity.

Gamez is not entitled to qualified immunity on the Free Exercise Clause claim for reasons similar to those that apply to the Establishment Clause claim: (1) Janny's evidence establishes a violation of the Free Exercise Clause; and (2) Gamez does not address the well-established law, beginning more than five decades before 2015, prohibiting the state from coercing a person to adopt or participate in a religion or religious activity. *See* Appellant's Br. at 38-41, 52.

IV. THE PROGRAM DEFENDANTS ACTED UNDER COLOR OF STATE LAW.

In his opening brief, Janny explained how the evidence satisfied two of the four tests to determine whether private parties should be considered state actors—the joint-action test and the nexus test. *See* Appellant's Br. at 41-47. Nothing in the Program Defendants' brief challenges this result in any meaningful way.

A. The Evidence Satisfies the Joint-Action Test.

The bulk of the Program Defendants' brief concerns the joint-action test, one of four tests to determine whether private actors should be considered state actors. *See* Appellant's Br. at 42. The Program Defendants' repetitive and overlapping arguments boil down to three main points: (1) the state's "mere acquiescence" in the Program Defendants' private conduct does not convert that conduct to state action; (2) there is no evidence that Konstanty engaged in conduct that could be considered "joint action" with the state; and (3) there is no evidence of a "conspiracy," a "common plan," "shared goals," or "cooperative action" between

the state and the Program Defendants. All three arguments fail because each is contradicted by evidence in the record.

1. "Mere Acquiescence"

As this Court has held, each of the four state-action tests "really gets at the same issue—is the relation between a nominally private party and the alleged constitutional violation sufficiently close to consider the nominally private party a state entity for purposes of a section 1983 suit?" *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 596 (10th Cir. 1999). It is well-understood that the relationship is "sufficiently close" if "a private party is a willful participant in joint action with the State or its agents." *Id.* (citations and internal quotation marks omitted). It is also well-understood that the relationship is not "sufficiently close" if the private party's actions were taken not in concert with the state, but only "'with the mere approval or acquiescence of the State . . . .'" *Wittner v. Banner Health*, 720 F.3d 770, 777 (10th Cir. 2013) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 49, 52 (1999)).

Like the court below (II App. 491), the Program Defendants rely on the "mere acquiescence" principle, invoking it seven times (Program Defs. Br. at 12, 16, 18, 19, 20). But unlike in *Wittner*, which the Program Defendants cite repeatedly, Janny *has* "alleged that . . . state officials conspired with [and] acted jointly" with the Program Defendants in taking the allegedly-unconstitutional

actions complained of. 720 F.3d at 777. Those allegations, which are supported by specific and competent evidence, contradict the Program Defendants' contention of "mere acquiescence," as Janny explained in his opening brief. *See* Appellant's Br. at 46-47.

The evidence of affirmative and intentional acts by the state, as opposed to "mere acquiescence," includes:

- Gamez was personally familiar with the Program at the Rescue Mission. Carmack, the director, was not only Gamez's former parolee, but the two were also "good friends." I App. 31. They had "an informal arrangement" that allowed Gamez to place "certain parolees" at the Rescue Mission. *Id*. 264.

- Gamez's placement of Janny in the Program at the Rescue Mission was purposeful: The Program had previously accepted only female parolees from Gamez, and Carmack was doing Gamez "a favor" as a first step to routinely accepting male parolees. *Id*. 31; II App. 418.

- Gamez knew of the Program's Christian orientation and religious requirements, and he mandated that Janny comply with those requirements. Janny's parole directive stated that he was to "abide by all house rules," I App. 172, and Gamez made clear to Janny in the February 4 phone call and the parole office meeting with Carmack that those rules, including the religious ones, "were the rules of [Janny's] parole." II App. 411; I App. 67 (p. 83).

- Gamez granted Carmack's request that Janny's electronic monitoring parole curfew be changed to

> 4:30 p.m. to assure Janny's attendance at the 5:00 p.m. daily chapel service. *Id.* 32, 167 (p. 83), 239.
>
> - Gamez and Carmack agreed that Janny would not be permitted to get a job outside the facility, again, to assure his attendance at religious activities. *Id.* 32; II App. 419.
>
> - Gamez told Janny at the February 4 parole office meeting with Carmack that Janny could choose between participating in the Program's religious activities or going back to jail. I App. 167 (pp. 83-84); II App. 419.
>
> - Janny made his choice, Carmack expelled him from the Program, and Gamez sent him back to jail. I App. 33, 169 (p. 109), 170 (p. 111), 240-41; II App. 412-13.

This evidence also rebuts a related argument, *i.e.*, that "the State did not create the Mission's rules, the Mission and not the State imposed and enforced its own rules, and the State is not responsible for the conduct of the Mission whatsoever." Program Defs. Br. at 11. On facts similar to those here—the religious program made its own rules, but state employees placed the plaintiff into the program, required him to follow the program's rules, and adopted the program's rules as the state's rules—the court in *Hanas v. Inner City Christian Outreach, Inc.*, 542 F. Supp. 2d 683 (E.D. Mich. 2008), held the program director to be a state actor.[6]

[6] The Program Defendants also argue that Janny "knew the terms of his Parole Agreement" when he signed it in December 2014 and when he signed the parole directive on February 3, 2015. Program Defs. Br. at 18-19. But when Janny

In short, Gamez's actions were not "mere approval or acquiescence" by him—the state—in the actions of the Program Defendants, private parties. Rather, Gamez and the Program Defendants were full partners in the unconstitutional course of conduct at issue here.

2. Konstanty's Role

Despite conceding that Konstanty "led Bible studies that Janny was required to attend," the Program Defendants nevertheless argue that "[t]he appellate record does not contain a scintilla of evidence that Konstanty acted in concert with the State to accomplish some shared unconstitutional goal." Program Defs. Br. at 14-15. In fact, the Program Defendants' own admission, combined with other record evidence, demonstrates Konstanty's role in violating Janny's First Amendment rights in concert with the state.

First, Konstanty, along with Carmack, conducted Janny's orientation session on February 4. II App. 410. Konstanty was the Rescue Mission's Assistant Director and Program Manager. I App. 200. When Janny stated that he was an atheist and would not participate in religious activities, Konstanty, like Carmack, responded by telling Janny that "you're going to be here and you're going to do the [P]rogram, or you're going to jail." I App. 166 (p. 73).

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signed the two documents, he was unaware that he would be required to participate in religious activities, learning that only at the February 4 orientation. I App. 30.

Second, in his sworn summary judgment declaration, Janny stated that "Konstanty was present for the call" that Carmack placed to Gamez during the orientation session. II App. 411. The Program Defendants argue that (1) there is no allegation that Konstanty "exchanged any words with Gamez whatsoever"; and (2) Janny's deposition testimony is inconsistent with his declaration. Program Defs. Br. at 14. As to the former, whether Konstanty spoke during the call is irrelevant in light of the evidence that he (a) like Gamez, threatened Janny with jail if he refused to participate in religious activities; (b) conducted the Bible studies that Janny was forced to attend with Gamez's knowledge; and (c) repeatedly proselytized Janny, urging him to abandon atheism and embrace Christianity. *See* Appellant's Br. at 7, 10-11.[7] As to the latter, although Janny expressed uncertainty in his deposition about whether Konstanty spoke during the orientation-session phone call with Gamez, Janny did not testify that Konstanty was not present for the call, and Janny did testify that Konstanty was aware of "what had been said" between Carmack and Gamez. I App. 168 (pp. 102-04).

Accordingly, Konstanty's role in depriving Janny of his constitutional rights is well-supported by the record evidence.

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[7] As this Court has recognized, proselytization is a particularly "aggressive form of advancement of religion" that violates the Establishment Clause. *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 n.10 (10th Cir. 1998) (en banc) (citing *Marsh v. Chambers*, 453 U.S. 783, 793 n.14 (1983)). "[T]he real danger in this area is effort by government to convert citizens to particular sectarian views." *Id.*

3. "Conspiracy," "Common Plan," "Shared Goals," and "Cooperative Action"

The Program Defendants' brief repeatedly asserts that there is no evidence that Gamez, Carmack, and Konstanty acted pursuant to a "conspiracy" or a "common plan," possessed "shared goals," or took "cooperative action." *See, e.g.*, Program Defs. Br. at 12, 13, 14, 15, 16, 17, 19, 20, 21, 26. Quite the opposite, the evidence extensively discussed in Janny's opening brief and set forth above demonstrates all four species of joint action. Janny's evidence supports the existence of an agreement—a conspiracy—to violate Janny's First Amendment rights by forcing him to participate in the Christian Program.

As fully set forth in the opening brief:

- Gamez and the Program Defendants used their "informal arrangement" to place Janny in the Program as part of a larger plan to expand the arrangement to include male parolees (Appellant's Br. at 4, 6);

- Gamez and the Program Defendants all threatened Janny with a return to jail if he refused to follow the Program's "rules," including those requiring religious observance (*id.* at 6-7, 9);

- Carmack attended a parole-office meeting with Gamez and Janny at which (a) additional threats of jail were made; and (b) at Carmack's request, Gamez changed Janny's curfew to 4:30 p.m. to ensure his attendance at daily chapel services (*id.* at 8-10);

- Carmack and Konstanty forced Janny to participate in Bible studies, religious counseling, and other religious activities (*id.* at 10-11);
- Carmack expelled Janny from the Program and the Rescue Mission when Janny refused to attend outside church services and Sunday chapel (*id.* at 11-12); and
- Gamez had Janny arrested, sent him back to jail, and participated in his parole revocation, which led to an additional 150 days of incarceration (*id.* at 12).

This evidence demonstrates the very "conspiracy . . . , joint participation, agreement, or 'meeting of the minds' to violate constitutional rights" that the Program Defendants claim did not exist. *See* Program Defs. Br. at 13. The cases on which the Program Defendants primarily rely are not to the contrary. In *Coleman v. Turpen*, 697 F.2d 1341, 1345 (10th Cir. 1982), this Court held that a private towing company's "joint participation" with the state in permanently depriving the plaintiff of his property—a camper—constituted state action for purposes of 42 U.S.C. § 1983. The Program Defendants did no less here. Similarly, this Court's decision in *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442 (10th Cir. 1995), provides no support for the Program Defendants. In that case, the plaintiffs failed to show that the state university and the private concert promoter shared a "specific goal to violate the plaintiff's constitutional rights by engaging in a particular course of action" when the promoter

independently conducted improper pat-down searches on concert patrons. *Id.* at 1455. Thus, the joint action test was not satisfied. *Id.* at 1456.

Nor do the Program Defendants succeed in their efforts to distinguish two decisions cited by Janny: *Hanas*, 542 F. Supp. 2d 683, and *Hazle v. Crofoot*, 727 F.3d 983 (9th Cir. 2013). Indeed, the Program Defendants concede that each decision is factually similar to this case (Program Defs. Br. at 25, 26), and both cases provide strong support for holding Carmack and Konstanty liable as state actors.

In *Hanas*, the county drug court judge (1) forced the plaintiff to choose between prison and a religious rehabilitation program; and (2) told the plaintiff, after he objected to the program's religious requirements, that "the rules of [the] Pastor['s] . . . program are the rules of the Court" (542 F. Supp. 2d at 693), just as Gamez told Janny that "the rules of the Program were the rules of [his] parole," including "the religious ones." II App. 411. *Hanas* held that the director of the private religious program was a state actor and liable under § 1983 for violations of the Establishment and Free Exercise Clauses. 542 F. Supp. 2d at 688, 693-94. Contrary to the Program Defendants' contention that the decision "provide[s] no useful legal analysis" (Program Defs. Br. at 25), the court explained that the joint-action test was satisfied because the private parties "acted jointly with the Drug Court" and were thus "willful participant[s] in joint activity with the State or its

agents." 542 F. Supp. 2d at 693. The same is true for the Program Defendants and Gamez.[8]

As for *Hazle*, the Program Defendants assert that "the Ninth Circuit explicitly declined to address whether the private substance abuse placement agency was a state actor." Program Defs. Br. at 27. But in *Hazle*, the Ninth Circuit held that (1) summary judgment evidence "support[ed] an inference that the [private agency] was responsible for [the plaintiff's] being referred to the religious treatment facility where his First Amendment rights were violated"; (2) reversed the grant of summary judgment to the private agency on the issue of whether it could be liable to the plaintiff for violating his constitutional rights; and (3) remanded to the district court for "a determination on a more complete record" of the state-action question. 727 F.3d at 997-98 & n.13. The Ninth Circuit's decision thus can only be understood as determining that the plaintiff presented evidence from which a trier of fact could conclude that the private agency was a state actor.

[8] The Program Defendants claim that a "more compelling analog" is another decision from the district where *Hanas* was decided—*Cain v. Caruso*, 2009 WL 2475456 (E.D. Mich. 2009) (unpublished). Program Defs. Br. at 25. But *Cain*, contrary to the Program Defendants' assertion, did not reject *Hanas*'s reasoning. Rather, it concluded that the plaintiff there, unlike the *Hanas* plaintiff, "offer[ed] nothing more than his assertion that [the private party] and state officials engaged in joint activity." *Id.* at *9. As a result, there was no evidence on which "a rational trier of fact [could] find for plaintiff." *Id.*

B. The Evidence Satisfies the Nexus Test.

The Program Defendants focus their discussion of the nexus test on the proposition that the test can be satisfied only if the state has "exercised sufficient coercive power" over the private party and its challenged action, and assert that Gamez had no such power over the Program Defendants. Program Defs. Br. at 22. But this description of the nexus test contends with only one of two ways to satisfy the test.

As explained in Janny's opening brief, the Supreme Court has established what a "sufficiently close nexus" requires: "[O]ur precedents indicate that 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." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis added). The test, then, is disjunctive, and is satisfied either when a state can be held responsible through the state's exercise of "coercive power" *or* when the state provides "significant encouragement, either overt or covert."

This case falls under the latter: Janny presented evidence that Gamez provided significant, overt encouragement to the Program Defendants in requiring Janny to participate in religious activities. "As is the case with all of the various tests for state action, the required inquiry is fact-specific." *Gallagher*, 49 F.3d at

1448. Here, the competent summary judgment evidence discussed above takes Gamez's actions out of the insufficient "mere acquiescence" category and places them squarely in the "significant encouragement" category. *See id.* In fact, when Carmack expelled Janny from the Program for violating the rules requiring participation in religious activity, Gamez carried out the threats made by both him and the Program Defendants, punishing Janny for his refusal to submit to religious worship and proselytizing by sending him back to jail.

The evidence shows the requisite "sufficiently close nexus."

CONCLUSION

For all the reasons set forth above and in Janny's opening brief, the Court should reverse the grant of summary judgment to Defendants and remand for further proceedings, including a trial on the merits.

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 6,110 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

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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.

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I certify that on this 28th day of August, 2020, I have electronically filed Appellant's Reply Brief by the CM/ECF system, which will then accomplish service to all counsel of record.

/s/ Charles B. Wayne