No. 12-5218

United States Court of Appeals
for the
Tenth Circuit

PAUL CAMPBELL FIELDS,
Plaintiff-Appellant,

v.

CITY OF TULSA, ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
HONORABLE GREGORY K. FRIZZELL
Civil Case No. 11-cv-115-GKF-TLW

APPELLANT'S PRINCIPAL BRIEF
ORAL ARGUMENT REQUESTED

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Rules & Statutes

GLOSSARY OF TERMS

DCOP ..... Deputy Chief of Police

IA.....Internal Affairs

TPD .....Tulsa Police Department

STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF JURISDICTION

On February 23, 2011, Plaintiff Fields filed his initial Complaint against Defendant Webster, individually and in his official capacity as Deputy Chief of Police, alleging violations arising under the U.S. Constitution and 42 U.S.C. § 1983. (R-2: Compl.). Defendant Webster answered on March 18, 2011. (R-8: Answer). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

On March 23, 2011, Plaintiff filed a First Amended Complaint against Defendant City of Tulsa (hereinafter "City"), Defendant Jordan, individually and in his official capacity as Chief of Police, and Defendant Webster, individually and in his official capacity, alleging violations under the U.S. Constitution and 42 U.S.C. § 1983. (R-11: First Am. Compl.). Defendants answered on April 25, 2011. (R-16: Answer).

On June 16, 2011, Plaintiff filed a motion for leave to file a Second Amended Complaint, (R-17: Mot. to Amend), which Defendants opposed, (R-19: Defs.' Resp. to Mot. to Amend). The district court denied Plaintiff's motion on November 28, 2011. (R-25: Op. & Order).

On August 14, 2012, Plaintiff filed a motion for summary judgment, (R-41, 42: Pl.'s Mot. for Sum. J.), and Defendants responded, (R-49: Defs.' Opp'n). On August 17, 2012, Defendants Webster and Jordan filed a motion for summary

judgment, (R-45: Defs.' Mot. for Summ. J.), and on the same day the City filed a separate motion for summary judgment, (R-46: City's Mot. for Sum. J). Plaintiff responded to both motions. (R-50: Pl.'s Opp'n to Individual Defs.' Mot.; R-52: Pl.'s Opp'n to City's Mot.).

On December 13, 2012, the district court denied Plaintiff's motion for summary judgment and granted Defendants' motions. (R-65: Op. & Order). Judgment was subsequently entered in Defendants' favor. (R-66: J.).

On December 26, 2012, Plaintiff filed a timely notice of appeal, seeking review of the district court's order denying Plaintiff's motion for leave to amend his pleading and the district court's order denying Plaintiff's motion for summary judgment and granting Defendants' motions. (R-67: Notice of Appeal). This appeal is from a final order and judgment that disposes of all parties' claims. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

Captain Paul Fields ("Plaintiff"), a loyal and dedicated police officer with a long and stellar career on the City police department, was summarily punished *for objecting* to an order *based on his sincerely held religious beliefs*. When Plaintiff questioned the lawfulness of an order compelling officer attendance at the "Law Enforcement Appreciation Day" hosted by the Islamic Society of Tulsa ("Islamic Society")—an event that included religious proselytizing—he was punitively

transferred, subjected to an Internal Affairs ("IA") investigation, and ultimately suspended without pay for two weeks. Major Julie Harris, Plaintiff's immediate supervisor, *candidly admitted during her sworn testimony that the Police Department retaliated against Plaintiff for exercising his constitutional rights*. (R-42-27: Harris Dep. at 118, App. 326). In fact, Defendants retaliated against Plaintiff because he, a Christian, objected to an order mandating officer attendance at an event that included Islamic proselytizing. As Defendant Jordan testified, he "*can't have a police department where everybody refuses to give – to interact with Muslims because they say it's their religious reasons*." (R-50-3: Jordan Arbitration Test. at 351, App. 1052).

As set forth below, Defendants' discriminatory treatment of Plaintiff violated his clearly established constitutional rights. The district court's opinion, which impermissibly ignored the gravamen of the constitutional claims at issue by setting up a straw man, should be reversed and judgment should be entered in Plaintiff's favor as to liability.

STATEMENT OF THE ISSUES FOR REVIEW

I. Whether Defendants violated the Free Exercise Clause of the First Amendment by summarily punishing Plaintiff for objecting to an order based on his sincerely held religious beliefs.

II. Whether Defendants violated Plaintiff's First Amendment right to the freedom of association when they summarily punished him for objecting to an order compelling an association that violated his sincerely held religious beliefs.

III. Whether Defendants violated the Establishment Clause by engaging in conduct that conveyed a message of endorsement of, and favor toward, Islam and a corresponding message of disfavor toward Christianity.

IV. Whether Defendants violated Plaintiff's rights guaranteed by the equal protection clause of the Fourteenth Amendment by impermissibly burdening his fundamental constitutional rights.

V. Whether Plaintiff's proposed Second Amended Complaint stated a claim under the Free Speech Clause of the First Amendment.

VI. Whether Plaintiff's proposed Second Amended Complaint stated a claim under the Oklahoma Religious Freedom Act.

STATEMENT OF THE CASE

On February 21, 2011, Plaintiff, a Christian, was summarily punished for objecting to an order on religious grounds that mandated officer attendance at an Islamic proselytizing event. The order was issued by Defendant Webster in his official capacity as Deputy Chief of Police, and Plaintiff's punishment was affirmed by the City and Defendant Jordan, the Chief of Police.

On February 23, 2011, Plaintiff filed his initial Complaint against Defendant Webster, individually and in his official capacity, alleging violations arising under the U.S. Constitution and 42 U.S.C. § 1983. (R-2: Compl.).

On March 23, 2011, Plaintiff filed a First Amended Complaint against the City, Defendant Jordan, individually and in his official capacity, and Defendant Webster, individually and in his official capacity, alleging violations under the U.S. Constitution and 42 U.S.C. § 1983. (R-11: First Am. Compl., App. 10-33). More specifically, Plaintiff alleged that Defendants violated his rights to the free exercise of religion and to the freedom of association protected by the First Amendment, that Defendants violated the Establishment Clause, and that Defendants deprived him of the equal protection of the law guaranteed under the Fourteenth Amendment. As noted, Plaintiff's claims arose out the fact that he was summarily punished for objecting—on religious grounds—to an order compelling officer attendance at an Islamic proselytizing event. For doing so, Plaintiff was immediately transferred and subjected to an IA investigation. Following the investigation, Plaintiff's transfer was made permanent, he was suspended without pay for two weeks, and he was denied the opportunity to seek a promotion for one year. Plaintiff's punishment was announced on or about June 9, 2011. (*See* R-17-5: Personnel Order, App. 96-98).

On June 16, 2011, Plaintiff filed a motion for leave to file a Second Amended Complaint. (R-17: Mot. to Amend, App. 45-100). Plaintiff sought to amend his complaint to add a First Amendment free speech claim in light of the punishment that was handed down following the investigation, and he sought to add a claim under the Oklahoma Religious Freedom Act, 51 Okla. Stat. § 253. The district court denied Plaintiff's motion on November 28, 2011. (R-25: Op. & Order, App. 126-32).

In August 2012, the parties filed cross-motions for summary judgment. And on December 13, 2012, the district court denied Plaintiff's motion and granted Defendants' motions. (R-65: Op. & Order, App. 1164-79). Judgment was subsequently entered in Defendants' favor on all claims. (R-66: J., App. 1180). This appeal follows.

STATEMENT OF FACTS

A. Plaintiff Paul Fields.

Plaintiff is a City police officer and a devout Christian. He is currently a Captain on the police department, having served honorably since 1995. (R-42-2: Fields Decl. at ¶¶ 1-2, App. 167).

As a police officer, Plaintiff swore an oath to "obey the lawful orders of [his] superiors," "[t]o stand up for what [he] know[s] is right," and "[t]o stand up against wrongs in any form." (R-42-2: Fields Decl. at ¶¶ 4-5, App. 167; R-42-4, Dep. Ex.

2, App. 186-87). Pursuant to his sworn oath, Plaintiff has a duty to point out unlawful orders, including those that violate his religious beliefs.[1] (R-42-24: Jordan Dep. at 15, App. 246; R-42-4: Fields Decl. at ¶ 6, App. 167).

B. Defendants Jordan and Webster.

Defendant Jordan is the Chief of Police for the City and the person responsible for making policy for the police department on behalf of the City. Defendant Jordan testified as follows:

> Q. And as the chief of police, do you have the responsibility to make policy for the police department on behalf of the City of Tulsa?
> A. That's correct. Yes, sir.

(R-42-24: Jordan Dep. at 9, App. 242).

Defendant Jordan is also responsible for officer discipline for the police department, and he exercises this authority on behalf of the City. (R-42-24: Jordan Dep. at 10, App. 243; R-42-2: Fields Decl. at ¶¶ 9, 50, App. 168, 175; R-42-16, 17: Dep. Exs. 17 & 18, App. 201-03). Defendant Jordan testified as follows:

> Q. And with regard to the internal affairs and professional conduct of officers, what specifically is your responsibility as chief of police?
> A. To review policy and determine any need to modify policy or initiate new policy or to remove policy from existing policies and procedures, rules and regulations. Also I' – I'm the ultimate authority that signs any disciplinary action or reviews any disciplinary action that comes up the chain of command.

[1] As Defendants acknowledge, Plaintiff did *not* violate his oath in this matter, and was thus not punished for that. (R-42-24: Jordan Dep. at 90, App. 263).

> Q. When you say "ultimate authority," is that on behalf of the City of Tulsa as the representative for the police department?
> A. Yes, sir.

(R-42-24: Jordan Dep. at 10, App. 243).

Defendant Webster is a Deputy Chief of Police for the City police department. (R-42-24: Jordan Dep. at 12, App. 244).

At relevant times, Defendants Jordan and Webster and Major Julie Harris were in Plaintiff's chain of command. Major Harris was Plaintiff's division commander prior to his punitive transfer. (R-42-2: Fields Decl. at ¶¶ 7, 8, App. 168; R-42-24: Jordan Dep. at 12, 13, App. 244-45).

C. Announcement of "Voluntary" Islamic Event.

On January 25, 2011, Defendant Webster announced in a staff meeting that the Islamic Society was hosting a "Law Enforcement Appreciation Day" ("Islamic Event") that was scheduled for Friday, March 4, 2011. (R-42-2: Fields Decl. at ¶¶ 10, 11, App. 168; R-42-7: Dep. Ex. 6, App. 190-91). Friday is the "holy day" or "Sabbath" for Islam. (R-42-2: Fields Decl. at ¶ 12, App. 168; R-42-26: Siddiqui Dep. at 75-76, App. 298-99 [acknowledging that it is a "special day" for Islam]). Ms. Sheryl Siddiqui, who was testifying on behalf of the Islamic Society pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, testified that this day was proposed (and "approved" by Defendants) specifically to give officers attending the event "the option to stay for the prayer," noting that "most of the officers chose

to stay." (R-42-26: Siddiqui Dep. at 75-76, App. 298-99).

Similar to every other "appreciation" event hosted by a religious organization or held at a religious place of worship, the Islamic Event, as originally announced at the January 25th staff meeting, was voluntary. (R-42-2: Field Decl. at ¶ 13, App. 168; R-42-24: Jordan Dep. at 40-41, App. 251-52; R-50-4: Wells Decl. at ¶¶ 1-13, App. 1054-58). Indeed, Defendant Jordan acknowledged that *no similar event was ever mandatory in his thirty-plus years on the police department*. (R-42-24: Jordan Dep. at 40-41, App. 251-52).

Unlike many of these other "appreciation" events, however, the Islamic Event was *advertised* as involving religious content and religious activities, including proselytizing. (R-42-2: Fields Decl. at ¶¶ 14, 23, App. 168, 170-71; R-42-9: Dep. Ex. 8, App. 193; R-50-4: Wells Decl. at ¶¶ 1-13, App. 1054-58). The event was not "community policing."[2] (R-50-4: Wells Decl. at ¶¶ 1-13, App. 1054-58; R-50-7: Fields Supplemental Decl. at ¶ 4, App. 1065; *see also* R-50-2: Jordan Dep. at 129-31, App. 1047-49).

D. The Islamic Event.

Plaintiff, who understands Islam and its "dawa" mission ("the call" or "invitation" "to Islam"), knew that the Islamic Event would involve proselytizing

[2] The district court simply—and erroneously—accepted Defendants' assertion that this event was similar to other "events at other religious locations and hosted by religious organizations," (R-65: Op. & Order at 12-13, App. 1175-76), which it wasn't, (*see infra; see also* R-50-4: Wells Decl. at ¶¶ 1-13, App. 1054-58).

that was contrary to his Christian faith.[3] (R-42-2: Fields Decl. at ¶¶ 15-21, App. 168-70; R-42-28: Fields Dep. at 60-63, 66-70, App. 330-38; R-42-26: Siddiqui Dep. at 53, App. 291 [acknowledging that Islam considers Jesus to be merely a prophet]).

According to the Islamic Society's constitution, which is publicly available, "The aims and purposes of [the Islamic Society] shall be to serve the best interest of Islam in the greater Tulsa area including the Tulsa city and its satellite towns in northeastern Oklahoma, so as to enable Muslims to practice Islam as a complete way of life." (R-42-2: Fields Decl. at ¶ 17, App. 169; R-42-21: Dep. Ex. 39, App. 210; R-42-26: Siddiqui Dep. at 54-55, App. 292-93 [testifying that the "aim and purpose" of the Islamic Society is "to promote the goals of Islam" during "outreach programs"]).

To carry out its mission, including its "dawa" mission, the Islamic Society "shall" work to "carry out Islamic programs and projects within the guidelines of

[3] A public webpage on "How to become Muslim" (*available at* http://isgoc.com/aboutislam/howtobecomemuslim/index.htm) that purports to be from, *inter alia*, the Islamic Society and that lists Sheryl Siddiqui, the organizer of the Islamic Event, as the "[o]utreach director" quotes the Quran as follows: "Islam is the universal message of God to mankind, and Muhammad (peace be upon him) is the final and last messenger of God. Our creator will not accept any other way of life as He Himself asserts: 'If anyone desires a religion other than Islam (submission to Allah-(God)) never will it be accepted of Him.' (The Qur'an 3:85)." (R-42-2: Fields Decl. at ¶ 16, App. 169; R-42-22: Dep. Ex. 43, App. 229). Plaintiff understands that this is a fundamental precept of the Islamic "dawa" mission; a mission that the Islamic Society promotes through its "outreach programs," such as the Islamic Event. (*See* R-42-2: Fields Decl. at ¶¶ 16-19, App. 169-70).

the Quran and Sunnah." (R-42-26: Siddiqui Dep. at 22, 23, 58, 59, 61, 62, App. 281-82, 294-97; R-42-21: Dep. Ex. 39, App. 210; *see also* R-42-2: Fields Decl. at ¶ 18, App. 169).

The "dawa" mission of the Islamic Society, including its goal of "disseminating Islamic knowledge," was promoted by the Islamic Event. (R: 42-26: Siddiqui Dep. at 61, 62, App. 294-95; *see also* R-42-2: Fields Decl. at ¶¶ 14-18, App. 168-69; R-42-21, 22: Dep. Exs. 39, 43, App. 210, 222).

In short, the "dawa" mission of the Islamic Society, its "aims and purposes" (*i.e.*, promoting Islam), the goals of its "outreach programs," its adherence and promotion of the "Quran and Sunnah" in its programs, and what the Quran commands with regard to Plaintiff's Christian religion, *are all public knowledge* and *were supported and promoted by the Islamic Event*.

E. Defendants' Mandatory Order.

On February 16, 2011, an email approved by Defendant Webster was sent to "All TPD users," which included Plaintiff and the officers under his command, asking the officers to "rsvp if attending to ensure there is plenty of great food and tour guides." (R-42-2: Fields Decl. at ¶ 22, App. 170; R-42-8: Dep. Ex. 7, App. 192). Attached to the email was a flyer from the Islamic Society, announcing that the Islamic Event would include "Mosque Tours," "Meet[ing] Local Muslims & Leadership," "Watch[ing] the 2-2:45 pm weekly congregational prayer service,"

and receiving "Presentations" on Islamic "beliefs." (R-42-2: Fields Decl. at ¶ 23, App. 170-71; R-42-9: Dep. Ex. 8, App. 193; R-42-25: Webster Dep. at 38, App. 274).

On February 17, 2011, Plaintiff received an email from Major Harris that had the subject line, "Tour of Mosque – March 4." The email stated, in relevant part, "We are *directed* by DCOP [Deputy Chief of Police] to have representatives from each shift—2nd, 3rd, and 4th to attend [the Islamic event]." (R-42-2: Fields Decl. at ¶ 24, App. 171; R-42-10: Dep. Ex. 9, App. 194 [emphasis added]).

This email contained the directive (*i.e.*, order) from Defendant Webster. (R-42-2: Fields Decl. at ¶ 25, App. 171; R-42-10: Dep. Ex. 9, App. 194; *see also* R-42-24: Jordan Dep. at 48, App. 253 [admitting that the directive was an order]). As a result of this order and as Defendant Jordan acknowledged, attendance at the Islamic Event was no longer voluntary. (R-42-24: Jordan Dep. at 48, 50, 51, App. 253-55).

F. Plaintiff's Objection to the Order on Religious Grounds.

After receiving the email with the mandatory order, Plaintiff met with Major Harris to discuss it. (R-42-2: Fields Decl. at ¶ 27, at App. 171). Plaintiff advised Major Harris that the order was unlawful in that it conflicted with his religious beliefs. (R-42-2: Fields Decl. at ¶ 28, App. 171; R-42-7: Harris Dep. at 73-74, App. 317-18). Indeed, police officers are prohibited from proselytizing their faith

while in uniform. (R-42-24: Jordan Dep. at 37, App. 250; *see also* R-42-2: Fields Decl. at ¶ 19, App. 170). Consequently, making the Islamic Event mandatory placed Plaintiff in a moral dilemma, both individually and as a commander. (R-42-2: Fields Decl. at ¶¶ 15-21, App. 168-70; R-42-28: Fields Dep. at 60-63, 66-70, App. 330-38).

Indeed, Plaintiff had sought volunteers from his shift, but there were none. As Major Harris testified:

> Q: Is it your understanding that Captain Fields asked for volunteers of his shift?
> A: Yes, because I asked him to.
> Q: And do you know if – did he ever report back to you if anybody in fact did volunteer?
> A: Well, no one volunteered. . . .

(R-42-27: Harris Dep. at 107, App. 323).

With the approval of Major Harris, Plaintiff responded to the order by email. (R-42-2: Fields Decl. at ¶¶ 29-30, App. 171; R-42-11: Dep. Ex. 10, App. 195). In his response, Plaintiff stated that he believed the order was "an unlawful order, as *it is in direct conflict with my personal religious convictions* . . . ." He concluded, "Please consider this email my official notification to the Tulsa Police Department and the City of Tulsa that *I intend not to follow this directive*, *nor require any of my subordinates to do so if they share similar religious convictions*." (R-42-2: Fields Decl. at ¶¶ 30-31, App. 171; R-42-11: Dep. Ex. 10, App. 195 [emphasis added]).

Plaintiff sent his response to Major Harris and copied his chain of command.[4] (R-42-2: Fields Decl. at ¶¶ 32, 33, App. 172; R-42-11: Dep. Ex. 10, App. 195).

On February 18, 2011, Defendant Webster sent an interoffice correspondence to Plaintiff by email that requested Plaintiff to reconsider his position and warned him of the consequences for not doing so. (R-42-2: Fields Decl. at ¶ 34, App. 172; R-42-20: Dep. Ex. 31, App. 207-09).

Plaintiff again told Defendants that he objected to the mandatory order based on his religious beliefs and convictions. (R-42-2: Fields Decl. at ¶ 35, App. 172). As a result, Defendant Webster ordered Plaintiff to appear in Defendant Jordan's conference room on Monday, February 21, 2011 for a meeting. (R-42-2: Fields Decl. at ¶ 36, App. 172). Plaintiff complied, and the meeting was held.[5] (R-42-2: Fields Decl. at ¶¶ 36, 37, App. 172-73).

During this meeting, Plaintiff again explained to Defendants that he believed the order was unlawful and that he could not, in good conscience, obey it or force

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[4] As Defendant Jordan admits, there are no rules or regulations specifying how an objection to an unlawful order should be brought to the attention of the chain of command. (R-50-2: Jordan Dep. at 21-25, App. 1037-41). Consequently, Plaintiff's email notification was proper. (R-50-9: Harris Dep. at 69-71, App. 1073-75 [testifying that the email was proper because "he got my permission" (emphasis added)]; *see also* R-50-4: Wells Decl. at ¶ 12, App. 1057-58).

[5] Representatives from the City, including representatives from Human Resources and the Legal Department, were present at this meeting. (R-50-7: Fields Supp. Decl. at ¶ 2, App. 1065).

officers under his charge who shared his religious beliefs to obey it. (R-42-2: Fields Decl. at ¶ 37, App. 172-73). *Defendants understood that Plaintiff would have no objection if the Islamic Event was voluntary*. (R-42-24: Jordan Dep. at 52, App. 256; *see also* R-42-27: Harris Dep. at 74, 107, App. 318, 107). *And they understood that Plaintiff's objection to the order was based on his sincerely held religious beliefs*. (R-42-24: Jordan Dep. at 54-55, App. 257-58; R-42-2: Fields Decl. at ¶¶ 30, 31, App. 171; R-42-11: Dep. Ex. 10, App. 195).

G. Defendants Punish Plaintiff for Objecting to the Order.

Moments after restating his religious objection to the order, Defendant Webster served Plaintiff with a prepared order signed by Defendant Jordan transferring Plaintiff to the Mingo Valley Division and with a notification that Defendants were initiating an IA investigation for his failure to obey the order.[6] (R-42-2: Fields Decl. at ¶¶ 41, 42, App. 173-74; R-42-12, 13: Dep. Exs. 11, 12, App. 197-98).

On March 10, 2011, Plaintiff received an email stating, "You are hereby notified that Chief Chuck Jordan has requested IA to conduct an administrative investigation *in regards to your refusal to attend* and refusal to assign officers from your shift, *who shared your religious beliefs*, to attend the 'Law Enforcement Appreciation Day' on March 4, 2011, at the Tulsa Peace Academy." (R-42-2:

[6] Prior to being punitively transferred, Plaintiff was the shift commander for 26 officers and 5 supervisors. (R-42-2: Fields Decl. at ¶ 44, App. 174).

Fields Decl. at ¶ 46, App. 174; R-42-15: Dep. Ex. 16, App. 200 [emphasis added]). Consequently, contrary to the district court's erroneous conclusion,[7] Defendants made it crystal clear as to why they were punishing Plaintiff.

Pursuant to the official notice, an IA investigation was conducted. (R-42-2: Fields Decl. at ¶ 47, App. 174). During the investigation, Major Harris acknowledged that "there's no need for me to force [the Islamic Event] on anybody" who had a religious objection to it. (R-42-23: Dep. Ex. 48, App. 238; *see also* R-42-2: Fields Decl. at ¶¶ 47, 49, App. 174-75).

Upon her review of the IA investigation, Major Harris recommended that the allegations against Plaintiff not be sustained. (R-42-27: Harris Dep. at 18-20, App. 304-06). As a result of her unwillingness to sustain the recommendations of the IA investigation, Major Harris was subjected to retaliation. (R-42-27: Harris Dep. at 18-20, 26, App. 304-07).

On June 9, 2011, Defendants officially punished Plaintiff by suspending him without pay for 80 hours/10 days, subjecting him to the possibility of "more severe

[7] The district court improperly disregarded this official notification and Plaintiff's performance evaluation—both of which set forth Defendants' *official* basis for punishing Plaintiff. (R-65: Op. & Order at 7, n.1, App. 1170 [dismissing these admissions as merely "[s]tatements after-the-fact"]). And the reason for this is apparent: these statements are contrary to the district court's (mis) characterization of this case and its preferred narrative—a narrative that avoids the difficult constitutional issues presented. (*See, e.g.,* R-65: Op. & Order at 2, App. 1165 ["The issue of whether a directive requiring his personal attendance at the event would have violated his First Amendment rights need not be decided here."]).

disciplinary action, including dismissal," prohibiting him from being considered for future promotion for at least one year, and making his temporary transfer permanent. (R-42-2: Fields Decl. at ¶ 50, App. 175; R-42-16, 17: Dep. Exs. 17, 18, App. 201-03). *The City approved the punishment*. (R-50-7: Fields Supp. Decl. at ¶ 3, App. 1065; R-50-8: Dep. Ex. 19, App. 1067-69).

The personnel orders setting forth Plaintiff's punishment are a permanent part of his record. (R-42-2: Fields Decl. at ¶ 51, App. 175). As further punishment, Plaintiff was assigned to the "graveyard" shift. (R-42-2: Fields Decl. at ¶ 52, App. 175).

Plaintiff's "Sworn-Employee Performance Evaluation" for the relevant time period states, "Captain Fields was disciplined during this rating period for refusing to attend and refusing to direct that officers attend a law enforcement appreciation day at a local mosque." (R-42-2: Fields Decl. at ¶ 54, App. 175-76; R-42-3: Decl. Ex. 1A, App. 179; R-49-9: Ex. 48, App. 987-90 [emphasis added]).

In short, Defendants retaliated against Plaintiff for objecting to the mandatory order on religious grounds.[8] Major Harris testified as follows:

Q: Do you believe the Department took adverse action against

[8] Plaintiff was the top performing shift commander in his division prior to being punitively transferred for objecting to the order. (R-42-27: Harris Dep. at 40, App. 311). At the time Plaintiff filed his motion for summary judgment (August 14, 2012), Defendants had yet to replace the shift commander position that became vacant once Defendants transferred Plaintiff, further demonstrating the punitive nature of the transfer. (R-42-27: Harris Dep. at 40-41, App. 311-12).

[Plaintiff] for exercising his rights?
A: Yes.[9]

(R-42-27: Harris Dep. at 118, App. 326).

Defendants' actions altered the terms and conditions of Plaintiff's employment, which also violated the City police department's policy prohibiting retaliation for exercising First Amendment rights. (R-42-2: Fields Decl. at ¶ 56, App. 176; R-42-18: Dep. Ex. 23, App. 204-05).

Defendants admit that Plaintiff had a deeply held religious belief opposing the mandatory order.[10] (R-42-24: Jordan Dep. at 74-75, App. 259-60 [testifying that he "*absolutely*" believed Plaintiff's religious objection was sincere and that he had no reason to question Plaintiff's religious convictions (emphasis added)]; R-42-27: Harris Dep. at 17-18, 73, App. 303-04, 317; R-42-25: Webster Dep. at 20, App. 272 [acknowledging Plaintiff's right to invoke a religious objection to his order and not questioning the sincerity of Plaintiff's religious beliefs]).

The punishment Plaintiff received was inconsistent with other similarly situated officers of his rank in that he was punitively transferred for invoking his

[9] Major Harris testified that because Plaintiff had a deeply held religious conviction opposing the order, he had a right to object to it. (R-42-27: Harris Dep. at 17, App. 303).

[10] In its assertion of "disputed facts," the district court erroneously credits the impertinent and false accusation of Defendants' counsel that Plaintiff's "conduct was motivated by anti-Muslim sentiment." (R-65: Op. & Order at 6, App. 1169). The undisputed *evidence*, which includes Defendants' sworn testimony, demonstrates otherwise. *See infra*.

constitutional rights. (R-42-27: Harris Dep. at 36-38, App. 308-10).

In sum, Defendants punished Plaintiff because he raised a religious objection based on his Christian beliefs to an order that mandated officer participation in an event that promoted Islam. Defendant Jordan admitted this fact, stating: "I can't have a police department where everybody refuses to give – to interact with Muslims because they say it's their religious reasons." (R-50-3: Jordan Arbitration Test. at 351, App. 1052).

H. Defendants' Policy of Granting Exemptions.

Pursuant to the policy and practice of the City police department, a division commander could excuse an officer from the Islamic Event if he raised a medical objection or some other non-religious grounds for not attending. It was up to the division commander to make a subjective, case-by-case evaluation of the circumstances. (R-42-27: Harris Dep. at 51-53, App. 314-16).

The City's policy and procedure for addressing religious objections by police department employees is one in which case-by-case inquiries are made such that there is an individualized assessment of the reasons for the relevant conduct that invites consideration of the particular circumstances involved in the particular case. (R-42-24: Jordan Dep. at 77, App. 261; *see also* R-42-2: Fields Decl. at ¶ 33, App. 172; R-42-25: Webster Dep. at 108-09, App. 276-77 [testifying that the department accommodates officers' religious beliefs "when possible . . . so long as

we could do so consistent with fulfilling the mission of the police department"]).

Defendant Jordan testified as follows:

> Q: And so what is the – what are the procedures or policy of the police department for dealing with situations where somebody raises a sincerely held religious objection to something they're being directed to do?
> A: Take it through the chain of command and *review each one on a case-by-case basis*.

(R-42-24: Jordan Dep. at 77, App. 261) (emphasis added).

I. No Legitimate Reason for Punishing Plaintiff.

On February 22, 2011, the day following Plaintiff's punitive transfer, Major Harris made the Islamic Event voluntary for Plaintiff's former shift.[11] (R-42-27: Harris Dep. at 77, 94, App. 319, 321). Major Harris was not punished for doing so, even though it was contrary to the extant order from her superior. (R-50-2: Jordan Dep. at 66-67, App. 1045-46; R-50-3: Jordan Arbitration Test. at 352-53, App. 1052). And two days later, on February 24, 2011, *Defendant Webster made the Islamic Event voluntary for the entire department*. (R-42-2: Fields Decl. at ¶ 55, App. 176; R-42-14: Dep. Ex. 13, App. 199; R-42-27: Harris Dep. at 93-94, App. 320-21).

The mission of the City police department was fulfilled by making the Islamic Event voluntary. (R-42-25: Webster Dep. at 108-09, App. 276-77; R-50-2:

[11] Major Harris candidly admitted that she would not have made attendance at the Islamic Event mandatory. (R-42-27: Harris Dep. at 48, App. 313).

Jordan Dep. at 59-60, App. 1043-44).

J. Defendants Also Punish Plaintiff for Filing this Lawsuit.

According to the personnel order setting forth Plaintiff's punishment, Defendants punished Plaintiff in part due to his "actions and writings that were made public" because they allegedly "brought discredit upon the department." (R-17-1: Second Am. Compl. at ¶¶ 67-69, 81-84, App. 63-64, 66). However, any "writings" that were internal communications or made pursuant to any of Plaintiff's official duties became public as a result of an Oklahoma Open Records Act request submitted by a third party. The only other public "writing" was the filing of the current civil rights lawsuit. (R-17-1: Second Am. Compl. at ¶ 68, App. 63-64).

Indeed, any statements that were publicly made about this matter were made by Plaintiff's counsel during the course of this litigation. Thus, Defendants punished and retaliated against Plaintiff because he filed this civil rights lawsuit, which made the public aware of Defendants' actions. (R-17-1: Second Am. Compl. at ¶¶ 68-69, App. 63-64).

Indeed, in addition to the allegations in the Second Amended Complaint, the undisputed facts reveal that the "speech" for which Plaintiff was punished was not his own, but *that of his counsel as a result of this litigation*. (R-17-1: Second Am. Compl. at ¶¶ 68, 69, App. 63-64; R-42-24: Jordan Dep. at 93-96, App. 264-67).

Defendant Jordan testified as follows:

Q. And then this – the second says he was suspended 40 hours for violating Rule and Regulation Number 8. And I want to direct your attention to the paragraph right after the bullet referring to Rules 10 and Regulation Number 8. It says, "Specifically, your actions and writings that were made public brought discredit upon the department related to furnishing officers to attend the law enforcement appreciation day held March 4th, 2011." What specific actions and writings did Captain Fields make public about any of this – these issues?

A. It was through his attorney, Scott Wood, and ultimately through other entities *that accused me of assisting in global jihad*.

Q. What other entities?

A. *Some Websites*.

Q. How was Captain Fields responsible for any of those instances that you just referred to?

A. I was – when I hire an attorney, they're talking for me.

Q. What was it that Scott Wood said that brought discredit upon the department that was attributed to Captain Fields?

A. It was said that he was forced to go to a religious – or they tried to force him to go to a mosque for a religious service. There were several – it was on nearly every television station. I think we've got all the video. I don't have it, obviously, cued up with us. But just references to the fact that the department was trying to force him to engage in the faith of Islam, which we absolutely did not.

Q. Are you aware of any statements that Captain Fields made directly to the public regarding any of these instances?

A. *I'm not aware of any*.

Q. So it's your understanding the statements that Scott Wood made is what brought discredit to the police department?

A. That and I believe he – I believe it's *your law firm's Website* that alluded to the fact that *I was assisting global jihad*, yeah.

* * *

Q. What information did you have that anything that Captain Fields specifically wrote was made public? I should say by him.

A. By him? *I don't know of anything by him*. It was just by his – his hire of attorneys.

(R-42-24: Jordan Dep. at 94-96, App. 265-67) (emphasis added).

K. Defendants' Promotion of the Islamic Event and Punishment of Plaintiff Conveyed a Message of Endorsement of Islam and Disfavor toward Christianity.

The Islamic Event promoted the religion of Islam. (R-42-29: Burrell Decl. at ¶ 3, App. 340; R-42-30: Ballenger Decl. at ¶¶ 4-8, App. 345-46; R-42-26: Siddiqui Dep. at 45-53, App. 283-91). During the event, the Muslim hosts discussed Islamic religious beliefs; they discussed Mohammed, Mecca, why Muslims pray, how they pray, and what they say when they are praying; they showed the officers a Quran; and they showed the officers Islamic religious books and pamphlets that were for sale and encouraged the officers to purchase them. (R-42-29: Burrell Decl. at ¶ 3, App. 340; R-42-30: Ballenger Decl. at ¶¶ 4-8, App. 345-46; R-42-26: Siddiqui Dep. at 45-53, App. 283-91).

Officers were present during the Islamic worship services and were photographed by the media observing these services. (R-42-29: Burrell Decl. at ¶ 4, Ex. A, App. 340, 343). Indeed, Friday, the holy day for Islam, was chosen specifically to give officers attending the event "the option to stay for the prayer," and, as noted by Ms. Siddiqui, the organizer of the event, "most of the officers chose to stay." (R-42-26: Siddiqui Dep. at 75-76, App. 298-99).

The Islamic Society posted a photograph of police officers sitting at a table with members of the mosque and below the photograph was written, "Discover

Islam Classes for Non-Muslims." (R-42-2: Fields Decl. at ¶ 57, App. 176; R-42-19: Dep. Ex. 24, App. 206). Defendant Jordan testified that he "would not be surprised" that the Islamic Society posted photographs of the Islamic Event. (R-42-24: Jordan Dep. at 128, App. 268). And he admitted that this photograph of the officers sitting with members of the mosque "would certainly imply that our officers were there taking classes." (R-42-24: Jordan Dep. at 128, App. 268; R-42-19: Dep. Ex. 24, App. 206).

Moreover, despite knowing that this event would involve religious content, Defendants did not reach out to the hosts of the Islamic Event to inform them that they should not engage in religious discussions with the officers or try to proselytize them, and Defendants admit that there was nothing that would have prevented the Muslim hosts from proselytizing the officers during the event. (R-50-2: Jordan Dep. at 45, App. 1042). Defendant Jordan testified as follows:

> Q. Let me just back up so my question is clear. Did you or anyone from the Tulsa Police Department reach out to anyone associated with the Islamic Society of Tulsa requesting the members of the Islamic Society of Tulsa not to engage in any religious discussions or proselytizing of the police officers?
> A. Not to my knowledge, no.
> Q. So prior to this event, based on your knowledge, *there was nothing that would have prevented the Islamic Society of Tulsa from engaging in religious discussions or proselytizing the police officers who attended the event*?
> A. *No, there was nothing that would prevent them from doing that*.

(R-50-2: Jordan Dep. at 45, App. 1042) (emphasis added). Indeed, the evidence shows that such proselytizing did, in fact, occur. (R-42-29: Burrell Decl. at ¶ 3, App. 340; R-42-30: Ballenger Decl. at ¶¶ 4-8, App. 345-46; R-42-26: Siddiqui Dep. at 45-53, App. 283-91).

SUMMARY OF THE ARGUMENT

It is well established that Plaintiff does not surrender his constitutional rights upon accepting employment with the City police department.

Under the Free Exercise Clause, the government is prohibited from regulating, prohibiting, or rewarding *religious beliefs* as such. The principle that government may not suppress *religious beliefs* or practices is well understood. Indeed, the Free Exercise Clause forbids subtle departures from neutrality and covert suppression of particular religious beliefs. Consequently, official action that targets religious beliefs or conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. Thus, when the government punishes someone who acted for religious reasons the government must have a compelling reason for doing so. In sum, government action that targets religious beliefs or conduct for disfavored treatment or punishment must satisfy strict scrutiny.

Here, Plaintiff, a Christian, raised a religious objection to an order compelling officer attendance at an event hosted by an Islamic religious

organization and held at a local mosque on a Friday—the holy day for Islam. The Islamic Event was advertised as including—and in fact did include—Islamic religious proselytizing. Never has such an event been mandatory. Moreover, officers are strictly prohibited from proselytizing in uniform.

For objecting to this order on religious grounds, Defendants summarily punished Plaintiff by stripping him of his command, transferring him to another division, subjecting him to an IA investigation, suspending him without pay for two weeks, and prohibiting him from being eligible for promotion for one year.

As the evidence shows, Plaintiff was subjected to an IA investigation because of his "refusal to attend and refusal to assign officers from [his] shift, who shared [his] religious beliefs, to attend" the mosque event. And Defendants admitted in Plaintiff's sworn performance evaluation that he "was disciplined during this rating period for refusing to attend and refusing to direct that officers attend a law enforcement appreciation day at a local mosque."

Defendants' punishment did not serve a compelling interest. Indeed, the very day following Plaintiff's punitive transfer and receipt of the IA investigation notice, the Islamic Event was made voluntary for his entire shift. And two days later, Defendant Webster made the event voluntary for the entire police department. In short, Defendants violated Plaintiff's right to the free exercise of religion.

Moreover, by punishing Plaintiff for objecting to a compelled association that was contrary to his sincerely held religious beliefs, Defendants also violated Plaintiff's right of association under the First Amendment, which presupposes a freedom not to associate based on religious grounds.

Furthermore, the U.S. Supreme Court has made clear that when evaluating the effect of government conduct under the Establishment Clause, the court must ascertain whether the challenged governmental action is "sufficiently likely to be perceived" as an endorsement or disapproval of an individual's "religious choices." Consequently, every government practice must be judged in its *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion. As this Circuit has held, governments may not make adherence to a religion relevant *in any way* to a person's standing in the political community. And actions which have the effect of communicating governmental endorsement or disapproval, *whether intentionally or unintentionally*, make religion relevant, in reality or public perception, to status in the political community in violation of the Establishment Clause.

Here, Defendants officially endorsed an Islamic event that included religious proselytizing and that was purposefully held on Friday—Islam's holy day—so that officers could attend religious worship services, which many "chose to do."

Indeed, officers in uniform were photographed attending worship services, and these photographs were published by the media.

When Plaintiff objected to the order mandating officer attendance at the event based on his sincerely held Christian beliefs, he was summarily punished—and he was punished because Defendant Jordan does not want his officers refusing to "*interact with Muslims because they say it's their religious reasons*." In sum, by promoting the Islamic Event and punishing Plaintiff for objecting to this event based on his Christian beliefs, Defendants violated the Establishment Clause.

Finally, as stated in the personnel order setting forth Plaintiff's punishment, Defendants punished Plaintiff, in part, for "actions and writings that were made public." However, these "actions and writings" were the consequence of the civil rights lawsuit filed in this case. Indeed, as Defendant Jordan admitted, Plaintiff himself made no public statements—orally or in writing. Defendants punished Plaintiff because of public statements made by his attorneys as a result of this litigation—statements that commented upon matters of public concern. In short, Defendants retaliated against Plaintiff for filing this civil rights lawsuit because it made public the underlying events, thereby violating Plaintiff's free speech rights guaranteed by the First Amendment. Thus, Plaintiff should have been permitted to amend his pleading to include this cause of action, as well as a cause of action arising under the Oklahoma Religious Freedom Act.

ARGUMENT

I. Standard of Review.

"This court reviews the grant of summary judgment de novo, applying the same standards used by the district court." *Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The factual record and reasonable inferences therefrom are viewed in the light most favorable to the party opposing summary judgment." *Byers*, 150 F.3d at 1274.

II. Plaintiff Does Not Surrender His Constitutional Rights upon Accepting Employment with the Government.

It is well established that Plaintiff does not surrender his constitutional rights upon accepting employment with the City police department. *See Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006); *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987); *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004). "[T]he theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967). Consequently, as a government employee, Plaintiff retains his constitutional rights, and those rights were violated by Defendants.

III. The City Is Liable for Violating Plaintiff's Constitutional Rights.

In *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978), the Supreme Court affirmed that municipalities are liable under 42 U.S.C. § 1983 if municipal policy or custom was the "moving force" behind the constitutional violation. And "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy [such as the acts of the Chief of Police], inflicts the injury . . . the government as an entity is responsible under § 1983." *Id.* at 694.

"*Monell* is a case about responsibility." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986). "The 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Id.* at 479. Thus, acts "of the municipality" are "*acts which the municipality has officially sanctioned or ordered.*" *Id.* at 480 (emphasis added). "If the decision to adopt [a] particular course of action is properly made *by the government's authorized decisionmakers*, it surely represents an act of official government 'policy' as that term is commonly understood." *Id.* at 481 (emphasis added).

Here, it is undisputed that Defendant Jordan makes policy for the police department on behalf of the City. (R-42-24: Jordan Dep. at 9, App. 242).

Moreover, he is the final decision maker and thus the policymaker for the City with regard to officer discipline, which includes the punishment Plaintiff received in this case. (R-42-24: Jordan Dep. at 10, App. 243). And this punishment was approved and ratified by the City. (R-50-7: Fields Supp. Decl. at ¶ 3, App. 1065; R-50-8: Dep. Ex. 19, App. 1067-69). Thus, the City is liable in this case.

IV. Defendants Violated Plaintiff's Right to the Free Exercise of Religion.

A. The District Court's Opinion Was Based on a Straw Man.

This case must be reversed because the district court failed to address the gravamen of the constitutional issues presented and, indeed, based its entire opinion upon a straw man:

> The court finds no reasonable jury could find Fields was personally ordered to attend the Law Enforcement Appreciation Day event at the Islamic Society of Tulsa because the directive at issue permitted him to assign others to attend rather than attend himself. Therefore, the directive did not conflict with Fields's sincere religious belief that he must proselytize when confronted by others whose religious beliefs differ from his. The issue of whether a directive requiring his personal attendance at the event would have violated his First Amendment rights need not be decided here.

(R-65: Op. & Order at 1-2, App. 1164-65).

Here, Plaintiff raised an objection to an order based on his sincerely held religious beliefs and was summarily punished as a result. Plaintiff's objection to the order was stated in the email he sent to his chain of command: "Please consider this email my official notification to the Tulsa Police Department and the City of

Tulsa that I intend not to follow this directive, nor require any of my subordinates to do so if they share similar religious convictions." (R-42-2: Fields Decl. at ¶¶ 30-31, App. 171; R-42-11: Dep. Ex. 10, App. 195). *For raising this objection*, which was based on Plaintiff's sincerely held religious beliefs, Plaintiff was severely punished. There is no dispute in the record on this very important—and dispositive—fact. The official notice of the IA investigation stated quite clearly "that Chief Chuck Jordan has requested IA to conduct an administrative investigation *in regards to your refusal to attend* and refusal to assign officers from your shift, *who shared your religious beliefs*, to attend the" Islamic Event. (R-42-2: Fields Decl. at ¶ 46, App. 174; R-42-15: Dep. Ex. 16, App. 200 [emphasis added]). And if there were any remaining or lingering doubts as to why Plaintiff was punished, Plaintiff's official performance evaluation, *which was signed and approved by Defendants Jordan and Webster*, states that "Captain Fields was disciplined during this rating period for *refusing to attend and refusing to direct that officers attend* a law enforcement appreciation day at a local mosque." (R-42-2: Fields Decl. at ¶ 54, App. 175-76; R-42-3: Decl. Ex. 1A, App. 179; R-49-9: Ex. 48, App. 987-90 [emphasis added]).

This was clearly understood by Defendant Jordan, who further testified as follows:

> Q. As you sit here today, is it your understanding that you could have accommodated Captain Fields' religious objections to this event if you had made it voluntary for him?
>
> * * * *
>
> A. Yeah. According to his e-mail, yes, I could have.

(R-42-24: Jordan Dep. at 77-78, App. 261-62).

Indeed, the evidence is compelling that Defendants wanted to make an example of Plaintiff by harshly punishing him for objecting on religious grounds to an order compelling attendance at the Islamic Event. Defendant Jordan admitted this fact, stating, "*I can't have a police department where everybody refuses to give – to interact with Muslims because they say it's their religious reasons*." (R-50-3: Jordan Arbitration Test. at 351, App. 1052) (emphasis added). Moreover, Major Harris, Plaintiff's immediate supervisor, acknowledged that Defendants retaliated against Plaintiff for exercising his rights. (R-42-27: Harris Dep. at 118, App. 326).

In sum and contrary to the district court's conclusion, a reasonable juror could reach only one conclusion in this case: Plaintiff was punished for raising a religious objection to an order mandating attendance at the Islamic Event—an objection that was based upon Plaintiff's sincerely held religious beliefs.

B. Defendants Impermissibly Burdened Plaintiff's Religious Beliefs.

The right to free exercise of religion embraces two concepts: the freedom to believe and the freedom to act. *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940). Under the First Amendment, the government may not impose special restrictions,

prohibitions, or disabilities *on the basis of religious beliefs*. *See McDaniel v. Paty*, 435 U.S. 618 (1978). "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding *religious beliefs* as such." *Id.* at 626 (emphasis added). Indeed, "[t]he principle that government may not enact laws that suppress *religious belief* or practice is . . . well understood." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993) (emphasis added); *see also id.* at 534 (holding that the Free Exercise Clause "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs") (quotations and citations omitted). "Official action *that targets* religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.*

Consequently, when government conduct burdens a person's *religious beliefs*, the Free Exercise Clause is implicated. In *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713 (1981), the Supreme Court affirmed this fundamental principle, stating that "beliefs rooted in religion are protected by the Free Exercise Clause. . . ." *See also id.* at 716 (noting also that "[c]ourts are not arbiters of scriptural interpretation").

As in *Thomas*, the record in this case is undisputed: Plaintiff acted "for religious reasons"—and was punished as a result. Indeed, Defendants acknowledge, and thus admit, that Plaintiff objected to the order based upon his

sincerely held religious beliefs, and Defendants do not question the sincerity of those beliefs. Thus, there is no dispute as to this aspect of Plaintiff's free exercise claim—which, as noted above, undermines the district court's opinion in this case.

In *Thomas*, the Court held that the State's denial of unemployment compensation benefits because the employee voluntarily terminated his employment with a roll foundry that produced armaments, claiming that the production of armaments was contrary to his religious beliefs, placed a substantial burden on the employee's right to free exercise of religion. *Thomas*, 450 U.S. at 707. By denying employment benefits because the employee refused, on religious grounds, to work in a plant that produced armaments, the State imposed a substantial burden on the employee's exercise of religion by "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.* at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."); *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) ("It is true that this Court has repeatedly held that *indirect coercion or penalties* on the free exercise of religion, *not just outright prohibitions*, are subject to scrutiny under the First Amendment.") (emphasis added).

Under extant free exercise jurisprudence, subjecting a person to punishment because she objects to reciting lines in a script that she believes are offensive to her

religion, *see Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), sufficiently burdens a plaintiff's religious beliefs to trigger a violation of the Free Exercise Clause.

In sum, "*beliefs rooted in religion* are protected by the Free Exercise Clause." *Thomas,* 450 U.S. at 713 (emphasis added). And what matters for a free exercise claim is whether the record is clear that the person asserting the claim acted "*for religious reasons*." *Id.* In this regard, the evidence before the court is undisputed. (*See, e.g.,* R-50-3: Jordan Arbitration Test. at 351, App. 1052) (acknowledging that Plaintiff was punished for "religious reasons").

C. Defendants' Actions Were Not "Neutral" or "Generally Applicable."

A law that burdens a religious belief or practice that is not neutral or generally applicable must "undergo the most rigorous scrutiny." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546. "[I]f a law that burdens a religious practice *or belief* is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the Free Exercise Clause unless it is *narrowly tailored* to advance a *compelling* government interest." *Axson-Flynn*, 356 F.3d at 1294 (internal quotations and citation omitted) (emphasis added).

1. Defendants' Actions Were Discriminatory.

A "rule," or as in this case, punishment for objecting to the "rule,"[12] "that is discriminatorily motivated and applied is not a neutral rule of general applicability." *Id.* And it is not necessary that the "discrimination" be "motivated by overt religious hostility or prejudice" to be actionable under the Free Exercise Clause. *See Shrum*, 449 F.3d at 1144. Rather, "the animating ideal of the constitutional provision is to protect the 'free exercise of religion' from unwarranted governmental inhibition whatever its source." *Id.* As this Circuit noted, "[T]he Free Exercise Clause has been applied numerous times when government officials interfered with religious exercise not out of hostility or prejudice, but for secular reasons, such as . . . maintaining morale on the police force . . . ." *Id.* at 1144-45.

Here, the undisputed evidence shows that not once in the past thirty years was <u>*any*</u> City police officer <u>*ever*</u> ordered to attend a similar "appreciation" event hosted by a religious organization or held at a place of religious worship until the Islamic Event. And consequently, no City police officer other than Plaintiff was ever punished for *objecting on religious grounds* to an order mandating attendance

[12] Free exercise claims are not limited to challenges involving a law, regulation, or ordinance. The use of the word "rule" includes "regulations, or other policies," including the exercise of executive authority. *Axson-Flynn*, 356 F.3d at 1294, n.17; *Shrum v. City of Coweta*, 449 F.3d 1132, 1140 (10th Cir. 2006) ("[T]he First Amendment applies to exercises of executive authority no less than it does to the passage of legislation.").

at such an event. In fact, Major Harris was not punished for her failure to abide by the order. And the day following Plaintiff's punitive transfer and the commencement of his IA investigation, attendance at the event was made voluntary for his shift, and two days later, it was made voluntary for the entire department. Indeed, Defendant Jordan admitted that Plaintiff was punished for holding religious beliefs that clash with Islam. (R-50-3: Jordan Arbitration Test. at 351, App. 1052 ["I can't have a police department where everybody refuses to give – to interact with Muslims because they say it's their religious reasons."]). In short, the order and concomitant punishment for objecting to the order were discriminatorily applied to Plaintiff, and Defendants did not have a compelling reason for doing so.

2. The "Individualized Exemption" Exception Applies.[13]

"[W]here a state's facially neutral rule contains a system of individualized exemptions, a state may not refuse to extend that system to cases of religious hardship without compelling reason." *Axson-Flynn*, 356 F.3d at 1294-95. As stated by this Circuit,

> Our Circuit has held that a system of individualized exemptions is one that gives rise to the application of a subjective test. . . . Such a system is one in which case-by-case inquiries are routinely made, such that there is an individualized governmental assessment of the

[13] The "hybrid rights" exception to the *Smith* rule would also apply here in that Plaintiff has advanced a "colorable" companion claim, *see Axson-Flynn*, 356 F.3d at 1295-97, that his right of association was violated.

> reasons for the relevant conduct that invites considerations of the particular circumstances involved in the particular case.

Axson-Flynn, 356 F.3d at 1297 (internal quotations and citations omitted). It is not necessary that the "system of individualized exemptions" be contained in a written policy because that requirement "would contradict the general principle that greater discretion in the hands of governmental actors makes the action taken pursuant thereto more, not less, constitutionally suspect." *Id.*

In sum, "if a defendant has in place a system of individualized exemptions, it must extend that system to religious exemptions or face strict scrutiny review. . . . It is also clearly established in this circuit that a system of individualized exemptions is one that is designed to make *case-by-case subjective determinations* on exemptions from generally applicable rules." *Id.* at 1300-01 (emphasis added).

Here, the City police department has a policy and practice whereby it makes "case-by-case subjective determinations on exemptions from generally applicable rules," including the mandatory order at issue. As Defendant Jordan testified:

> Q: And so what is the – what are the procedures or policy of the police department for dealing with situations where somebody raises a sincerely held religious objection to something they're being directed to do?
> A: Take it through the chain of command and *review each one on a case-by-case basis*.

(R-42-24: Jordan Dep. at 77, App. 261) (emphasis added). Pursuant to this policy, a division commander has the authority on behalf of the police department to make

subjective, case-by-case exceptions to orders, such as the mandatory order at issue here, based on non-religious grounds, such as a medical reason.

In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 367 (3rd Cir. 1999), then Circuit Judge Alito, writing for the court, held that the Newark Police Department's policy regarding the prohibition on the wearing of beards was unconstitutional under the Free Exercise Clause because the department made exceptions from its policy for secular reasons, such as medical reasons, but refused to exempt officers whose religious beliefs prohibited them from shaving their beards. In so ruling, the court rejected the department's claim "that permitting officers to wear beards for religious reasons would undermine the force's morale and esprit de corps." *See id.* at 366-67.

Similarly here, there is no legitimate reason (compelling or otherwise) for severely punishing Plaintiff for raising a religious objection to the mandatory order when Defendants would simply excuse a police officer from the order for secular reasons. As Defendant Jordan testified:

> Q. As you sit here today, is it your understanding that you could have accommodated Captain Fields' religious objections to this event if you had made it voluntary for him?
>
> * * * *
>
> A. Yeah. According to his e-mail, yes, I could have.

(R-42-24: Jordan Dep. at 77-78, App. 261-62).

D. Defendants' Actions Cannot Withstand Strict Scrutiny.

To survive constitutional scrutiny, Defendants must show that their actions were "narrowly tailored to advance a compelling government interest," *Axson-Flynn*, 356 F.3d at 1294, which it cannot do for a number of reasons.[14] First, the very day following Plaintiff's punitive transfer and receipt of notice of an IA investigation, the mandatory order was rescinded and the Islamic Event became voluntary for Plaintiff's shift. Within a matter of days (and more than a week before the actual event), Defendants made the event voluntary for the entire police department. Consequently, Plaintiff's objection had *no* impact on the police department's interests or objectives. Thus, Defendants had no compelling reason based on its "community policing" objectives or any other objective to punish Plaintiff for objecting to the mandatory order. Second, as this Circuit acknowledged, "maintaining morale on the police force" is not a sufficient reason to burden a police officer's right to free exercise of religion. *Shrum,* 449 F.3d at 1144-45. Finally, it is incorrect as a matter of law to argue that Defendants are prohibited from providing an exemption for Plaintiff's religious objection to the order because doing so could violate the Constitution. Indeed, failing to do so in this case *was* a violation of the Constitution. *Axson-Flynn*, 356 F.3d at 1300-01

[14] Indeed, Defendants' unreasonable actions cannot survive rational basis review. *See United States v. Hardman*, 297 F.3d 1116, 1126 (10th Cir. 2002) (observing that even "a valid and neutral law of general applicability" must be "rationally related to a legitimate government end").

(stating that "if a defendant has in place a system of individualized exemptions, it must extend that system to religious exemptions or face strict scrutiny review").

In conclusion, Plaintiff was punished for raising a religious objection to an order that mandated officer attendance at an event involving Islamic proselytizing. Defendants could have accommodated Plaintiff's objection by simply making the event voluntary—which they did for the entire police department within days of initiating their punishment of Plaintiff. In short, the evidence demonstrates that Defendants retaliated against Plaintiff for raising a religious objection based on his Christian beliefs to an order mandating attendance at an event that involved Islam. Defendants' actions may have been "politically correct," but they were legally incorrect and violated Plaintiff's constitutional rights as a result.

V. Defendants Violated Plaintiff's First Amendment Right of Association.

"[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). And the "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

By punishing Plaintiff for objecting to an order compelling an association that was contrary to his sincerely held religious beliefs, Defendants not only

violated Plaintiff's right to the free exercise of religion, but they also violated his right of association under the First Amendment. (*See* R-50-3: Jordan Arbitration Test. at 351, App. 1052 ["I can't have a police department where everybody refuses . . . to interact with Muslims because they say it's their religious reasons."]).

VI. Defendants Violated the Establishment Clause.

Here, again, the district court ignores the gravamen of the Establishment Clause claim by setting up a straw man, stating, "The order to send two officers and a supervisor to the Appreciation Event did not violate the Establishment Clause." (R-65: Op. & Order at 12, App. 1175). From this faulty premise, the court proceeds to conduct a conclusory review of the order under the *Lemon* test, while ignoring relevant law and critical facts in the process. Indeed, Plaintiff's Establishment Clause claim is not based simply on the "order." Moreover, the district court's reference to "scores of events at other religious locations and hosted by other religious groups" (R-65: Op. & Order at 12-13, App. 1175-76) is disingenuous because it is the uniqueness of *this* religious event (*i.e.*, the Islamic Event) *and its surrounding circumstances* that are at issue. In short, similar to its free exercise analysis, the district court avoids the constitutional issue by ignoring the facts and law to reach a preordained conclusion.

As the Supreme Court admonished, "Every government practice must be judged in its *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (emphasis added). Indeed, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

The U.S. Supreme Court "has *made clear* that, when evaluating the effect of government conduct under the Establishment Clause, [the court] must ascertain whether 'the challenged governmental action is *sufficiently likely to be perceived'*" as an endorsement or disapproval of an individual's "religious choices." *Cnty. of Allegheny v. A.C.L.U.,* 492 U.S. 573, 597 (1989) (citations omitted) (emphasis added).

As Justice O'Connor explained in *Lynch v. Donnelly*, 465 U.S. 668 (1984):

> Endorsement *sends a message* to nonadherents that they are outsiders, not full members of the political community, and an *accompanying message* to adherents that they are insiders, favored members of the political community. Disapproval *sends the opposite message*.

Id. at 688 (O'Connor, J., concurring) (emphasis added). When determining whether the challenged government action has the "impermissible effect of communicating a message of governmental endorsement or disapproval of religion," the court views the evidence "through the eyes of an objective observer."

Am. Atheists, Inc. v. Duncan, 637 F.3d 1095, 1119 (10th Cir. 2010) (internal quotations and citations omitted). As this Circuit observed,

> [G]overnments may not make adherence to a religion relevant *in any way* to a person's standing in the political community. And actions which have the effect of communicating governmental endorsement or disapproval, *whether intentionally or unintentionally*, make religion relevant, *in reality or public perception*, to status in the political community.

Id. at 1119 (internal punctuation, quotation, and citations omitted) (emphasis added).

Here, the facts demonstrate that Defendants punished Plaintiff because he objected—based on his Christian religious beliefs—to an order requiring mandatory attendance at the Islamic Event, which was advertised as including, and in fact did include, Islamic religious proselytizing. *Never* has the City police department ordered officers to attend an event hosted by a religious organization at a religious place of worship (here, a mosque) that included invitations to tour the religious sanctuary, observe religious worship services, and receive presentations on religious beliefs.[15] *Never* has the City ever punished an officer for raising a

[15] Indeed, the Islamic Event was not a community policing event. (R-50-4: Wells Decl. at ¶¶ 1-13, App. 1054-58; R-50-7: Fields Supplemental Decl. at ¶ 4, App. 1065; *see also* R-50-2: Jordan Dep. at 129-31, App. 1047-49). "The emphasis and focus of community policing is to address causes of crime and crime trends as well as crime prevention. There was no agenda on the Islamic Society event flyer or in any of the emails directing attendance at the Islamic Society event for the invited officers to discuss crime or crime related issues of any kind. To the contrary, the expressed agenda was focused on religious activities: mosque tours, meeting

religious objection to attending such an event. And it is clear that Plaintiff was punished because he is a Christian who objected to an event that promoted Islam.

Additionally, as noted, the district court's reference to "events at other religious locations" does not cure the constitutional defects associated with *this* event at *this* location under *these* circumstances. This event was advertised as promoting, and it in fact did promote, Islam. And despite knowing that this event would involve religious content, Defendants did not reach out to the hosts of the Islamic Event to inform them that they should not engage in religious discussions with the officers or try to proselytize them, and Defendants admit that there was nothing that would have prevented the Muslim hosts from proselytizing the officers during the event. (R-50-2: Jordan Dep. at 45, App. 1042).

Consequently, during the Islamic Event, which was purposely held on Islam's "holy day," the Muslim hosts discussed Islamic religious beliefs; they discussed Mohammed, Mecca, why Muslims pray, how they pray, and what they say when they are praying; they showed the officers a Quran; and they showed the officers Islamic religious books and pamphlets that were for sale and encouraged the officers to purchase them. Friday, Islam's holy day, was chosen precisely because it gave officers attending the event "the option to stay for the prayer," and, as noted by the Muslim organizer of the event, "most of the officers chose to stay."

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religious leaders, watching a prayer service, and receiving presentations on Islamic religious beliefs." (R-50-4: Wells Decl. at ¶ 7, App. 1055-56).

Indeed, officers were present during the Islamic worship services and were photographed by the media observing these services. The Islamic Society also posted a photograph of police officers sitting at a table with members of the mosque and below the photograph was written, "Discover Islam Classes for Non-Muslims." Defendant Jordan acknowledged that this photograph "would certainly imply that our officers were there taking classes." And finally, Defendant Jordan made it clear that Defendants punished Plaintiff because his objection to the order was based on the fact that his Christian faith clashed with Islam, stating that he "can't have a police department" where officers object to "interact[ing] with Muslims . . . for religious reasons." (R-50-3: Jordan Arbitration Test. at 351, App. 1052).

In the final analysis, the *totality of the circumstances* in this case demonstrate that Defendants have, in at least some "way," made "adherence to a religion relevant to [Plaintiff's] standing in the political community. And [Defendants'] actions [have had] the effect of communicating governmental endorsement or disapproval, *whether intentionally or unintentionally*, mak[ing] religion relevant, *in reality or public perception*, to status in the political community" in violation of the Establishment Clause. *See Am. Atheists, Inc.*, 637 F.3d at 1119.

In sum, the unmistakable "reality" and "public perception" is that Plaintiff, a Christian, was severely (and discriminatorily) punished because he objected to an order mandating attendance at an event that involved Islamic religious proselytizing in violation of the Establishment Clause.

VII. Defendants Violated the Equal Protection Clause.

The Equal Protection Clause embodies the principle that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). When a classification targets a suspect class *or infringes a fundamental right*, such as the free exercise of religion, the court applies strict scrutiny. *See Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002); *Secsys, LLC v. Vigil*, 666 F.3d 678, 687 (10th Cir. 2012) ("Laws selectively burdening fundamental rights are also 'carefully scrutinized.'") (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972)). "To survive strict scrutiny, the government must show that its classification is narrowly tailored to achieve a compelling government interest." *KT&G Corp. v. Att'y Gen. of Okla.*, 535 F.3d 1114, 1137 (10th Cir. 2008).

Here, Plaintiff was discriminated against and punished for objecting to the mandatory order based on his sincerely held Christian beliefs—punishment that infringed a fundamental right—in violation of the Equal Protection Clause.

VIII. Defendants Are Not Entitled to Qualified Immunity.

Qualified immunity does not protect a defendant against claims for declaratory and injunctive relief, for claims brought against him in his official capacity, nor does it apply to claims against a municipality, such as the claims advanced against the City. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998) (noting that qualified immunity is unavailable "in a suit to enjoin future conduct [or] in an action against a municipality"); *Cannon v. City & Cnty. of Denver*, 998 F.2d 867, 876 (10th Cir. 1993) (stating that "there is no qualified immunity to shield the defendants from claims" for "declaratory and injunctive relief"); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989) ("Qualified immunity . . . does not bar actions for declaratory or injunctive relief.").

Moreover, government officials are protected from personal liability for money damages and thus enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). However, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be

apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citation omitted).

To defeat a claim of qualified immunity, Plaintiff must show: "(1) that [Defendants'] actions violated a constitutional or statutory right and (2) that the right was clearly established at the time of [Defendants'] unlawful conduct." *Stearns v. Clarkson*, 615 F.3d 1278, 1282 (10th Cir. 2010) (quotations and citation omitted). The court may decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances" of the particular case. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Once Plaintiff makes this showing, Defendants "must show that there are no material factual disputes as to whether [their] actions were objectively reasonable in light of the law and the information [they] possessed at the time. . . . At all times during this analysis, [this court] evaluate[s] the evidence in the light most favorable to the nonmoving party [*i.e.*, Plaintiff]." *Axson-Flynn*, 356 F.3d at 1300.

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 353 U.S. 194, 202 (2001). "In order for the law 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." *Stearns*, 615 F.3d at 1282 (quotations and citation omitted) (emphasis added). Indeed, as noted by this Circuit, "We have *never said that there must be a case presenting the exact fact situation at hand* in order to give parties notice of what constitutes actionable conduct. Rather, we require parties to make *reasonable applications of the prevailing law to their own circumstances*." *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1251 (10th Cir. 1999) (emphasis added).

Here, the right to be free from punishment, discrimination, and retaliation for exercising a right protected by the First Amendment was clearly established on February 21, 2011. *See Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 824 (6th Cir. 2007) (denying qualified immunity because "Supreme Court decisions . . . recognize that government actions may not retaliate against an individual for the exercise of protected First Amendment freedoms" and thus concluding that "the 'contours of the right' to be free from retaliation were thus abundantly clear") (internal quotations and citation omitted). Indeed, Defendants Jordan and Webster do not enjoy qualified immunity because "the law is clearly established that if a governmental requirement burdening a religious practice is not neutral or generally applicable, it is subject to strict scrutiny," and "[i]t was clearly established by the Supreme Court that if a defendant has in place a system of individualized exemptions, it must extend that system to religious exemptions or

face strict scrutiny review." *Axson-Flynn*, 356 F.3d at 1300-01 (denying qualified immunity defense on a free exercise claim); *Shrum*, 449 F.3d at 1145 (denying qualified immunity defense to an assistant chief of police on a free exercise claim and noting that "it was clearly established that non-neutral state action imposing a substantial burden on the exercise of religion violates the First Amendment").

IX. The District Court Abused Its Discretion by Denying Plaintiff Leave to Amend his Complaint.

A. Standard of Review.

To safeguard a plaintiff's opportunity to test his claims on the merits, Rule 15(a)(2) provides that "[t]he court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Accordingly, a district court must clearly justify its denial of a motion to amend. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). Thus, while this court reviews the district court's decision to deny Plaintiff's motion for abuse of discretion, *Bauchman v. West High Sch.*, 132 F.3d 542, 559 (10th Cir. 1997), "[w]here there is lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny [the] motion," *Hurn v. Ret. Fund Trust of Plumbing, Heating & Piping, Indus. of S. Cal.*, 648 F.2d 1252, 1254 (9th Cir. 1981); (*see* R-67: Notice of Appeal, App. 1181 [seeking review of the district court's order denying Plaintiff's motion to amend]).

B. Plaintiff's Proposed Amended Complaint Stated a Plausible Claim for Relief under the Free Speech Clause.

1. Plaintiff's Speech Involved a Matter of Public Concern.

The district court incorrectly held that the speech for which Plaintiff was punished did not involve a "matter of public concern." (R-25: Op. & Order at 3-5, App. 129-30). Indeed, speech that "*fairly* [*may be*] *considered as relating to*" issues "of political, social, or other concern to the community" is speech involving "matters of public concern." *Connick*, 461 U.S. at 143. Moreover, this Circuit, as well as many other courts, acknowledges that when the content of the speech focuses on disclosing wrongdoing or other malfeasance on the part of government officials in the conduct of their official duties, it is a matter of public concern. *Prager v. LaFaver,* 180 F.3d 1185, 1190 (10th Cir. 1999) ("Speech which discloses any evidence of corruption, impropriety, or other malfeasance on the part of public officials, in terms of content, clearly concerns matters of public import."); *Wulf v. City of Wichita*, 883 F.2d 842, 857 (10th Cir. 1989) (citing cases). Here, Plaintiff's speech—the filing of his civil rights lawsuit, which disclosed the violation of his constitutional rights by his government employer—is speech involving a matter of public concern. *See generally Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties"). In fact, according to

Defendant Jordan's testimony, the speech for which Plaintiff was punished related to accusations derived from this litigation that Defendant Jordan was promoting "global jihad"—which is clearly a matter of public concern. (R-42-24: Jordan Dep. at 93-96, App. 264-67).

2. Plaintiff's Civil Rights Lawsuit Was Not Filed pursuant to His Official Duties.

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court held that when a public employee makes statements pursuant to his official duties, such employees are not speaking as private citizens for First Amendment purposes, and thus the First Amendment does not prohibit managerial discipline of such employees for the speech. *Id.* at 421-22.

Here, Plaintiff's speech (*i.e.*, the filing of his civil rights lawsuit and the concomitant publicity it generated) was not made pursuant to any official duty or responsibility he was employed to fulfill. Rather, the lawsuit was filed to seek redress for the *ultra vires* actions of his government employers. Consequently, there is simply no basis for claiming that this civil rights lawsuit—or the media attention it garnered—constitutes speech made pursuant to Plaintiff's official duties as a police officer.

3. Plaintiff's Speech Is Protected by the First Amendment.

Inherent in the right to freedom of speech is the right to seek redress of one's grievances in a court of law. "It was not by accident or coincidence that the rights

to freedom of speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights . . . ." *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *see also United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 221-22 (1967). Indeed, "[t]he right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482-83 (1985); *see also id.* at 484 ("Filing a complaint in court is a form of petitioning activity."). Consequently, the Supreme Court has long recognized that public interest litigation to enforce constitutional rights, as in this case, is activity protected by the First Amendment's "freedoms of expression and association." *See NAACP v Button*, 371 U.S. 415, 437-44 (1963).

4. Defendants' Actions Inhibited Plaintiff's Speech.

As the Supreme Court acknowledged, "[T]he threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968). There can be no dispute that suspending Plaintiff without pay for 10 days, permanently transferring him, punitively assigning him to the graveyard shift, making him ineligible for promotion, and subjecting him to further scrutiny and the possibility of "more severe disciplinary action, including

dismissal" because of his protected speech is a potent means of inhibiting speech, in violation of the First Amendment.

In sum, Plaintiff's proposed Second Amended Complaint stated a plausible claim arising under the Free Speech Clause of the First Amendment such that the district court abused its discretion by denying Plaintiff's motion to amend.

C. Plaintiff's Proposed Amended Complaint Stated a Plausible Claim for Relief under the Oklahoma Religious Freedom Act.

The Oklahoma Religious Freedom Act ("ORFA") provides, in relevant part, that "[n]o governmental entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden is [e]ssential to further a compelling governmental interest, and [t]he least restrictive means of furthering that compelling governmental interest." 51 Okla. Stat. § 253.

Under the statute, "exercise of religion" means the same as the right to free exercise of religion guaranteed by Article 1, Section 2 of the Oklahoma Constitution and the First Amendment to the United States Constitution. 51 Okla. Stat. § 252.

Pursuant to ORFA, the strict scrutiny standard applies "even if the burden results from a rule of general applicability." *Id.* Consequently, the statute employs, in part, the standard that applied to free exercise claims prior to the U.S. Supreme Court's decision in *Emp't Div. v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court held that "the right of free exercise does not relieve an individual of the

obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (quotations and citation omitted). This was viewed as a departure from the standard set forth in cases such as *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wis. v. Yoder*, 406 U.S. 205 (1972). In response, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"). 42 U.S.C. § 2000bb, *et seq*.; *but see City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress exceeded its authority by imposing RFRA on the States; however, RFRA still applies to the federal government). Similar to the Oklahoma statute, RFRA prohibited the government from substantially burdening a person's exercise of religion, even if the burden resulted from a rule of general applicability, unless the government could demonstrate that the burden was in furtherance of a compelling government interest and was the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1. Additionally, in 2000, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), which applies the pre-*Smith* strict scrutiny standard for free exercise claims arising in the land use context and for those brought by prisoners. 42 U.S.C. § 2000cc-1.

In its decision below, the district court denied Plaintiff's request to amend his complaint to add a claim under ORFA, holding that it would be futile because the "substantial burden" provision of this statute was not the same as the test

applied in claims arising under the Free Exercise Clause and thus finding that Plaintiff did not set forth a plausible claim for relief under the statute. (*See* R-25: Op. & Order at 5-7, n.4, App. 130-32). In reaching this conclusion, the district court relied principally upon *Steele v. Guilfoyle*, 76 P.3d 99 (Okla. Civ. App. 2003), a prisoner case. The district court was mistaken.

Indeed, in *Steele*, the court referenced RLUIPA and cited to *Werner v. McCotter*, 49 F.3d 1476, 1479 (10th Cir. 1995), when discussing the "substantial burden" test. *Steele*, 76 P.3d at 102. And in *Werner*, this Circuit affirmed that RLUIPA "establishes the 'compelling interest' test" of *Sherbert v. Verner* and *Wis. v. Yoder* "as the analytical framework governing 'all cases where free exercise of religion is substantially burdened.'" *Werner,* 49 F.3d at 1479.

Thus, for the reasons that Defendants violated Plaintiff's free exercise rights under the First Amendment, *see infra*, Defendants similarly violated Plaintiff's rights protected by ORFA. Consequently, the district court abused its discretion by denying Plaintiff leave to amend his complaint to include a claim under this statute.

CONCLUSION

Plaintiff respectfully requests that the court reverse the district court's order granting Defendants' motions for summary judgment and denying Plaintiff's motion for partial summary judgment and enter judgment in Plaintiff's favor on all

claims as to liability. In the alternative, Plaintiff requests that the court reverse the district court's orders granting Defendants' motions for summary judgment and denying Plaintiff's motion to amend his complaint and remand the case for further proceedings.

ORAL ARGUMENT STATEMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 10th Cir. R. 28.2(C)(4), Plaintiff respectfully requests that this court hear oral argument. This case presents for review important questions of law arising under the First and Fourteenth Amendments to the United States Constitution.

Oral argument will assist this court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this court deems relevant.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 13,855 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that pursuant to 10th Cir. R. 25.5, all required privacy redactions have been made.

I further certify that the hard copies of this brief to be submitted to the court are exact copies of the version submitted electronically.

I further certify that the electronic submission of this brief was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that on this day seven (7) hard copies of the brief and two (2) copies of Appellant's Appendix (four volumes) were sent to the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit via Federal Express.

Finally, I certify that on this day one (1) copy of Appellant's Appendix (four volumes) was served via Federal Express upon the following:

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ATTACHMENT

Record No.	Description
R-25	Opinion & Order (Motion to Amend)
R-65	Opinion & Order (Cross-Motions for Summary Judgment)
R-66	Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL CAMPBELL FIELDS, Plaintiff, v. CITY OF TULSA; CHARLES W. JORDAN, individually and in his official capacity as Chief of Police, Tulsa Police Department; DARYL WEBSTER, individually and in his official capacity as Deputy Chief of Police, Tulsa Police Department, Defendants.	)	Case No. 11-CV-115-GKF-TLW

OPINION AND ORDER

This matter comes before the court upon plaintiff Paul Campbell Fields' Motion for Leave to File Second Amended Complaint (Dkt. #17). Fields seeks leave to amend his complaint to add 1) a claim under the Free Speech Clause of the First Amendment, and 2) a claim under the Oklahoma Religious Freedom Act. The defendants argue Fields' proposed amendment to add two additional claims would be futile.

This suit arises out of a dispute between Officer Fields and the Tulsa Police Department. Fields was instructed to have officers under his command attend a "Law Enforcement Appreciation Day" being hosted by the Islamic Society of Tulsa at a local mosque. Officer Fields refused to attend the event, and refused to require his subordinates to attend. Officer Fields was subject to discipline as a result.

Under Fed. R. Civ. P. 15(a)(2), "[t]he court should freely give leave [to amend] when justice so requires." Nonetheless, leave to amend may be denied when amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962). "The district court [is] clearly justified in denying the motion to amend if the proposed amendment [cannot withstand] a motion to dismiss or otherwise fail[s] to state a claim." *Ketchum v. Cruz*, 961 F.2d 916, 920 (10th Cir. 1992). To withstand a motion to dismiss, the plaintiff must merely "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citations omitted).

I. Proposed Free Speech Claim

"When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom," including limitations on his freedom of speech. *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006). The Tenth Circuit has adopted the *Garcetti/Pickering* analysis to determine when a government employee's speech is protected by the First Amendment:

> "First, the court must determine whether the employee speaks 'pursuant to [his] official duties.' If the employee speaks pursuant to his official duties, then there is no constitutional protection because the restriction on speech 'simply reflects the exercise of employer control over what the employer itself has commissioned or created.' Second, if an employee does not speak pursuant to his official duties, but instead speaks as a citizen, the court must determine whether the subject of the speech is a matter of public concern. If the speech is not a matter of public concern, then the speech is unprotected and the inquiry ends. Third, if the employee speaks as a citizen on a matter of public concern, the court must determine 'whether the employee's interest in commenting on the issue outweighs the interest of the state as employer.' Fourth, assuming the employee's interest outweighs that of the employer, the employee must show that his speech was a 'substantial factor or a motivating factor in [a] detrimental employment decision.' Finally, if the employee establishes that his speech was such a factor, 'the employer may demonstrate that it would have taken the same action against the employee even in the absence of the protected speech.' The first three steps are to be resolved by the district court, while the last two are ordinarily for the trier of fact."

Brammer-Hoelter v. Twin Peaks Charter Academy, 492 F.3d 1192, 1202-03 (10th Cir. 2007) (internal citations omitted).

With regard to the first factor, the defendants argue that Fields' speech "(a) refusing to mandate that 'representatives' of the Tulsa Police from his command attend a 'Law Enforcement Appreciation Day' on the grounds that it was an 'Islamic Event' and (b) criticizing the Tulsa Police for the same," was speech pursuant to Fields' official duties. (Dkt. #19, p.5-6). Fields does not dispute that his conduct in refusing to mandate attendance at the Law Enforcement Appreciation Day, and his internal communications within the Tulsa Police Department were speech within the scope of his official duties.[1] Nonetheless, Fields argues that filing this lawsuit was protected speech outside the scope of his official duties and that the defendants retaliated against him for filing the lawsuit. (Dkt. #22, p.4 ("the only 'public' speech of Plaintiff that 'criticiz[ed] the Tulsa Police' (and properly brought 'discredit upon the department') was speech associated with this civil rights lawsuit.")); Proposed Second Amended Complaint, Dkt. #17-1, p.18 ("Defendants punished Plaintiff and retaliated against him because he filed this civil rights lawsuit . . . in violation of Plaintiff's right to freedom of speech.")). The defendants do not argue that filing this lawsuit was within the scope of Fields' official duties. Therefore, the speech Fields claims is protected—the filing of this lawsuit—was outside Fields' official duties.

With regard to the second factor, "a public employee plaintiff who has [filed a lawsuit] is in no better position than one who has merely exercised free speech" because such a claim still "must meet the 'public concern' test." *Martin v. City of Del City*, 179 F.3d 882, 889 (10th Cir. 1999). "In these cases, we construe 'public concern' very narrowly, limiting first amendment

[1] The Proposed Second Amended Complaint suggests that Fields' communications prior to the lawsuit were within his official duties: "any 'writings' that were internal communications or made pursuant to any of Plaintiff's official duties became public as a result of an Oklahoma Open Records Act request submitted by a third party." (Dkt. #17-1, p.15-16, ¶68).

protection to statements made by public employees which '*sufficiently inform [an] issue*' of public concern." *Flanagan v. Munger*, 890 F.2d 1557, 1563 (10th Cir. 1989) (emphasis in original). "[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Lancaster v. Ind. School Dist. No. 5*, 149 F.3d 1228, 1233 (10th Cir. 1998) (quoting *Connick v. Myers*, 461 U.S. 138, 147 (1983)). Typically, the speech of whistleblowers reflects a public concern because "any evidence of corruption, impropriety, or other malfeasance on the part of [public] officials, in terms of content, clearly concerns matters of public import." *Prager v. LaFaver*, 180 F.3d 1185, 1190 (10th Cir. 1999) (citations omitted). "In contrast, we have held that the following are not matters of public concern: speech regarding grievances about internal departmental affairs, *Hom v. Squire*, 81 F.3d 969, 974 (10th Cir.1996), disputes over the term of employment, *Lancaster v. Indep. Sch. Dist. No. 5*, 149 F.3d 1228, 1233-34 (10th Cir.1998), and workplace frustration, *McEvoy v. Shoemaker*, 882 F.2d 463, 466 (10th Cir.1989)." *Brammer-Hoelter*, 492 F.3d at 1205.

Fields alleges only an employment dispute that resulted from an alleged violation of his own personal rights; not any corruption, impropriety, or malfeasance on the part of officials in the Tulsa Police Department. Merely bringing the alleged violation of his personal rights to public attention through filing a lawsuit does not make it a matter of public concern; if that were so then every employment suit would be a public concern. Fields has offered no case law for the proposition that filing a lawsuit turns a dispute over the violation of personal rights into a public

concern that implicates the First Amendment.[2] Field's proposed First Amendment claim arose from his attempt to vindicate his personal rights in this lawsuit. As such, the speech reflects grievances about internal departmental affairs and the terms of his employment, which are not matters of public concern. Therefore, Fields may not amend his complaint to add a claim for violation of the First Amendment because it would be futile.[3]

II. Proposed Oklahoma Religious Freedom Act Claim

Under the Oklahoma Religious Freedom Act ("ORFA"), "no governmental entity shall substantially burden a person's free exercise of religion" unless that burden passes strict scrutiny. 51 Okla. Stat. § 253. The ORFA defines "substantially burden" as "to inhibit or curtail religiously motivated practice." 51 Okla. Stat. § 252.[4] The Oklahoma Court of Civil Appeals addressed a claim brought under the ORFA in *Steele v. Guilfoyle*, 76 P.3d 99 (Okla. Civ. App. 2003).[5] The court found no substantial burden when an incarcerated Muslim plaintiff was forced to share a cell with a non-Muslim. The Muslim plaintiff "complained his cellmate eats pork and has photographs of beings with souls hanging in their cell. This, Plaintiff contended, defiles his cell and prevents angels from entering" *Id.* at 100. Despite the plaintiff's objections to spending time in a cell with someone whose religious beliefs he did not share, the court found

[2] Fields offers one case for the proposition that a violation of his rights is a matter of public concern. The case addresses the constitutionality of Ohio's Charitable Solicitation Act. *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474 (6th Cir. 1995). *Dayton* mentions the public interest only in the context of weighing the public interest to determine whether a preliminary injunction is warranted. The case says nothing about whether a lawsuit challenging the violation of an individual's rights is a matter of public concern.

[3] Defendants also argue that the First Amendment claim is futile because it does not plead any specific retaliatory actions. However, the proposed complaint clearly enumerates a number of specific acts of retaliation including suspension and ineligibility for promotion. (Proposed Second Amended Complaint, Dkt. #17-1, p.15, ¶67).

[4] Plaintiff cites a number of Free Exercise cases which are irrelevant to this inquiry because they do not use the "substantial burden" test of the ORFA.

[5] In Oklahoma, decisions of the Court of Civil Appeals are not precedential unless released for publication by the Oklahoma Supreme Court. *Steele* was released for publication only by the Court of Civil Appeals and thus has persuasive effect only.

"Defendant's actions in no way prohibit Plaintiff from practicing his religion, [and] praying or meeting with fellow Muslims." *Id.* at 100-01.

Fields argues his religious beliefs were substantially burdened because the defendants punished him for refusing "to engage in conduct that was contrary to his religious beliefs (*i.e.*, attending the place of worship of another religion and being subjected to proselytizing by that religion)." (Dkt. #22, p.10). However, nothing in Fields' proposed Second Amended Complaint suggests that Defendants' actions in any way inhibited or curtailed Fields from practicing his religion. First, the order directing Fields to attend the event did not inhibit or curtail Fields' religiously motivated practice. Exhibit 1 to Fields' Proposed Second Amended Complaint is a flyer inviting "All Tulsa Law Enforcement to LAW ENFORCEMENT APPRECIATION DAY." It invites law enforcement to a "Casual Come & Go Atmosphere" from 11:00am-5:30pm to "[c]ome enjoy a Buffet of American & Ethnic Foods," to take a Mosque Tour "15 minutes or an hour- it's up to you!", to "[w]atch the 2-2:45pm weekly congregational prayer service," and "[m]eet Local Muslims & Leadership." It also contains the following statement: "Presentations upon request: beliefs, human rights, women[.] All questions welcome!" Although Fields alleges that officers who attended the event were subjected to proselytizing, nowhere does he allege that such presentations were mandatory or that any such presentations would have inhibited or curtailed Fields from practicing his sincerely held religious beliefs.

Second, the adverse employment actions alleged in the Proposed Second Amended Complaint cannot be said to have violated Fields' rights under the ORFA. The ORFA protects Oklahomans from government action inhibiting or curtailing religiously motivated practice. It does not provide a police officer a claim against his employing city for requiring him to attend a Law Enforcement Appreciation Day hosted by a faith other than his own or for disciplining him

for his refusal to do so. Fields' claims under the Establishment Clause and the Free Exercise Clause remain.

WHEREFORE, the Motion for Leave to File Second Amended Complaint (Dkt. #17) is denied.

DATED this 28th day of November, 2011.

Gregory K. Frizzell
United States District Judge
Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL CAMPBELL FIELDS, Plaintiff, v. CITY OF TULSA; CHARLES W. JORDAN, *individually and in his official capacity as Chief of Police, Tulsa Police Department*; and, ALVIN DARYL WEBSTER, *individually and in his official capacity as Deputy Chief of Police, Tulsa Police Department*, Defendants.	)	Case No. 11-cv-115-GKF-TLW

OPINION AND ORDER

This matter comes before the court on the motion for partial summary judgment of plaintiff Captain Paul Campbell Fields ("Fields") (Doc. #41); the motion for judgment on the pleadings and alternative motion for summary judgment of defendants Chief of Police Charles W. Jordan ("Jordan") and Deputy Chief of Police Alvin Daryl Webster ("Webster") in their individual capacities, (Doc. ##45, 47); and the motion for judgment on the pleadings and alternative motion for summary judgment of defendants City of Tulsa and Jordan and Webster in their official capacities (Doc. ##46, 48).

The court finds no reasonable jury could find Fields was personally ordered to attend the Law Enforcement Appreciation Day event at the Islamic Society of Tulsa because the directive at issue permitted him to assign others to attend rather than attend himself. Therefore, the directive did not conflict with Fields's sincere religious belief that he must proselytize when

confronted by others whose religious beliefs differ from his. The issue of whether a directive requiring his personal attendance at the event would have violated his First Amendment rights need not be decided here. The defendants' motions for summary judgment are granted, as more fully explained below.

I. Background

Fields alleges the Tulsa Police Department violated his First Amendment rights by disciplining him after he refused to either attend or order his subordinates to attend a community policing event at the Islamic Society of Tulsa.

A. Undisputed Facts

Captain Fields is an Tulsa Police Department officer. (Doc. #42 ¶1). Fields's chain of command consisted of Major Julie Harris, Deputy Chief of Police Alvin Webster, and Chief of Police Charles Jordan. (*Id.* ¶¶8-10).

TPD has a policy of engaging in community policing. (Doc. #45 ¶30). Building trust in the community is part of TPD's mission. (*Id.* ¶39). TPD accepted requests for attendance at 327 religious venues or from religious organizations between 2004 and 2011. (*Id.* ¶47).

The Islamic Society of Tulsa hosted a "Law Enforcement Appreciation Day" on Friday, March 4, 2011. (Doc. #42 ¶11). The Islamic Society had received threats in 2010, and TPD provided protection. (Doc. #45 ¶¶11-12). To show their thanks, the Islamic Society invited TPD, the Sheriff's Office, the district attorney's office, and the FBI to their Appreciation Day. (*Id.* ¶16). After discussing the event with Webster, the Islamic Society ensured the invitation made clear that officers need not tour the Mosque or discuss Islam to attend. (Doc. ##45 ¶¶17-18, 45-8 (Appreciation Day Flier)).

On January 25, 2011, Webster announced the Appreciation Day event at a staff meeting. (Doc. #45 ¶21; Doc. #42 ¶11). On February 16, 2011, Webster emailed the event invitation to

"All TPD Users" and asked officers to notify him if they would be attending. (Doc. #45 ¶¶21-22; Doc. #42 ¶22). That day, Webster also sent an email to the three patrol division majors, requesting:

> I have advised Ms. Siddiqui to expect small-group visits at 1100, 1330, and 1630. Please arrange for 2 officers and a supervisor or commander from each of your shops to attend at each of those times. They can expect to be at the facility for approximately 30 minutes but stay longer if they wish. Each Patrol Division will provide a total of 6 officers and 3 supervisors for the day's event….

(Doc. ##45 ¶25, 45-11). The next day, Major Harris emailed Fields, stating "[w]e are directed by DCOP Webster to have representatives from each shift – 2nd, 3rd, and 4th to attend" and pasting the above statement from Webster. (Doc. #45 ¶25; Doc. #42 ¶24).

On February 17, 2011, Fields responded via email to 15 people, including Harris, Webster, and Jordan, objecting to the directive to send 2 officers and a supervisor to each shift:

> I'm a little confused in reference to DCOP Webster's directive to send 2 officers and at least 1 supervisor or shift commander from 2nd, 3rd, and 4th, shifts to the Islamic Society of Tulsa Law Enforcement Appreciation Day. Initially, this was to be on a voluntary basis, however now it is a directive. What has changed?
>
> I have no problem with officers attending on a voluntary basis; however, I take exception to **requiring** officers to attend this event. Past invitations to religious/non-religious institutions for similar purposes have always been voluntary. I believe this directive to be an unlawful order, as it is in direct conflict with my personal religious convictions, as well as to be conscience shocking.
>
> This event is **not** a police "call to service", which I would readily respond to, as required by my Oath of Office. Instead, it is an invitation to, tour a Mosque, meet Muslim Leadership, watch a congregational prayer service, and receive "presentations on beliefs, human rights, and women." It is my opinion and that of my legal counsel, that forcing me to enter a Mosque when it is not directly related to a police call for service is a violation of my Civil Rights.
>
> Please consider this email my official notification to the Tulsa Police Department and the City of Tulsa that I intend not to follow this directive, nor require any of my subordinates to do so if they share similar religious convictions.

(Doc. #45-13) (emphasis in original).

The next day, Webster sent Fields a three-page, single-spaced interoffice correspondence, clarifying that "voluntary participation is desirable and should an adequate number of personnel volunteer, assignment would not be necessary… Should voluntary response not be up to the task, assignment would be the next alternative." (Doc. #45-22 at 1). Webster noted that "I and other personnel have either been detailed or strongly encouraged to attend community outreach events at the Jewish Community Center, churches in North Tulsa to reach out to African American residents, and churches in East Tulsa to reach out to Hispanic residents." (*Id.* at 1-2). And Webster explained that "[t]here is no distinction between performing our lawful duties in a reactive manner (call response) and doing so in a proactive manner (community outreach)." (*Id.* at 2). Webster also agreed that "[w]ere Police Department personnel expected to participate in religious services, I would agree with you… Personnel would not be required [to] participate in religious services on duty that they would not choose to participate in off duty." (*Id.*). Given the Department's clarification that "you are not required to participate or assist in any religious observance, make any expression of belief, or adopt any belief system," Webster encouraged Fields to reconsider his refusal to participate or identify others to participate. (*Id.* at 3). After conferring with his counsel, Fields responded that "there is no need to reconsider my decision." (Doc. ##45 ¶58, 45-25).

Webster ordered Fields to report to the Chief's office with his counsel on Monday, February 21st. (Doc. #45 ¶62; Doc. #42 ¶34). Fields recorded the meeting and recounts:

> Defendant Webster asked Plaintiff whether he sought volunteers, and Plaintiff responded, "Yes, I have." Defendant Webster then asked, "Okay, and the response?" to which Plaintiff responded, "Is zero." Defendant Webster then stated, "Alright. And so that makes this fairly easy. Are you prepared to designate two officers and a supervisor or yourself to attend this event?" Plaintiff responded, "No." Defendant Webster then stated, "If ordered?" Plaintiff responded, "No, Chief, I am not." Defendant Webster then stated, "Okay," and

> referred to Defendant Jordan, stating, "Is there anything else you'd like to add, Chief?" to which Defendant Jordan stated, "No, sir."

Decl. of Captain Fields (Doc. #42-2 ¶40). At the end of the meeting, Fields received a prepared order transferring him to a different division and a notification that defendants were initiating an internal investigation for alleged violations of the Duty to be Truthful and Obedient (TPD Rule 6). (Doc. #45 ¶63; Doc. #42 ¶40). After the February 21st meeting, local media began covering the story. (*E.g.* Doc. #45-34).

Captain Luther Breashears conducted the internal investigation. (Doc. #45 ¶68). Fields then received a pre-Action hearing. (Doc. #45 ¶77). After the hearing, Deputy Chief Larsen recommended a four week unpaid suspension. (Doc. #45 ¶78). Jordan imposed one week unpaid suspensions each for violating the duty to be obedient (Rule 6) and for conduct unbecoming an officer (Rule 8). (Doc. #45 ¶79).

B. Disputed Facts Accepted As True For Purposes of Deciding the Summary Judgment Motions

Fields asserts attendance at the Appreciation Day event was mandatory until he complained, when it then became voluntary. Defendants deny attendance was mandatory unless there were insufficient officers willing to attend. (Doc. #49 at 3).

Fields asserts his objection to attendance was based upon his religious beliefs. Fields describes the specific religious belief at issue:

> As a Christian, I have a duty to proselytize the Gospel of Jesus Christ. I also have a duty to repent for my sins and I have a duty to increase my relationship and my personal relationship with the Lord through the Scripture and good deeds….
>
> I have a duty as a Christian to proselytize to people that aren't of my faith. And when I come to work, I don't presume to know someone's religion. It doesn't enter into the question when I'm providing a police call for service. I'm there to provide a specific police service.
>
> Here I have an instance where I'm being compelled to attend an event that's very – it's an open invitation to discuss their religion. Certainly there's a reasonable

> expectation there will be discussion about their religion there, and yet I can't express my faith to them.
>
> It's in direct conflict. I don't know how to make it any clearer for you than that.

Dep. of Captain Fields (Doc. #42-28 at 62:23-63:25); *see also id.* at 66:14:25 ("As a Christian, I have a duty to proselytize my faith to people that are not of my faith. You know, this -- I said about before, I'm being compelled to go to an event hosted by a group of people that are not of my faith, where they are going to be speaking about their faith openly, and I can't comment on that. That's the moral dilemma I have. They are not of my faith. They don't have the same beliefs I have as far as Jesus Christ. So I can't, in good conscience, sit mute and not say anything because that violates my religious conscience."). Defendants deny that Fields's conduct was based on his religious beliefs and that his beliefs are sincere. They aver that Fields's conduct was motivated by anti-Muslim sentiment. (Doc. #49 at 3).

For the purposes of deciding the defendants' motion for summary judgment, the court accepts as true plaintiff's contentions that the directive to designate two officers and a supervisory or himself was mandatory and that his objection was based upon a sincere religious belief in his obligation to proselytize.

C. A Reasonable Jury Could Not Find That The Department, Jordan, Or Webster Ordered Fields Personally To Attend the Appreciation Day Event

Fields suggests that Webster ordered him personally to attend the Appreciation Day event: "forcing me to enter a Mosque when it is not directly related to a police call for service is a violation of my Civil Rights." (Doc. #45-13); s*ee also* Doc. #42 ¶¶39 (adding emphasis to "or yourself"), 44 (adding emphasis to "your refusal to attend"). Defendants deny that Fields was required to attend the event. (Doc. #49 at 3).

The court finds the email unambiguously directed Fields to find volunteers or assign individuals to attend the Appreciation Day. Fields could have included himself among those

volunteers or assigned individuals, but he was not required to attend. Doc. #45-11 ("Please arrange for 2 officers and a supervisor or commander from each of your shops to attend at each of those times."); Decl. of Captain Fields (Doc. #42-2 ¶40) (Webster: "Are you prepared to designate two officers and a supervisor or yourself to attend this event?" Fields: "No.").[1]

The legal analysis herein would not change if Fields had been ordered to attend, except in assessing whether the "individualized exemption" exception to the constitutionality of neutral, generally applicable laws would apply. *Infra* § II.A.1) (Free Exercise). In addition, even had Fields been required to attend the Appreciation Day, he was neither required to attend the afternoon prayer service nor was he required to listen to presentations on Islam.

D. Motions For Judgment On The Pleadings

Defendants' motions each request judgment on the pleadings, or in the alternative, summary judgment. (Doc. ##45 at 5, 46 at 7). Because the defendants have submitted myriad attachments, deposition transcripts, and other materials outside the pleadings, and the court has elected to consider those materials, the motions for judgment on the pleadings are denied. (Doc. ##47, 48).

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[1] Statements after-the-fact describing the disciplined conduct as refusal to attend *and* refusal to order others to attend does not change the meaning of the directive itself as written in the original email and reiterated at the in-person February 21, 2012 meeting. *See* Doc. ##42-3 at 2 ("Captain Fields was disciplined during this rating period for refusing to attend and refusing to direct that officers attend a law enforcement appreciation day at a local mosque."), 42-15 ("Chief Chuck Jordan has requested IA to conduct an administrative investigation in regards to your refusal to attend and refusal to assign officers from your shift, who shared your religious beliefs, to attend the "Law Enforcement Appreciation Day").

II. DISCUSSION

A. Summary Judgment

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Federal Rule of Civil Procedure 56(a) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Adler v. Wal-Mart Stores, Inc*., 144 F3d 664, 670 (10th Cir. 1998). A court must examine the factual record in the light most favorable to the party opposing summary judgment. *Wolf v. Prudential Ins. Co. of Am.*, 50 F.3d 793, 796 (10th Cir. 1995).

When the moving party has carried its burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted). "An issue is 'genuine' if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. An issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." *Adler*, 144 F.3d at 670. In essence, the inquiry for the court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

1) Free Exercise Clause

Taking all reasonable inferences in his favor, Fields's primary claim is that his superior officers ordered him to order his subordinates to attend the Appreciation Day event and/or to attend the event himself, and that order violated his sincerely-held religious belief that he must proselytize to non-Christians because the event was at an Islamic Mosque where optional tours and discussions on Islamic topics would occur. These allegations are insufficient to require submission to a jury, as a reasonable jury could only find that defendants did not violate Fields's freedom to exercise his own religion.

Fields must show the government limited his right to freely exercise his religious belief. "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice." *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989). Fields identifies the religious belief or practice being impugned as his religion's requirement to proselytize. For purposes of summary judgment, the court accepts that the asserted religious belief is sincere. *Cf. United States v. Seeger*, 380 U.S. 163, 185 (1965) (permitting courts to "to decide whether the beliefs professed… are sincerely held").

The Free Exercise Clause of the First Amendment protects individual religious belief from government action. But neutral rules of general applicability do not usually raise free exercise concerns, and are reviewed merely for a rational basis. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004). "By contrast, if a law that burdens a religious practice or belief is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest." *Id.* The order given to Fields was a neutral, generally applicable order. The order applied to all similarly situated officers. The order requested Fields

ensure two officers and a supervisor attend the Appreciation Day event. Fields characterizes the order as not neutral because no previous order had required officers to attend such an event at a religious location where religious services would be ongoing and optional discussion about the religion itself would be offered. That misconstrues the neutrality required. The order here applied neutrally and generally to all officers; it did not single out officers of a certain religion. Thus, only a rational basis must exist for the order. The Police Department's commitment to community policing provides a rational basis for the order.

Fields next asserts that if the Department provided any individualized exceptions to attending the event, it is required to provide religious-based exceptions. The "individualized exemption" exception to *Smith*'s treatment of neutral, generally applicable rules does not apply here. When "individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason." *Church of Lukumi Babalu Aye,* 508 U.S. at 537 (citing *Smith,* 494 U.S. at 884). The Tenth Circuit considers any exemptions that require case-by-case inquiries under a "subjective test" to be such a system. *Axson-Flynn*, 356 F.3d at 1297-98; *see also Sherbert v. Verner*, 374 U.S. 398 (1963) (denial of unemployment benefits for failure to work Saturdays forced Sherbert to choose between her religion and forfeiting benefits). Here, the Department gave no individualized exemptions to the directive to send two officers and a supervisor to the event. Fields incorrectly focuses on Department exemptions from attending the event. If the Department had ordered Fields to attend personally and provided other exemptions that require a case-by-case subjective assessment, the Department would have to provide a religious-based exception as well or show the directive was narrowly tailored to accomplishing a compelling state interest. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d

359 (3d Cir. 1999) (holding police department policy providing medical exemptions to its no-beard requirement while refusing religious exemptions was subject to heightened scrutiny). Because Fields could have assigned others to attend and did not have to attend himself, the court need not analysis the directive under this stricter standard. Fields provides no evidence that the directive to order three people to attend the event was subject to any individual exemptions.

Therefore, Fields's free exercise claim fails because the directive was a neutral, generally applicable rule sustained by a rational basis.[2]

2) Expressive Association

Defendants have not infringed Fields's right to associate or not associate with any organization. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), the Supreme Court held that law school's freedom of expressive association was not infringed by a statute requiring law schools to allow military recruiters on campus to receive federal funding. The Court held:

> To comply with the statute, law schools must allow military recruiters on campus and assist them in whatever way the school chooses to assist other employers. Law schools therefore "associate" with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students-not to become members of the school's expressive association. This distinction is critical.

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[2] Because the directive is a neutral, generally applicable rule sustained by a rational basis, the court need not consider whether the *Garcetti-Pickering* doctrine–that the government may place greater restrictions on public employee's free speech–applies to other First Amendment rights, including the freedom to exercise one's religion. *See Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) ("The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 578 (1968) ("the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general").

Id. at 69. Officers attending the Appreciation Day event were "outsiders" who went to the Mosque for a limited purpose. Fields was never ordered to become a member of any group nor to cease being a member of any group. Fields simply does not state a violation of the First Amendment's guarantee of freedom of association. *See id.*

3) Establishment Clause

The order to send two officers and a supervisor to the Appreciation Day event did not violate the Establishment Clause. Despite its indeterminacy, the *Lemon* test is applied to determine whether government action violated the Establishment Clause. "To pass constitutional muster, the governmental action (1) 'must have a secular legislative purpose,' (2) its 'principal or primary effect must be one that neither advances nor inhibits religion,' and (3) it 'must not foster an excessive government entanglement with religion.'" *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1030 (10th Cir. 2008) (*quoting Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971)). Addressing the first and second *Lemon* tests, the Tenth Circuit "interprets the purpose and effect prongs of *Lemon* in light of Justice O'Connor's endorsement test." *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1117 (10th Cir. 2010). Under that test, *Lemon*'s purpose prong "asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Id.*

First, the directive had a secular purpose. It ensured TPD officers would attend an outreach event to further the Department's community policing effort. TPD officers have attended scores of events at other religious locations and hosted by religious organizations. *See* Doc. #45-20 (listing over 300 events). The Department's commitment to interact with all Tulsa

communities encompasses the Appreciation Day event. No reasonable observer would see the directive as endorsing Islam or disapproving of Christianity.

Second, the principal effect of the directive neither advances nor inhibits religion. For similar reasons, directing Fields to arrange for two officers and a supervisor to attend the Law Enforcement Appreciation Day event did not advance Islam nor inhibit Christianity. And the directive does not convey an unwitting message of endorsement or disapproval of religion in general or a specific religion.

Third, the directive does not excessively entangle government with religion. Requiring Fields to assign other officers to a community policing event put on by an Islamic group does not entangle government with religion. The myriad events at other religious locations and hosted by other religious groups similarly did not entangle government with religion. *See* Doc. #45-20 (listing events). Moreover, the attending officers were not required to attend religious services or tour the Mosque.

The Establishment Clause does not bar TPD from directing Fields to identify officers to attend community policing events at religious locations or run by religious groups.

4) Equal Protection

Preliminarily, the court's statement in a previous order that Fields's claims under the "Establishment Clause and the Free Exercise Clause remain" must not be taken to imply that the Equal Protection Claim has been dismissed. (Doc. #25 at 7).[3] Fields's Amended Complaint remains, (Doc. #11), and the court did not dismiss the Equal Protection Claim. (*Contra* Doc. #46 at 22 (wherein the City of Tulsa argues the equal protection claim was dismissed)).

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[3] In that Order, the court denied Fields's request to further amend his First Amended Complaint and add new claims.

Fields claims that defendants' directive that he assign two officers and a supervisor to the Appreciation Day event "had a discriminatory effect on Plaintiff and others who share Plaintiff's religious beliefs" and that defendants' actions "favored the religious beliefs and convictions of Muslims over those of non-Muslims." (Doc. #11 ¶¶94, 96). Fields's Equal Protection Claim fails.

First, Fields "tries to repackage [his] free exercise argument in equal protection language, by claiming that the [order] unduly burdens [his] fundamental right freely to exercise its religion." *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007). Where, as here, the underlying free exercise argument fails, the Supreme Court requires only a "rational basis scrutiny" of the equal protection claim. *Id.* The directive did not treat Christians different than Muslims. It required Fields to identify subordinates, or himself, to attend an event. Neither on its face, nor in practice, did the directive discriminate against a group. And even if the directive did somehow discriminate, the TPD community policing effort provides a rational basis for doing so.

Second, Fields's claim might more properly be raised as an anti-retaliation claim under federal employment law. That Fields did not utilize the EEOC process to address the claimed retaliation does not turn a possible statutory claim into a constitutional one. "If this court were to hold otherwise, every claim of unlawful retaliation against a government employer, whether brought under state or federal law, could be transformed into an equal protection claim simply by defining the relevant class as consisting of those employees who challenged the government's unlawful employment policies." *Teigen v. Renfrow*, 511 F.3d 1072, 1086 (10th Cir. 2007). The court will not do so here.

Finally, proof of "discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 253 (1977). Fields provides no evidence that defendants had discriminatory intent when issuing the directive.

B. Qualified Immunity

The individual defendants are also entitled to summary judgment on the grounds of qualified immunity.

Qualified immunity protects government officials from individual liability in a section 1983 action unless the officials violated clearly established constitutional rights. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Qualified immunity is "an immunity from suit rather than a mere defense to liability, and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). As a result, the Supreme Court has stressed that it is critical to resolve immunity questions at the earliest possible stage in the litigation. *See Saucier v. Katz*, 533 U.S. 194, 199-201 (2001); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

When a defendant pleads qualified immunity, the plaintiff bears the burden to show: "First, the plaintiff must demonstrate that the defendant's actions violated a constitutional or statutory right." *Albright v. Rodriguez,* 51 F.3d 1531, 1534 (10th Cir. 1995). "Second, the plaintiff must show that the constitutional or statutory rights the defendant allegedly violated were clearly established at the time of the conduct at issue." *Id.* The court may consider the two questions in any order. *Pearson v. Callahan,* 555 U.S. 223 (2009).

Here, the alleged right is not clearly established. Fields claims Jordan and Webster violated his constitutional right to free exercise, freedom of association, and equal protection by directing him to send two officers and a supervisor to the Appreciation Day event. First, the

First Amendment religion clauses, including the *Lemon* test, are notoriously unclear guidance in novel situations. *See Van Orden v. Perry*, 545 U.S. 677, 685-86 (2005); *Bauchman v. West High School*, 132 F.3d 542, 550-53 (10th Cir. 1997) ("Indeed, many believe the Court's modern Establishment Clause jurisprudence is in hopeless disarray, and in need of substantial revision"); *id.* (*Lemon* provides "no useful guidance to courts, legislators, or other government actors"). Jordan and Webster's desire to ensure attendance at the Islamic Society's Appreciation Day similar to other outreach events is understandable given their concern that differing treatment might have violated the Establishment Clause by appearing to disapprove of Islam. (Doc. #45-22 at 2). And Jordan and Webster's thoughtful response to the Islamic Society's request for officer attendance, including ensuring the visit's religious aspects were minimal and not required, further demonstrates their conscientious handling of the situation. Second, Fields's claimed Free Exercise clause violation concerns the right to not be forced by his municipal employer to send *other individuals* to a community event at a Mosque. Given the notable lack of cases cited involving even remotely similar circumstances, such a right–if it exists–was not well-established. Thus, defendants in their individual capacities are entitled to qualified immunity.

III. CONCLUSION

WHEREFORE, defendants' motions for summary judgment are granted. (Doc. ##45, 46). Defendants' motions for judgment on the pleadings are denied. (Doc. ##47, 48). Plaintiff's motion for partial summary judgment is denied. (Doc. #41).

DATED this 13th day of December, 2012.

GREGORY K. FRIZZELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL CAMPBELL FIELDS, Plaintiff, v. CITY OF TULSA; CHARLES W. JORDAN, *individually and in his official capacity as Chief of Police, Tulsa Police Department*; and, ALVIN DARYL WEBSTER, *individually and in his official capacity as Deputy Chief of Police, Tulsa Police Department*, Defendants.	)	Case No. 11-cv-115-GKF-TLW

JUDGMENT

This Court has granted defendants' motions for summary judgment. It is ordered that plaintiff Paul Campbell Fields recover nothing, the action be dismissed on the merits, and the defendants recover costs from the plaintiff.

DATED this 13th day of December, 2012.

GREGORY K. FRIZZELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT