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 REPLY BRIEF
ORAL ARGUMENT REQUESTED

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GLOSSARY OF TERMS

IA.....Internal Affairs

TPD .....Tulsa Police Department

INTRODUCTION

Defendants' response brief ignores (or mischaracterizes) salient and undisputed facts, and it presents a tangential view of the law divorced from these facts that cannot be sustained.[1] But perhaps most troubling is Defendants' invitation to this court that it accept the faulty premise that Plaintiff must surrender his constitutional rights upon accepting government employment—a premise that has, quite appropriately, been uniformly rejected by the courts, including the U.S. Supreme Court. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967)

[1] The ACLU's *amicus* brief suffers from the same fatal defects, as will be discussed further in this reply. (*See*, *e.g.,* ACLU Br. at 2-8 [reciting alleged "facts"]). Indeed, the ACLU takes a rather remarkable position in support of Defendants, considering that this is the same organization that objects to the government simply displaying a nativity scene on government property during Christmas, a national holiday (*n.b.*: the government was apparently "reaching out" to the Christian community by permitting a Catholic group to erect the temporary display). *See Cnty. of Allegheny v. A.C.L.U.,* 492 U.S. 573 (1989). Indeed, the ACLU is willing to challenge a police order when it conflicts with the religious interests of Muslims, even if the police department believes that the order is necessary to preserve discipline, morale, *esprit de corps*, and a uniform appearance in an effort to provide the public with a better sense of security and trust in its public servants. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999) (filing *amicus* brief in support of Muslim police officers who objected to an order requiring them to shave their beards). Consequently, as the ACLU tacitly admits, there are police orders allegedly intended to promote "public trust" that violate the free exercise rights of officers. And contrary to the ACLU's position here, an order forcing an officer to attend a *proselytizing* event (not a call for service or other legitimate police event) at a place of worship contrary to the officer's religious beliefs <u>is</u> such an unconstitutional order.

("[T]he theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.").

In sum, Defendants have presented no basis—legal or factual[2]—for sustaining the erroneous ruling of the district court. This court should reverse.

SUMMARY OF RELEVANT FACTS

Much of Defendants' opposition is premised upon factual predicates that do not exist. Indeed, the following facts are not in dispute. And this is particularly the case since these facts are mostly supported by *Defendants*' testimony and documents. Moreover, for purposes of this appeal, the court must, at a minimum, construe these facts in Plaintiff's favor. *Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998) ("The factual record and reasonable inferences therefrom are viewed in the light most favorable to the party opposing summary judgment.").

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[2] As raised in Plaintiff's opposition to the individual Defendants' motion for summary judgment, it is improper for a court—including this one—to rely on Defendants' citations to the Internal Affairs ("IA") investigation report as evidentiary support for their statement of facts because this report is inadmissible hearsay. (*See* R-50: Pl.'s Opp'n to Individual Defs.' Mot. at 1-12, App. 1009-20). Moreover, Defendants' asterisk notations to certain objectionable facts are inaccurate, as is their characterization of Plaintiff's response to their statement of facts. For example, Defendants do not mark fact numbers 69 or 70 with an asterisk (*see* Defs.' Br. at 23-24); yet, Plaintiff objected to these factual assertions because they too relied on the IA report for the truth asserted, (*see* R-50: Pl.'s Opp'n to Individual Defs.' Mot. at 10, App. 1018). Plaintiff urges the court to review his actual response to Defendants' statement of facts rather than rely upon Defendants' characterization of that response. (*See* R-50: Pl.'s Opp'n to Individual Defs.' Mot. at 1-20, App. 1009-28).

- **Defendants punished Plaintiff for ***objecting*****, on ***religious*** **grounds, to an order mandating officer attendance at an Islamic proselytizing event held at a local mosque.**

Plaintiff was punished for objecting to an order that was "*in direct conflict with [his] personal religious convictions*" and notifying Defendants that he "*intend[s] not to follow this directive, nor require any of [his] 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]).

For objecting to this order on religious grounds, Plaintiff was *immediately* stripped of his command, *immediately* transferred to another division where he was subsequently assigned to the graveyard shift, and *immediately* subjected to an IA investigation (*i.e.*, he was *summarily* punished)—*prior* to any formal investigation.[3] (*See* Defs.' Br. at 5 [erroneously stating that Plaintiff's "proposed issue concludes, *without support*, Plaintiff was 'summarily punish[ed]'" (emphasis added)]). As Defendants admit, these actions were taken against Plaintiff for his "refusal to attend and refusal to assign officers from [his] shift, who shared [his] religious beliefs, to attend the "Law Enforcement Appreciation Day" hosted by the Islamic Society of Tulsa (hereinafter "Islamic Event"). (R-42-2: Fields Decl. at ¶ 46, App. 174; R-42-15: Dep. Ex. 16, App. 200). And this punishment was handed

[3] As Major Harris testified, Plaintiff's punishment was inconsistent with other similarly situated officers of his rank in that he was punitively transferred *before* the investigation commenced. (R-42-27: Harris Dep. at 36-38, App. 308-10).

down at the close of the meeting held with Defendants on Monday, February 21, 2011.

As a result, it is disingenuous (and incorrect) for Defendants to assert that "[t]he record is undisputed that, after improperly telling his subordinates he thought the order was unlawful and he wasn't going to obey, *he never even asked* his subordinates to comply." (Defs.' Br. at 29). First, Plaintiff's *religious* objection to the order and his email setting forth his objection were entirely proper.[4] And second, when Plaintiff again informed Defendants at the February 21, 2011, meeting that he objected, on religious grounds, to the order mandating attendance at the Islamic Event, Defendants *immediately* stripped Plaintiff of his command and transferred him. Consequently, to argue that Plaintiff should have done something (assuming, *arguendo*, that it would have been proper in the first instance for Plaintiff to question his subordinates as to their religious beliefs) he was incapable of doing (*i.e.*, directing subordinates he no longer commanded to attend the mosque event following the inquisition) because of Defendants' actions and then use that *against* Plaintiff is improper in the extreme.

[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). Moreover, Major Harris testified that Plaintiff's email notification to his superiors, which also informed some of "his subordinates [that] he thought the order was unlawful," was proper because Plaintiff "got [her] permission" to send it. (R-50-9: Harris Dep. at 69-71, App. 1073-75 [emphasis added]).

Moreover, Plaintiff's "Sworn-Employee Performance Evaluation" for the relevant time period—an evaluation that was approved and signed 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."[5] (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, Plaintiff was "disciplined" *because* of his religious beliefs.

Thus, the ultimate question presented here is whether the Constitution permits Defendants to punish Plaintiff because he objected to an order on religious grounds that mandated attendance at an "appreciation" event (*i.e.*, not a police call for service or police-related event) held at a mosque that involved religious proselytizing, particularly when Plaintiff is prohibited from discussing or defending his Christian faith while in uniform. (R-42-24: Jordan Dep. at 37, App. 250 [acknowledging that police officers are prohibited from proselytizing their faith while in uniform]). And the answer is, and should be, an unequivocal "No"—

[5] As noted, Plaintiff was punished for refusing to direct officers to attend *who shared his religious beliefs*—that was his stated objection, and Defendants understood that to be the case as evidenced by their official notification to Plaintiff of the basis for the IA investigation—an investigation "that Chief Chuck Jordan ha[d] requested." (R-42-15: Dep. Ex. 16, App. 200).

Defendants are imposing an unconstitutional burden upon Plaintiff's fundamental rights without a lawful basis for doing so.

- **More specifically, Defendants punished Plaintiff because he raised a religious objection based on his Christian beliefs to the order mandating officer attendance at an event that promoted Islam.**

In a rather candid moment, 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, it's important to bear in mind that Plaintiff was one of the officers *primarily* responsible *for protecting* the mosque from "threats targeting its members." (Defs.' Br. at 2). In fact, the host of the Islamic Event, Ms. Sheryl Siddiqui, stated that Plaintiff "was one of the people who was out here night after night during the threat, watching out for our building and community. So we can only say thank you to him." (R-53-2: Siddiqui Dep. at 85, App. at 1124). Consequently, this case has <u>*nothing*</u> to do with refusing to perform *legitimate* police services—Plaintiff has honorably performed his police duties his entire career and will continue to do so. Consequently, this case <u>*is*</u> about protecting the religious rights of Plaintiff. The City's and the ACLU's efforts to mischaracterize this case as "anti-Islam" or to mischaracterize Plaintiff as discriminating in any way against the people he has and will continue to serve honorably are

wrongheaded and offensive. (*See* Defs.' Br. at 5-6; ACLU Br. at 8-16 [mischaracterizing Plaintiff's claim as seeking "the right to refuse, while on duty as a police officer, an assignment that brings him into contact with individuals he knows to be Muslim"]).

- **Officers from the Tulsa Police Department have *never* been ordered to attend an event that involved religious proselytizing like the Islamic Event at issue here.**

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). Defendant Jordan testified as follows:

> Q. Are you aware of any instances where [officers] were invited to watch a [religious] service in which you made the event mandatory?
> A. No. I don't know of any.
> Q. Are you aware of any instances where [officers] were invited to hear presentations about a (sic) certain religious beliefs that you made mandatory?
> A. No.
> Q. Are you aware of any where [officers] were invited to tour the sanctuary, whether it be a synagogue or a church, where you made it mandatory?
> A. Not that I'm aware of, no, sir.

(R-42-24: Jordan Dep. at 40-41, App. 251-52). Consequently, it is factually incorrect to compare the Islamic Event with *any* other "appreciation" event—this event was *sui generis*. And it 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). Instead, *it was an Islamic proselytizing event*.

- **The Islamic Event was advertised as including—and in fact did include—Islamic proselytizing.**[6]

As announced, the Islamic Event included "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). Indeed, the Islamic Event *promoted the religion of Islam*—there is no disputing this fact.[7] (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

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[6] When one considers the facts of this event, it is inaccurate to describe it as a "thank them for providing protection" luncheon. (*See* Defs.' Br. at 2). This was not a backyard barbeque—it was an event that promoted Islam.

[7] This event was not designed to be—nor was it conducted as—a community policing event. "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 leaders, watching a prayer service, and receiving presentations on Islamic religious beliefs." (R-50-4: Wells Decl. at ¶ 7, App. 1055-56).

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). In short, it was an event that promoted Islam.

- **Despite *knowing* that the Islamic Event would include religious content, Defendants did not reach out to the Muslim hosts 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.**

  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). Despite this fact and knowing that officers, such as Plaintiff, are *prohibited* from discussing *their* faith while in uniform, (R-42-24: Jordan Dep. at 37, App. 250), Defendants still punished Plaintiff for objecting, on religious grounds, to the order mandating officer attendance—including his attendance—at this event.[8]

[8] The ACLU's assertion that "the Department went out of its way to ensure that officers would not be subjected to prayer, proselytizing, or other religious

- **Friday, the holy day for Islam,[9] was specifically chosen by the Muslim hosts—and it was approved by Defendants—because worship services would be taking place in the mosque.**

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 as follows:

> Q. And why did you – or did you select Friday as the date for this event, or was it something that the Tulsa Police Department selected?
> A. *We proposed it, and they approved it*.
> Q. Why did you propose a Friday for the event?
> A. As I mentioned, we've hosted events for law enforcement in the past, and *given the option to stay for the prayer*, *most of the officers chose to stay*. And they were very involved in the – in [t]he – in *watching what was going on*, *they had lots of questions*. They seemed to tell us that it was very helpful to them.

(R-42-26: Siddiqui Dep. at 76, App. 298-99 [emphasis added]).

- **Plaintiff sought volunteers to attend the Islamic Event, but there were none.**

Major Harris testified as follows:

> 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. . . .

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discussion" (ACLU Br. at 4) is, once again, not true.

[9] (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]).

(R-42-27: Harris Dep. at 107, App. 323; *see also* R-42-2: Fields Decl. at ¶ 40, App. 173 [informing Defendants that the number of volunteers was "zero"]).

- **Defendants have a policy and procedure for granting exemptions to orders, like the mandatory order at issue here, 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.**

Pursuant to Defendants' policy and practice, an officer could be excused from the Islamic Event if the officer raised a medical objection or some other non-religious grounds for not attending. It was up to Defendants to make a subjective, case-by-case evaluation of the circumstances.[10] (R-42-27: Harris Dep. at 51-53, App. 314-16; *see also* R-42-24: Jordan Dep. at 77, App. 261 [testifying that requests for exemptions are taken "through the chain of command" and "review[ed] on a case-by-case basis"]).

- **Plaintiff's punishment was "harsh" *and* retaliatory.**

Defendants seek to minimize the punishment they inflicted upon Plaintiff as if this somehow diminishes—or eradicates altogether—the constitutional claims,

[10] Defendants make the somewhat tongue-in-check claim that nothing in the order "mandated that officers attending the event eat brownies, baklava, or baked chicken. . . ." (Defs.' Br. at 12). Of course, none of these activities implicates Plaintiff's constitutional rights. Nonetheless, if an officer objected to attending the event because of a severe allergy, for example, to any of the foods served, he could be exempted from attending. However, because Plaintiff had a religious objection, he was punished. And he was punished because his Christian beliefs conflict with Islam. (R-50-3: Jordan Arbitration Test. at 351, App. 1052 [stating that he can't have a police department where officers object to "interact[ing] with Muslims because they say it's their religious reasons"]).

which, of course, it doesn't. (*See* Defs.' Br. at 29 [claiming that because "[t]he record lacks evidence that Plaintiff was harshly punished," the court should not "set aside existing precedent" or "blaze a new trail for application of the Free Exercise [C]lause"]).

Indeed, here is what the record shows with regard to Plaintiff's punishment, which was announced on June 9, 2011: "Effective Sunday, June 12, 2011, through Saturday, June 25, 2011, you are *suspended without pay for 80 hours/10 days*. . . . Any further violations of Rules and Regulations and/or policies and Procedures of the Tulsa Police Department *will lead to more severe disciplinary action*, *including dismissal*. Furthermore, you will *not be considered for future promotions* for a period of one (sic) at least one (1) year from the effective date of this order." (R-17-5: Personnel Order, App. 96-98).

This, by any man's measure, is "harsh" punishment. And as evidenced by the testimony of Major Harris, Plaintiff's immediate supervisor, this punishment was retaliatory. Major Harris candidly testified as follows:

> Q: Do you believe the Department took adverse action against [Plaintiff] for exercising his rights?
> A: Yes.

(R-42-27: Harris Dep. at 118, App. 326).[11]

[11] Indeed, the fact that the event was made voluntary for Plaintiff's entire shift the very next day and for the entire police department two days later further demonstrates that this punishment was retaliatory—and that Defendants had no

- **Plaintiff was punished for filing this lawsuit, which made public the allegations that Defendants violated his constitutional rights.**

Contrary to Defendants' mischaracterization (*see* Defs.' Br. at 30-37), Plaintiff's free speech claim is *not* based on any statement or email Plaintiff made pursuant to his official duties. Rather, Plaintiff's claim is based upon the fact that Defendants punished him for filing this lawsuit, which made public the allegations set forth in his complaint—allegations that plainly address matters of public concern.

According to Defendants, they punished Plaintiff in part because his "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 4, 2011." (R-17-5: Personnel Order, App. 97 [emphasis added]). Yet, the only "public" writings about this matter were the court-filed pleadings, websites that covered this lawsuit (none of which belong to Plaintiff), and whatever media is covering the litigation (*n.b.* Plaintiff has never spoken to the media nor made a public statement about this litigation)—all of which address matters of public concern. (*See* R-17-1: Second Am. Compl., App. 50-100). Indeed, the Islamic Event was itself a matter of public interest, as demonstrated by the media presence at the event. (*See, e.g.*, R-42-29: Burrell Decl., Ex. A, App. 343 [photo of officer

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legitimate—compelling or otherwise—basis for their actions. (R-42-27: Harris Dep. at 77, 94, App. 319, 321; 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).

observing worship service at Islamic Event with news media stamp on bottom right of image]).

As Defendant Jordan testified,

> 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 96, App. 266 [emphasis added]; *see also* R-42-24: Jordan Dep. at 94-96, App. 266 [referring to websites *not* created by Plaintiff that allegedly "accused [Defendant Jordan] of assisting in global jihad"]).

ARGUMENT[12]

I. Defendants' Free Speech Arguments Are Misguided because They Are Based upon a False Factual Premise.

Defendants spend a considerable amount of time addressing Plaintiff's claim that the district court erred by denying him leave to amend his complaint to add a free speech cause of action. (*See* Defs.' Br. at 32-37). And the reason is apparent: Defendants want this court to adopt and apply their "*Garcetti-Pickering*" / *Connick* "public concern" argument to Plaintiff's free exercise claim as well. (*See* Defs.' Br. at 42 ["In this case, the Court should find a public employee's Free Exercise

[12] Much of what Defendants argue in their response brief was addressed by Plaintiff in his principal brief. Consequently, in an effort to avoid needless repetition, Plaintiff will endeavor to not repeat those arguments here and will, instead, attempt to focus his reply on the more egregious arguments advanced by Defendants.

claims must satisfy the *Garcetti-Pickering* analysis generally, and the *Connick* public concern test specifically."]). However, Defendants cite to no case—and Plaintiff is not aware of one—that has applied these employee speech cases to an employee's free exercise claim.[13] And the reason is obvious: they are inapplicable. *See, e.g., Shrum v. City of Coweta*, 449 F.3d 1132, 1139-45 (10th Cir. 2006) (applying the traditional free exercise analysis to a claim advanced by a police officer). Consequently, this court should not shoehorn such an analysis where it does not fit.

Here, Plaintiff sought to amend his complaint to include a free speech claim only after Defendants announced their punishment on June 9, 2011—punishment that was based upon the fact that Plaintiff filed a civil rights lawsuit, which then made public the constitutional allegations set forth in the complaint. This punishment violated the First Amendment.

The factors considered by this court when deciding a *free speech* claim advanced by a government employee are as follows:

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[13] And this issue is separate and distinct from whether the "public concern" requirement should apply to Plaintiff's freedom of association claim because the protected association is for the free exercise of religion. *See, e.g., Merrifield v. Bd. of Cnty. Comm'rs for Cnty. of Santa Fe*, 654 F.3d 1073, 1082 (10th Cir. 2011) (stating that "the public-concern requirement applies to a claim that a government employer retaliated against an employee for exercising the instrumental right of freedom of association for the purpose of engaging in speech, assembly, or petitioning for redress of grievances" and stating that it "need not determine whether the public-concern requirement applies when the alleged protected association is for the free exercise of religion").

> (1) whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interest; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct.

Dixon v. Kirpatrick, 553 F.3d 1294, 1302 (10th Cir. 2009); *see also Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). Plaintiff previously addressed these factors in light of the district court's denial of his motion for leave to amend.[14] (*See* Pl.'s Principal Br. at 53-56). However, additional discussion is warranted here.

A. The Speech for which Plaintiff Was Punished ***Was Not*** Made pursuant to His Official Duties.

Defendants begin their argument on the free speech issue by mischaracterizing the claim as follows: "Plaintiff alleged he was disciplined for (a) refusing to mandate representatives of TPD in his command attend a 'Law Enforcement Appreciation Day' on the grounds it was an 'Islamic Event' and (b) criticizing the Tulsa Police for same." (Defs.' Br. at 32; *see also id*. at 33 ["Plaintiff acted in his official capacity when he refused to provide representatives from his shift to attend the Law Enforcement Appreciation Day."]). Suffice to say, Plaintiff's free speech claim is not based on discipline associated with "refusing to

[14] There is no dispute that the fourth and fifth factors weigh in Plaintiff's favor. (R-17-5: Personnel Order, App. 97 [punishing Plaintiff because of "actions and writings that were made public"]). And Defendants do not argue otherwise.

mandate" officers to attend the Islamic event (this doesn't refer to any "speech"), and Plaintiff has not "criticiz[ed] the Tulsa Police for same." Instead, Plaintiff has filed a federal civil rights lawsuit seeking vindication of fundamental constitutional rights, and this lawsuit garnered public attention because it involved matters of great public concern and interest. And because of this lawsuit and the attention it drew from the public (and what others wrote and said about it in the press and on the Internet), Defendants punished Plaintiff. (R-17-5: Personnel Order, App. 97 [punishing Plaintiff because of "actions and writings that were made public"]).

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court rejected the argument that Defendants present here, stating,

> We reject . . . the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. . . . The proper inquiry is a practical one. [The employer must] demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Id. at 424-25. As the Court noted, a government employer cannot create an "excessively broad" job description as a way of suppressing an employee's free speech rights, as Defendants are attempting to do here. Indeed, as a "practical" matter, filing a federal civil rights lawsuit is simply <u>not</u> a "task within the scope of [Plaintiff's] professional duties for First Amendment purposes." And there is no evidence to conclude otherwise. *Compare id*. at 421 (finding that an employee's speech in an official memorandum he prepared as a prosecutor fulfilling a

responsibility to advise his supervisor about how best to proceed with a pending case was not protected by the First Amendment).

B. The Speech for which Plaintiff Was Punished ***Was*** on a Matter of Public Concern.

The matters addressed in the lawsuit (and by the media and on the Internet) are matters of public concern. A matter is one of public concern when it relates to "any matter of political, social, or other concern to the community"; that notion is juxtaposed with an action that is "only of personal interest" to the employee.[15] *Connick v. Myers*, 461 U.S. 138, 146-47. Matters of public concern are those that are "subject[s] of legitimate news interest; that is a subject of general interest and of value and concern to the public." *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004).

Here, there can be no question that the matters at issue in this lawsuit—and thus the speech addressing these matters—are of public concern. In fact, Defendants themselves assert that the Islamic Event—the event that is at the heart of this constitutional controversy—was a "community" event. (Defs.' Br. at 1).

In sum, there is simply no basis in law or fact to conclude that this litigation (and its coverage by the media and on the Internet) involves anything but matters

[15] It should perhaps not go unnoticed that Plaintiff is represented by two, nonprofit public interest law firms (American Freedom Law Center and the Thomas More Law Center) precisely because this case involves matters of great public interest and concern.

of public concern. This is not simply a case in which "[a] petition [was] filed with an employer using an internal grievance procedure" and which "involve[d] nothing more than a complaint about a change in the employee's own duties." *See Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2501 (2011) (internal quotations omitted). Rather, this lawsuit "address[es] matters of great public import"—locally and nationally.[16] *Id*. at 2500. Indeed, it "seek[s] to advance political, social, or other ideas of interest to the community as a whole." *Id*. at 2498; *see also David v. City & Cnty. of Denver*, 101 F.3d 1344, 1356 (10th Cir. 1996) ("[E]ven speech that focuses on internal employment conditions and is made in the context of a personal dispute may be regarded as pertaining to a matter of public concern if it addresses important constitutional rights which society at large has an interest in protecting."); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("[T]he public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties.").

[16] As noted, the ACLU, including its New York and Washington, D.C. offices, has decided to weigh in on the important constitutional issues presented. (*See* ACLU Br.).

C. Defendants' Interests Do Not Outweigh Plaintiff's Interests or the Public's Interests in this Litigation.

Defendants claim that they have "considerable interests in community policing, law enforcement, discipline, and compliance with the Establishment Clause" that "outweigh Plaintiff's interests" in vindicating his constitutional rights. Yet, they never explain how any of their interests are legitimately advanced by punishing Plaintiff for filing this civil rights lawsuit. As Defendant Webster noted in Plaintiff's "Sworn-Employee Performance Evaluation" for the relevant time period, "Should subsequent . . . judicial review alter the disciplinary record, this evaluation can be modified accordingly." (R-49-9: Ex. 48, App. 990). Consequently, Defendants understand, at least at some level, that the vindication of constitutional rights by way of litigation is entirely proper.

Moreover, this country has a "strong tradition of access to judicial proceedings." *United States v. Hubbard*, 650 F.2d 293, 317 n.89 (D.C. Cir. 1980). As a general rule, the courts are not intended to be, nor should they be, secretive places for the resolution of secret disputes. *See, e.g., Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."). Given the strong policy in favor of public access, this case can and should be open to the public to the greatest extent possible, and Defendants should not be permitted to punish Plaintiff as a result.

In the final analysis, Defendants' position on Plaintiff's free speech claim is essentially this: if a government employee files a federal civil rights lawsuit against his municipal employer alleging constitutional violations, and this filing then causes the public to respond negatively toward the employer, the employer is licensed to then punish the employee for filing the lawsuit. Endorsing such a position will no doubt chill government-employed, civil rights plaintiffs from seeking vindication of fundamental rights that are important to the entire community. Such a position should be rejected.

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

It cannot be gainsaid that the "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Thus, Plaintiff's interest in not being forced to attend an Islamic proselytizing event is the sort of interest protected by this constitutional guarantee. (R-49-9: Ex. 48, App. 987-90 ["Captain Fields was disciplined during this rating period for refusing to attend" the Islamic Event.]).

Defendants claim that *Rumsfeld v. Forum for Academic & Inst'l Rights*, 547 U.S. 47 (2006), is controlling. (Defs.' Br. at 53-54). They are mistaken. In *Rumsfeld*, the Court held that the federal statute at issue did not violate the plaintiffs' right of association, noting that the "[s]tudents and faculty [were] free to associate to voice their disapproval of the military's message" on campus. *Id*. at

69-70. Here, Defendants sought to force Plaintiff to engage in an association with members of another religion under circumstances (*i.e.*, attendance at a proselytizing event) that violate his religious beliefs[17] *and* right of association precisely because Defendants *prohibit* Plaintiff from "voicing his disapproval" of their religion and defending his own while he is in uniform.

III. Defendants' Establishment Clause Arguments Are Misguided.

As noted throughout this reply, Defendants' arguments are premised upon factual mischaracterizations and thus without merit. In their Establishment Clause argument, Defendants again incorrectly assert that the Islamic Event was similar to every other "community event" that was "held in religious venues or associated with religious groups." (Defs.' Br. at 50; *see also id.* at 53 ["[T]he City's order to attend the Appreciation Day, in light of the City's participation in similar events hosted in Christian and Jewish venues, was itself necessary to comply with constitutional jurisprudence."]). Yet, we know from Defendant Jordan's testimony (and others), no less, that this assertion is false. (R-42-24: Jordan Dep. at 40-41, App. 251-52). Consequently, Defendants' arguments, which consist mostly of string cites to cases that do not apply[18] and which entirely ignore the unique facts

[17] As noted previously, Defendants' very own documents make it clear that they punished Plaintiff because he objected to attending the Islamic proselytizing event on religious grounds. (*See supra* at 3-6).

[18] Defendants cite to several Establishment Clause cases arising in the public school context and in which the courts did not find constitutional violations

and circumstances of the Islamic Event, are without merit.[19] *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) ("Every government practice must be judged *in its unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion.") (emphasis added).

In short, in light of the facts of *this* case, it is evident that Defendants have, in at least some "way," made "adherence to a religion relevant to [Plaintiff's] standing in the political community. And [their] 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. *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1119 (10th Cir. 2010).

IV. Defendants' Free Exercise Clause Arguments Are Misguided.

"The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). "The principle that government may not enact laws that

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because the students were permitted to "opt-out" of the offending practice. (*See* Defs.' Br. at 51-53). Of course, this case does not involve a public school and, more important, Defendants did not permit Plaintiff to "opt-out" of the Islamic Event. Instead, they punished him for objecting to the order mandating attendance.

[19] Similar to Defendants, the ACLU mischaracterizes the facts and thus essentially argues, contrary to the law, that Defendants were *required* to force officers to attend the Islamic proselytizing event because to do otherwise would result in discrimination prohibited by the Establishment Clause. (ACLU Br. at 17).

suppress religious belief . . . is . . . well understood." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993).

Indeed, in *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), this court held that subjecting the student plaintiff to possible punishment because she objected to reciting lines in a script that she believed were offensive to her religion sufficiently burdened her religious beliefs to trigger a violation of the Free Exercise Clause. Nothing prevented the student plaintiff from going to church, engaging in religious worship, or practicing any substantive aspect of her religion. But that is not all that the Free Exercise Clause protects. It protects the right of a plaintiff to object to being forced to engage in activity that violates his or her religious beliefs, *see id.*, as in this case. Defendants claim that "[Plaintiff] must allege something more than the fact the [challenged action] offended [his] personal religious beliefs." (Defs.' Br. at 39). But what Defendants fail to note is that they punished Plaintiff for objecting to an order that forced him to offend his personal religious beliefs.[20] Under extant jurisprudence, that is a violation of the Free Exercise Clause. *See id*.

[20] Indeed, this is a more compelling free exercise case than *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981), in which the Supreme Court held that the government violated the petitioner's right to free exercise when they denied him unemployment benefits because he voluntarily terminated his employment with a factory that produced armaments, claiming that the production of armaments was contrary to his religious beliefs.

Moreover, Defendants do not address in any substantive way the fact that the order at issue was not neutral and generally applicable—aside from simply claiming, *ipse dixit*, that it was.[21] (*See* Defs.' Br. at 44-46). Because this order discriminated against Plaintiff's Christian religious beliefs it was not neutral. And because Defendants permit exemptions to such orders on non-religious grounds, but denied granting Plaintiff (or anyone who shared Plaintiff's religious beliefs) a religious exemption, the order was not generally applicable. Consequently, Defendants have the burden of demonstrating that the order was *narrowly tailored* to advance a *compelling interest*.[22] *Axson-Flynn*, 356 F.3d at 1294 ("[I]f a law that burdens a religious . . . 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.") (internal quotations and citation omitted). Because the Islamic Event

[21] The ACLU's brief makes the similar fatal mistake by simply parroting, without addressing the actual facts, the district court's error that the challenged order was "'applied neutrally and generally to all officers,' no individualized exceptions were authorized, and the order 'did not single out officers of a certain religion.'" (ACLU Br. at 8 [quoting "Order at *6"]).

[22] The ACLU's claim that providing such an exemption to Plaintiff would result in an "administrative nightmare" is simply wrong as a matter of fact, (*see* ACLU Br. at 12), and it disregards clearly established law that *denying* such an exemption for religious reasons is unconstitutional, *see, e.g., Axson-Flynn*, 356 F.3d at 1300-01; *Shrum*, 449 F.3d at 1145; *Fraternal Order of Police Newark Lodge No. 12,* 170 F.3d at 364-66 (acknowledging that the government may not decide that secular motivations for requesting an exemption from an order are more important than religious motivations).

was made voluntary for Plaintiff's entire shift the very day following the initial punishment and voluntary for the entire police department two days later, Defendants cannot satisfy their burden as a matter of fact and law.[23]

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.

Respectfully submitted,

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[23] Consequently, the individual Defendants do not enjoy qualified immunity. *Axson-Flynn*, 356 F.3d at 1300-01 (denying qualified immunity defense on a free exercise claim and stating that "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"); *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").

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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 6,901 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.

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 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 seven (7) hard copies of the brief will be sent to the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit via Federal Express.

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