No. 14-2030

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ALVIN MARRERO-MÉNDEZ; CYNTHIA PÉREZ-VALENTÍN; CONJUGAL PARTNERSHIP MARRERO-PÉREZ,

Plaintiffs – Appellees,

v.

GUILLERMO CALIXTO-RODRÍGUEZ, former Carolina Area Commander for the Puerto Rico Police Department; MARIO RIVERA, Chief of the Carolina Precinct of the Puerto Rico Police Department; RICARDO CRUZ-DOMÍNGUEZ, Supervisor of the Puerto Rico Police Department

Defendants – Appellants,

HÉCTOR PESQUERA, Superintendent of the Puerto Rico Police Department; WILLIAM OROZCO, Carolina Area Commander of the Puerto Rico Police Department.

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

OPPOSITION BRIEF FOR APPELLEES ALVIN MARRERO-MÉNDEZ, CYTHINIA PÉREZ-VALENTIN, AND CONJUGAL PARTERNSHIP MARRERO-PÉREZ

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ISSUE PRESENTED FOR REVIEW

Whether the District Court properly held that (1) the facts alleged by Appellee made out a violation of the Establishment Clause; and (2) the relevant law on government coercion of religion was clearly established at the time of Appellants' unconstitutional conduct, where Appellants (officer-supervisors of the Puerto Rico Police Department) subjected Appellee (a patrol officer) to mandatory prayer and then, because he refused to pray, chastised and humiliated him, permanently stripped him of his authorization to carry his service weapon, and demoted him from a regular patrol officer to a vehicle-maintenance attendant and messenger.

INTRODUCTION

There is no question that the Establishment Clause of the First Amendment to the U.S. Constitution prohibits the government from coercing individuals into religious exercise. And there is no uncertainty in the law that punishing or penalizing an individual because he refuses to submit to prayer is religiously coercive and unconstitutional. Nor is there any debate regarding whether this fundamental principle applies to public employers, including police departments. The federal courts have made clear that it does. Thus, the District Court was correct in holding that "qualified immunity does not shield a police officer from liability where he forces a subordinate to observe religious prayer at an official meeting." Addendum to Appellants' Opening Br. 15 (Dist. Ct. Op.).

Here, Officer Alvin Marrero-Méndez has alleged that Appellants subjected him to Christian prayer at mandatory meetings and briefings. On March 9, 2012, Appellant Guillermo Calixto-Rodríguez required him and other officers to line up in military-style formation to receive instructions for their weekend patrol assignment. Before adjourning the meeting and releasing the officers from this formation, Calixto-Rodríguez ordered the usual prayer to start. When Officer Marrero-Méndez objected and stated that he did not feel comfortable participating in prayer, Appellant nevertheless required him to remain present during the religious exercise. He also verbally chastised Officer Marrero-Méndez because he

did not share the same religious beliefs as his colleagues and supervisors. The same day, in response to his objections, Appellants stripped Officer Marrero-Méndez of his service weapon; and two days after he filed a formal complaint about the prayers and the events of March 9, Appellants effectively demoted him from a patrol officer to a vehicle attendant and messenger.

Under these facts, Appellants plainly violated Officer Marrero-Méndez's Establishment Clause rights. The law prohibiting this type of religious coercion was clearly established at the time; and no reasonable officer could have believed that treating Officer Marrero-Méndez in this manner was constitutionally permitted. The District Court's decision denying Appellants qualified immunity should, therefore, be affirmed.

STATEMENT OF THE CASE

This case poses the straightforward question whether, consistent with the Establishment Clause of the First Amendment to the U.S. Constitution, a police department may subject an unwilling officer-employee to mandatory prayer and then punish him for his refusal to pray. Appellee, Officer Alvin Marrero-Méndez filed this action on March 8, 2013, in the United States District Court for the District of Puerto Rico alleging, pursuant to 42 U.S.C. § 1983, the deprivation of his rights under the First Amendment. Appellants' Appx. 2 (Compl. ¶3). Specifically, he alleged that Appellants – supervising officers of the Puerto Rico

Police Department ("Department" or "PRPD") – violated his Establishment Clause rights by incorporating official Christian prayer into mandatory PRPD meetings and coercing him to take part in, and subject himself to, these prayers by humiliating and chastising him because of his religious beliefs, permanently prohibiting him from carrying his service weapon, and effectively demoting him from a patrol officer to a messenger and vehicle attendant after he objected and refused to pray. *See id.* at 2, 8-10 (Compl. ¶¶ 3-4, 42-48, 50-52). Officer Marrero-Méndez also alleged that Appellants' conduct constituted retaliation in violation of the First Amendment and violated various provisions of the Puerto Rico Constitution and Puerto Rico statutory law. *Id.* at 9-11 (Compl. ¶¶ 49-65). In his Complaint, Officer Marrero-Méndez sought declaratory relief and permanent injunctive relief barring Appellants from continuing to violate his First Amendment rights, as well as damages resulting from these unconstitutional acts. *Id*. at 11-12 (Compl., Prayer for Relief).

Appellants filed their Answer to the Complaint on May 30, 2013. *Id*. at 14-29. On May 5, 2014, nearly a year after filing their Answer, they filed three separate motions to dismiss. *Id.* at 30-71. The motions asserted that two originally named Defendants should be dismissed on the ground that Appellee had failed to adequately state a claim for supervisory liability (*id.* at 30-35); that Appellee had failed to adequately allege an Establishment Clause claim (*id.* at 36-54); and that

Appellants were entitled to qualified immunity as to the Establishment Clause claim (*id.* at 55-71). Appellee timely filed his opposition to all three motions on June 3, 2014. *Id.* at 79-104.

On August 19, 2014, finding that Appellants' conduct was "plainly coercive," the District Court denied their motion to dismiss Officer Marrero-Méndez's Establishment Clause claim. *Id.* at 10-11.[1] Regarding Appellants' qualified-immunity argument, the Court first noted that, "[a]s a threshold matter . . . the defense does not shield government officials from claims for equitable relief" and, accordingly, held that the asserted "qualified immunity defense against Plaintiffs' claims for equitable relief fails." *Id.* at 11-12. The Court also denied qualified immunity with respect to Appellee's claim for damages, reasoning that, under clearly established law, qualified immunity could "not shield a police officer from liability where he forces a subordinate to observe religious prayer at an official meeting." *Id.* at 15. On September 17, 2014, Appellants filed their Notice of Appeal regarding the Court's qualified-immunity decision. Appellants' Appx. 105.

[1] The District Court granted the motion to dismiss two of the originally named Defendants, reasoning that the allegations in the Complaint were insufficient to sustain claims of supervisory liability against them. Addendum to Appellants' Opening Br. 5-6 (District Court opinion).

STATEMENT OF FACTS

Prior to the events alleged in the Complaint, Officer Marrero-Méndez, an avowed atheist, had served as a police agent and patrol officer in the Puerto Rico Police Department for nearly thirteen years. *Id.* at 3-4 (Compl. ¶¶ 10-11). In this capacity, his professional duties included, among others, patrolling, attending to citizens' complaints, conducting arrests, dealing with the public, and undertaking other crime-prevention activities. *Id.* However, after Officer Marrero-Méndez objected to Appellants' practice of incorporating prayer into mandatory meetings and briefings and refused to pray, he was stripped of all of these duties and effectively demoted to a messenger and vehicle-maintenance attendant. *Id.* at 7 (Compl. ¶¶ 32-34).

On March 9, 2012, around 7:30 p.m., Appellant Guillermo Calixto-Rodríguez, one of Appellee's supervisors, summoned at least 40 officers from the PRPD Carolina region to the Plaza Shopping Mall parking lot to dispense orders and instructions relating to that weekend's assignment. *Id.* at 5 (Compl. ¶ 23). The officers, including Appellee, were directed to stand in military formation as Appellant Calixto-Rodríguez addressed them. *Id.* (Compl. ¶¶ 23-24).

Before releasing the officers from the briefing, Calixto-Rodríguez solicited a volunteer from the formation to deliver a closing prayer. *Id.* (Compl. ¶ 24). Officer Marrero-Méndez asked to speak with Calixto-Rodríguez and informed him

that he objected to such official prayers because they promoted religious beliefs to which he did not subscribe. *Id.* at 5-6 (Compl. ¶ 25). He told Calixto-Rodríguez that he felt very uncomfortable and did not want to participate in the prayers. *Id.*

In response to this objection, rather than dispensing with the prayer, Calixto-Rodríguez, now visibly upset, commanded Officer Marrero-Méndez to remove himself from the formation. *Id.* at 6 (Compl. ¶ 26). When he began to walk away, however, Calixto-Rodríguez ordered him to stop and stand still until the prayer was finished. *Id.* Then, in front of the entire formation, Calixto-Rodríguez shouted that Officer Marrero-Méndez was standing apart from them because "he doesn't believe in what we believe." *Id.* Officer Marrero-Méndez felt humiliated and was forced to remain present for the overtly Christian prayer. *Id.*

Later that evening, during a car ride with his immediate supervisor, Appellant Ricardo Cruz-Domínguez, Officer Marrero-Méndez stated that he had been humiliated by the prayer incident and the response to his objection. *Id.* at 6 (Compl. ¶ 27). He informed Cruz-Domínguez that he intended file an administrative complaint, and, to avoid further humiliation, he asked to be assigned to perform his "usual duties" that weekend at the airport precinct. *Id.* When they arrived at the airport precinct, however, Officer Marrero-Méndez was not assigned to his usual duties; instead, citing his purportedly "emotional state," Cruz-Domínguez ordered him to relinquish his Department-issued service weapon. *Id.*

On March 12, 2009, Appellee filed an administrative complaint with the Department's Administrative Investigation Division at its Headquarters in San Juan, asserting that his constitutional right to freedom of religion had been violated; he served copies on the Auxiliary Superintendent of Field Operations and the Office of the Commander for the Carolina Region. *Id.* at 6-7 (Compl. ¶¶ 29-30).

On March 14, 2009, per the order of Appellant Cruz-Domínguez, Appellee met with Appellant Mario Rivera. *Id.* at 6-7 (Compl. ¶¶ 28, 32). Refusing to return Officer Marrero-Méndez's service weapon or to permit him to resume his usual duties, Rivera instead informed him that he had only two options: either report to the Command Office for clerical tasks, or stay in the airport station to assist with vehicle maintenance. *Id.* at 7 (Compl. ¶ 32). Appellee chose the latter even though both alternatives effectively constituted demotions from his usual responsibilities as a police officer. *Id.*

Thereafter, instead of performing the law-enforcement duties for which he is trained and that he had performed for more than a decade, Officer Marrero-Méndez was relegated to car-washing and messenger duties. *Id.* at 7 (Compl. ¶¶ 33-34).

To this day, he remains disarmed, and Appellants have not permitted him to resume his usual duties as a police officer. *Id* at 7-8 (Compl. ¶ 36). The

Department continues to incorporate prayer into its official, mandatory meetings and briefings. *Id.* at 8 (Compl. ¶ 37).

As a result of Appellants' conduct subjecting him to mandatory prayer and penalizing him for his objections and refusal to pray, Officer Marrero-Méndez has suffered emotional distress and discomfort, and seeks damages for these injuries. *See id.* at 8, 12 (Compl. ¶ 40 & Prayer for Relief). Further, he believes and fears that Appellants will continue to incorporate Christian prayers into official meetings, in violation of his beliefs, and will continue to punish him for refusing to participate in the prayers by preventing him from resuming his usual duties as a patrol officer. *See id*. at 8 (Compl. ¶¶ 38-39).

SUMMARY OF ARGUMENT

Under the first prong of this Court's two-part qualified-immunity analysis, Officer Marrero-Méndez's allegations, which must be accepted as true at this stage, are more than sufficient to substantiate his Establishment Clause claim. In addition, a review of the relevant case law makes clear that, under the second prong of the qualified-immunity inquiry, Appellants had fair warning that their conduct was patently unconstitutional.

The Establishment Clause guarantees, at a minimum, that the government may not coerce anyone to participate in religious exercise. In applying this fundamental First Amendment principle over the span of more than half a century,

the Supreme Court and other federal courts have repeatedly affirmed that the government may not, without running afoul of the prohibition on religious coercion, punish an individual for his refusal to submit to prayer, worship, or proselytizing.

The prohibition on governmental retribution for resistance to religious practices is not abstract, but concrete. It has been enforced against public employers, prison officials, and the military; there is no precedent to suggest that Appellants, supervising officers of the Puerto Rico Police Department, should enjoy special exemption or immunity from this rule. On the contrary, uncontradicted case law specifically imposes this basic constitutional stricture on police departments' treatment of their employees and officers.

Appellants suggest that they cured any coercion by permitting Officer Marrero-Méndez to opt out of the prayer. The facts alleged in the Complaint, however, state just the opposite: Despite Officer Marrero-Méndez's strong objections, Appellant Calixto-Rodríguez required him to remain present during the religious exercise. And beyond that, Appellants further violated his rights by shaming him in front of his colleagues, prohibiting him from carrying a service weapon, and denying him the ability to serve as a patrol officer, as he did for thirteen years prior to his refusal to participate in official prayers.

Appellants also argue that they are entitled to qualified immunity because there are no cases with facts identical to those alleged here. This misstates the law. Appellee need not point to a case with exactly parallel facts to defeat Appellants' assertion of qualified immunity. It is enough that, under precedent existing at the time, Appellants were on notice that the Establishment Clause prohibits the government, including police departments, from penalizing individuals who decline to take part in officially sponsored prayers.

Appellants have not cited one case permitting the government to punish an individual for his failure to submit to religious exercise. Tellingly, they do not discuss or even mention the federal courts' longstanding precedent prohibiting religious coercion. Instead, they describe, at length, the Supreme Court's supposedly "contradictory" religious-display cases, arguing that Establishment Clause jurisprudence is simply too "confusing" to hold Appellants liable for their treatment of Officer Marrero-Méndez. *See* Appellants' Op. Br. 14-15. But this case is not about religious displays; it is about coercive prayer. And whatever uncertainty may exist in the law about religious displays does not extend to the courts' clear rejection of religiously coercive acts by the government.

As set forth below, based on clearly established law, only a plainly incompetent officer could have thought that the law permitted him to subject a subordinate to official prayers during mandatory departmental meetings; require

that subordinate to remain present for these prayers, even after he objected; publicly excoriate him over his religious beliefs; and permanently disarm and effectively demote him because he would not submit to the official religious exercise.

Finally, Appellants do not indicate whether they continue to maintain that they are entitled to qualified immunity on Appellee's claim for injunctive relief. They surely are not, as qualified immunity is not a proper defense to claims for equitable remedies.

The District Court properly denied qualified immunity in this case. Appellee respectfully requests that this Court affirm that decision.

ARGUMENT

This Court applies a two-prong analysis to qualified-immunity claims, inquiring "(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was 'clearly established' at the time of the defendant's alleged violation." *Glik v. Cunniffe*, 655 F.3d 78, 81 (1st Cir. 2011) (citation and internal quotation marks omitted). In addressing the second prong, the Court examines the "the clarity of the law at the time of the alleged civil rights violation," and "whether, given the facts of the particular case, a reasonable defendant would have understood that his conduct violated the plaintiff's constitutional rights." *Id.* (citation and internal quotation

marks omitted). The second prong asks, "[a]t bottom, . . . whether the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional." *Id.* (internal quotation marks omitted).

Although the two prongs "may be resolved in any order," *id.*, here, it is appropriate and beneficial that the Court consider each prong in the traditional sequence. Relying primarily on the Supreme Court's religious-display jurisprudence, Appellants have cited virtually none of the most relevant precedent—the federal case law pertaining to religious coercion. A full analysis of this precedent, and its applicability to the facts alleged by Officer Marrero-Méndez, shows not only that Appellee has asserted a valid claim for infringement of his Establishment Clause rights, but also that the alleged violation was so obvious under the law that Appellants cannot credibly claim they did not have the fair warning required by the second prong of the qualified-immunity analysis.

In addition, where a qualified-immunity appeal reaches the Court via a motion to dismiss,[2] the Court "must accept all of the nonmovant's well-pleaded factual averments as true, and draw all reasonable inferences in his favor." *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 22 -23 (1st Cir. 2007); *see also, e .g.*, *Maldonado v.*

[2] Appellants' motions to dismiss were filed nearly a year after their Answer, and were thus untimely and filed in violation of Fed. R. Civ. P. 12(b), which provides that "[a] motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed."

Fontanes, 568 F.3d 263, 266 (1st Cir. 2009) (stating, on appeal from denial of a motion to dismiss on qualified-immunity grounds, that the court must take as true all factual allegations in the complaint).

I. APPELLEE HAS ADEQUATELY ALLEGED A VIOLATION OF THE ESTABLISHMENT CLAUSE.

'"It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoted in *Freedom From Religion Found. v. Hanover Sch. Dist*, 626 F.3d 1, 12-13 (1st Cir. 2010)). *Accord, e.g.*, *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007) ("For the government to coerce someone to participate in religious activities strikes at the core of the Establishment Clause of the First Amendment, whatever else the Clause may bar."); *DeStefano v. Emergency Hous. Grp.*, 247 F.3d 397, 411 (2d. Cir. 2001) (noting that "at the heart of Establishment Clause doctrine lies the principle that government may not coerce" participation in religious exercise) (internal quotation marks omitted); *Doe v. Phillips*, 81 F.3d 1204, 1210 (2d Cir. 1996) ("It is well settled that a government official has no authority to require a religious act[.]"); *Anderson v. Laird*, 466 F.2d 283, 291 (D.C. Cir. 1972) (Bazelon, C.J.) (recognizing that "freedom from governmental imposition of religious activity is a core value protected by the Establishment Clause").

The constitutional prohibition against religious coercion is rooted, in part, in the Framers' understanding that "Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." James Madison, *A Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *reprinted in* SELECTED WRITINGS OF JAMES MADISON 21, 22 (Ralph Ketcham ed., 2006) (internal quotation marks omitted). *Accord Terrett v. Taylor*, 13 U.S. 43, 49 (1815) (Story, J.) ("Consistent with the constitution of Virginia the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe."). And while the Supreme Court summarized this fundamental protection perhaps most succinctly in *Lee*, the Court has highlighted the anti-coercion principle from its earliest jurisprudence interpreting the Establishment Clause. In *Everson v. Board of Education*, 330 U.S. 1, 511 (1947), for instance, the Court explained that "the establishment of religion clause means at least this: Neither a state nor the federal government . . . can force a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion." *See also Zorach v. Clausen*, 343 U.S. 306, 314 (1952) ("[The government] may not thrust any sect on any person. It may not make a religious observance compulsory.").

A. Unconstitutional Religious Coercion Occurs Whenever the Government Penalizes an Individual Because He Refuses to Profess Religious Beliefs or Participate in Religious Exercise.

The prohibition against religious coercion is so obvious and so deeply ingrained within our understanding of the Establishment Clause that the government has rarely violated it. But, on those occasions where the federal courts have been called upon to enforce this principle, they have made absolutely clear that the government may not penalize, or threaten to penalize, an individual because he or she refuses to adopt particular religious beliefs, does not hold the same religious beliefs and practices as government officials, declines to participate in religious exercise, or otherwise rebuffs unwanted, government-imposed religious messages or activities.

In *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961), for example, Torcaso was appointed by the governor of Maryland to serve as a notary public; however, the county clerk denied him a commission because he would not take an oath affirming a belief in God. Maryland's highest court upheld the clerk's decision on the ground that the state constitution required a "declaration of belief in God as a qualification for office." *Id.* at 489. The Supreme Court reversed, railing against the "historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept." *Id.*

at 494. The Court "repeat[ed] and again reaffirm[ed]" that, under the Establishment Clause, "neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion." *Id.* at 495 (internal quotation marks omitted). *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943) (holding that First Amendment barred State from expelling or penalizing students who declined to recite the Pledge of Allegiance).

Applying *Torcaso* and other precedent, the U.S. Court of Appeals for the D.C. Circuit held in *Anderson*, 466 F.2d at 291-95 (Bazelon, C.J.), that a Department of Defense rule providing for "compulsory attendance at worship and prayer" by military academy cadets, who were punished for non-attendance, was unconstitutionally coercive. The court concluded that the "military regulations in this case violate the core value of the Establishment Clause." *Id.* at 296.

Likewise, in *Phillips*, 81 F.3d at 210-12, the Second Circuit found that a prosecutor had unconstitutionally coerced the appellant by requiring her to swear to her innocence on a Bible in church or face a criminal trial. And, in a series of cases, various federal courts have ruled that it is impermissibly coercive to punish parolees or prisoners who object to taking part in drug or alcohol rehabilitation programs that involve prayer and other religious teachings. *See, e.g.*, *Inouye*, 504 F.3d at 712-13 (declaring that parole officer "offend[ed] the core of Establishment

Clause jurisprudence" by requiring parolee to attend religious rehabilitation program and then revoking parole after parolee refused to do so); *Warner v. Orange Cnty. Dep't of Probation*, 115 F.3d 1068, 1075 (2d Cir. 1996) (finding that "[t]here can be no doubt . . . that [appellant] was coerced into participating in" prayers and religious teachings at A.A. meetings mandated by probation department and that, had he failed to attend, appellant would have been subject to imprisonment for violating his parole); *Kerr v. Farrey*, 95 F.3d 472, 474 (7th Cir. 1996) (holding that State could not discipline prisoner for nonattendance at religiously themed drug-treatment meetings by increasing his security-risk classification and limiting his parole opportunities).

This constitutional precept has been specifically reiterated in the context of police departments' treatment of their employees. In *Venters v. City of Delphi*, 123 F.3d 956, 970 (7th Cir. 1997), for example, a police department radio dispatcher alleged that her supervisor, the police chief, "from his first day in office pressured her to bring her thinking and conduct into conformity with the principles of his own [Christian] religious beliefs, and admonished her in no uncertain terms that she was at risk of losing her job if she was unwilling to do so." She further alleged that she was eventually fired based on the chief's "perception that she did not measure up to his religious expectations." *Id.* In reversing the district court's grant of summary judgment in favor of the police chief, the Seventh Circuit

explained, "If a jury were to ultimately conclude that Venters was fired because she did not live up to Ives' religious expectations, the discharge itself would of course amount to a violation of the Establishment Clause." *Id.* The court added: "A jury could find that by requiring Venters to submit to these religious dialogues by means of intimidation, [the police chief] engaged in the kind of coercion proscribed by the establishment clause-even if he ultimately terminated her for lawful reasons." *Id*. (internal quotation marks omitted).

Similarly, in *Milwaukee Deputy Sheriffs' Association v. Clarke*, 513 F. Supp. 2d 1014, 1018 (E.D. Wis. 2007), a county sheriff repeatedly invited an evangelical group to proselytize officers during mandatory leadership conferences and roll calls (required meetings at the beginning of each work shift during which announcements were made and other instructions issued). At the leadership conferences, before introducing the evangelical group, the sheriff "discussed promotion criteria and distributed written material recommending among other things that deputies surround themselves with people of faith," thereby suggesting that "receptiveness to the [group's] message would impress [him] and increase [officers'] opportunities for advancement." *Id.* at 1021. Characterizing the defendants' conduct as "particularly troubling because [they] promoted religion through the coercive power of government," the court granted summary judgment in favor of the plaintiffs—Muslim and Catholic officers who objected to the

prosleytizing. *Id.* at 1017, 1021. The court concluded that the "case involve[d] coercion because defendants required deputies to attend the leadership conference and/or roll calls and did not advise them that they could skip the Centurions' presentations or offer them an opportunity to comfortably dissent." *Id.* The Seventh Circuit affirmed, reasoning that the defendants' conduct unconstitutionally endorsed religion. *See Milwaukee Sheriffs' Assoc. v. Clarke*, 588 F.3d 523, 529 (7th Cir. 2009) ("[I]t would be difficult to interpret the Sheriff's actions as anything other than endorsement[.]"). Although the court of appeals did not focus on plaintiffs' coercion argument, it did note that the sheriff had distributed religious materials in connection with his announcements about upcoming promotions and that attendance at these regularly scheduled meetings was mandatory. *Id*. at 526, 529 (observing that religious presentations took place at "a mandatory conference for government employees" and at "mandatory roll calls during work hours, granting [the evangelical group] unfiltered access to a captive audience of subordinates").

B. Appellants Clearly Violated the Establishment Clause by Punishing Officer Marrero-Méndez Because He Refused to Participate in Official Prayer.

In analyzing whether Appellants' conduct was impermissibly coercive, the District Court applied the three-part coercion framework set forth by the Seventh Circuit in *Kerr*, which asks '"first, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular?'" Addendum to Appellants' Opening Br. 9 (quoting *Kerr*, 95 F.3d at 479). Noting that the Eighth and Ninth Circuits have also adopted this formulation, the District Court acknowledged that the First Circuit "has not yet expressed its position on *Kerr*," but nevertheless found the test '"particularly useful'" for '"determining whether there was governmental coercion of religious activity.'" *Id.* (quoting *Inouye*, 504 F.3d at 713). Based on the precedent discussed above and the allegations in the Complaint, Appellants' conduct patently violated the Establishment Clause under this test.

1. *Appellants' conduct was State-sponsored.*

The District Court correctly concluded that "there is no doubt" that the State has acted here. Addendum to Appellants' Opening Br. 10. Although Appellants suggest, in passing, that that their prayers are "merely tolerable religious expression[s] made by individuals, entitled to their own constitutional right to exercise religious freedom," Appellants' Opening Br. 28, they offer no case law to

support this argument. Nor could they: At the time of the events, Appellants "were all PRPD officers, and, because the [March 9] meeting was called to organize a PRPD intervention, they were all acting in their official capacity." Addendum to Appellants' Opening Br. 10. At the briefing, a commanding officer asked a subordinate "volunteer" to deliver the prayer before the meeting was adjourned as the other officers remained in a military-style formation. Appellants' Appx. 5-6 (Compl. ¶¶ 23-24, 26). Moreover, notwithstanding Appellants' attempt to characterize the March 9 prayer as an "ad hoc" event, Appellants' Opening Br. 23, Appellee specifically alleged that Appellants have an established practice of routinely incorporating prayer into official meetings and briefings. *See id.* at 8 (Compl. ¶¶ 37-38). The events following the parking lot incident also constituted acts of the State as Appellants disarmed Officer Marrero-Méndez and reassigned him to inferior duties using their supervisory authority over him. *See id.* at 4-5 (Compl. ¶¶ 18, 20).

2. *Appellants' conduct was religiously coercive.*

The District Court also correctly held that Appellants' conduct was "plainly coercive" under *Kerr*'s three-part test. Addendum to Appellants' Opening Br. 10 & n.2 ('"It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.' It is equally evident that the

State cannot punish an individual for expressing such resistance.") (quoting *Lee*, 505 U.S. at 596). Appellants have repeatedly subjected Officer Marrero-Méndez to unwanted prayers at mandatory work meetings and briefings. Appellants' Appx. 8 (Compl. ¶¶ 37-38). When his conscience could take these infringements no longer, he objected. *Id.* at 5-6 (Compl. ¶¶ 25-26). Despite his staunch objections, Appellants required Officer Marrero-Méndez to remain present for the duration of the prayer and chastised him because he did not share the religious beliefs expressed in the prayers and favored by Appellants. *Id.* at 6 (Compl. ¶ 26). Delivered in the context of a police formation by "an authority figure with tremendous discretionary authority, whose words carry a presumption of legitimacy," this type of "verbal censure is a form of punishment[.]" *See Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1268-69 (11th Cir. 2004) (holding that teacher's rebuke of student for constitutionally protected actions relating to the Pledge of Allegiance "singled out [the student] in front of his entire class, subjecting him to embarrassment and humiliation," and could not "help but have a tremendous chilling effect on the exercise of First Amendment rights"); *see also infra*, pp. 32-33 (discussing Supreme Court case law prohibiting government actors from signaling disfavor or opprobrium toward prayer nonparticipants).

Appellants' coercive conduct did not stop there, however. Only hours after Officer Marrero-Méndez objected to the prayer practice and refused to pray,

Appellant Cruz-Domínguez stripped him of his service weapon. Appellants' Appx. 6 (Compl. ¶¶ 27-28). And, after Officer Marrero-Méndez filed a formal complaint regarding the prayers and the events of March 9, Appellants further punished him for his objection to their mandatory prayer policy by effectively demoting from a patrol officer to a vehicle attendant and messenger. *Id.* at 6-8 (Compl. ¶¶ 29-36). To date, Officer Marrero-Méndez's service weapon has not been returned, and he has been prohibited from resuming his position as a patrol officer. *Id.* at 7-8 (Compl. ¶ 36).

In asking this Court to disregard the punitive nature of these actions, Appellants claim they were merely trying to help Appellee preserve his religious rights. For example, Appellants assert that, by ordering Officer Marrero-Méndez to stand aside from the formation, they were simply allowing him to "opt out" of the prayer. Appellants' Opening Br. 31. This badly misstates the facts alleged in the Complaint and misconstrues the law. After ordering Officer Marrero-Méndez to abandon the formation, Appellant Calixto-Rodríguez specifically commanded him not to leave the area and to stand still until the prayer was over. Appellants' Appx. 6 (Compl. ¶ 26). Appellee was thus not allowed to opt out, and his presence for the prayer was compulsory in violation of the Establishment Clause. *See*, *e.g.*, *Anderson*, 466 F.2d at 291 (rejecting the government's argument that cadets need not have participated in services they were compelled to attend, and explaining that

the "government may not require an individual to engage in religious practices or be present at religious exercises"). Appellant Calixto-Rodríguez reinforced this coercion by shouting that Officer Marrero-Méndez was standing apart from his colleagues because "he doesn't believe in what we believe." Appellants' Appx. 6 (Compl. ¶ 26).

After claiming that Officer Marrero-Méndez "first suggested that he be transferred," Appellants also contend that "a reasonable police officer could have believed that accepting Plaintiff's very own suggestion of reassigning him to the airport station was a proper way of accommodating everyone's interests." Appellants' Opening Br. 29-30. Appellants again misstate the facts alleged in the Complaint. According to the Complaint, Officer Marrero-Méndez asked to be removed from that weekend's intervention and he requested that he be assigned his "usual duties" at the airport precinct. *Id.* (Compl. ¶ 27). He never proposed or consented to being permanently disarmed and relegated to vehicle maintenance and other responsibilities that have nothing to do with his usual duties as a patrol officer. Indeed, he has made his disagreement with these acts abundantly clear since that time. Appellants' suggested interpretation of the facts pleaded by Appellee ignores or misstates key, materials details and turns others on their head. In short, Appellants ask the Court to disregard its duty to consider Appellee's

allegations as true and in the light most favorable to him. *See, e.g.*, *Maldando*, 568 F.3d at 271.

What is more, even if Appellants had permitted him to leave the briefing and had not later punished him by disarming and effectively demoting him, the coercive pressures faced by Officer Marrero-Méndez would have remained. As this Court has recognized, "[c]oercion need not be direct to violate the Establishment Clause, but rather can take the form of 'subtle coercive pressure' that interferes with an individual's 'real choice' about whether to participate in the activity at issue." *Freedom From Religion Found.*, 626 F.3d at 12. Not only is the "employer-employee relationship . . . inherently somewhat coercive,"[3] but "law enforcement officers may be particularly vulnerable to employer coercion given their strict chain of command." *Milwaukee Deputy Sheriffs' Assoc.*, 513 F. Supp. 2d at 1021.

Here, Appellee and his fellow subordinates were lined up in a military-style formation while receiving orders from a commanding officer. In this environment, where obedience and conformity are expected, Officer Marrero-Méndez was put in the position of choosing between, on one hand, participating in or subjecting

[3] *See, e.g.*, *Martin Tractor Co. v. FEC*, 627 F.2d 375, 387 (D.C. Cir. 1980) (referring to the "inherently coercive context of employer-employee relationships"); *Camp v. Alexander*, 300 F.R.D. 617, 621 (N.D. Cal. 2014) ("Courts have also observed that an ongoing employer-employee relationship is particularly sensitive to coercion.").

himself to State-sponsored religious practices, or, on the other hand, disregarding or violating his Commander's orders by leaving the formation during an official briefing to avoid the prayer. Even without the opprobrium directed at him and the other punishments imposed by Appellants, the Establishment Clause "demands that the [Appellants] may not force this difficult choice upon" Officer Marrero-Méndez or his colleagues: "[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Santa Fe*, 530 U.S. at 312 (internal quotation marks omitted); *see also Mellen v. Bunting*, 327 F.3d 355, 371-72 (4th Cir. 2003) ("Although VMI's cadets are not children, in VMI's educational system they are uniquely susceptible to coercion . . . Because of VMI's coercive atmosphere, the Establishment Clause precludes school officials from sponsoring an official prayer, even for mature adults.").

3. *The object of Appellants' coercion was religious.*

Finally, the object of the coercion here – prayer – is indisputably religious under the third prong of *Kerr's* coercion test. "Prayer, of course, is a quintessential religious practice." *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 818 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000) (internal quotation marks omitted). It "plays a significant role in the devotional lives of most religious people." *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981). *Accord Engel v. Vitale*, 370 U.S. 421, 424-25 (1962) ("There can, of course, be no doubt that . . . invocation of God's

blessings . . . is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious[.]"); *Holloman*, 370 F.3d at 1286 ("Praying is perhaps the quintessential religious practice[.]") (internal quotation marks omitted); *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 384 (6th Cir. 1999) (referring to the "intrinsically religious practice of prayer"); *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991) (describing prayer as an "intrinsically religious" act); *Hall v. Bradshaw*, 630 F.2d 1018, 1020 (4th Cir. 1980) (holding that prayer is "undeniably religious").

For this reason, when analyzing governmental prayers under the *Lemon* and endorsement tests,[4] which do not require coercion to find an Establishment Clause violation,[5] the federal courts have repeatedly held that such prayers have the

[4] In *Lemon v. Kurtzman*, the Supreme Court held that a governmental practice is unconstitutional unless it (1) has a secular purpose; (2) has a "principal or primary effect . . . that neither advances nor inhibits religion"; and (3) does not "foster an excessive government entanglement with religion." 403 U.S. 602, 612-13 (1971) (internal quotation marks omitted). The endorsement test asks "[i]n cases involving state participation in a religious activity . . . whether an objective observer . . . would perceive [the governmental conduct] as a state endorsement of religion." *See Santa Fe*, 530 U.S. at 308. Appellate courts have concluded that the endorsement test is the same, or very similar to, *Lemon*'s effects prong. *See, e.g.*, *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 282 (3d Cir. 2011); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 492 (6th Cir. 2004); *ACLU of New Jersey v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1485-86 (3d Cir. 1996).

[5] The Establishment Clause "does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving

unconstitutional purpose and/or effect of endorsing religion. *See, e.g.*, *Santa Fe*, 530 U.S. at 314-16 (holding that, in addition to being coercive, a public-school policy authorizing school-sponsored prayers at football games had "the purpose and perception of school endorsement of student prayer"); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (striking down state moment-of-silence statute because the addition of "voluntary prayer" language was "intended to characterize prayer as a favored practice" and was thus "not consistent with the established principle that the government must pursue a course of complete neutrality toward religion"); *Engel*, 370 U.S. at 430 (prohibiting daily recitation of official public-school prayer even though schools allowed "those who wish to do so to remain silent or be excused from the room"); *Mellen*, 327 F.3d at 373 (ruling that military academy prayers, in addition to being coercive, send the "unequivocal message" that government officials "endorse[] the religious expressions embodied in the prayer[s]"); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278-79 (5th Cir. 1996) (overturning school-prayer statute as "defective under any of the tests" that have been used by the Supreme Court "to determine whether a government action or policy constitutes an establishment of religion"); *Constangy*, 947 F.2d at 1151

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individuals or not." *Engel*, 370 U.S. at 430. *Accord Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) ("The distinction between the two [religion] clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.").

("When a judge sits on the bench, says 'Let us pause for a moment of prayer,' and proceeds to recite a prayer in court, clearly the court is conveying a message of endorsement of religion."); *Hall*, 630 F.2d at 102 (holding state department of transportation's inclusion of "Motorist's Prayer" on official map had "both a religious purpose and effect"); *Newman v. City of East Point*, 181 F. Supp. 2d 1374, 1380-81 (N.D. Ga. 2002) (holding that city's funding and promotion of prayer breakfast ran afoul of the *Lemon* and endorsement tests); *cf. Doe v. Village of Crestwood*, 917 F.2d 1476, 1478 (7th Cir. 1990) (holding that village could not sponsor a mass as part of a municipal festival because "[a] religious service under governmental auspices necessarily conveys the message of approval or endorsement"); *Milwaukee Deputy Sheriffs' Assoc.*, 588 F.3d at 528-29 (finding that county sheriff had endorsed religion by inviting religious group to give proselytizing presentations to employees as part of mandatory leadership conference and roll call meetings).[6]

[6] Because Officer Marrero-Méndez has alleged facts sufficient to state a claim for religious coercion under the Establishment Clause, *supra* pp. 14-29, this Court need not analyze Appellants' conduct under the *Lemon* or endorsement tests. However, even absent any coercion, Appellants' prayer practice, condemnation of Officer Marrero-Méndez's religious beliefs, and disarming and demoting him because he refused to participate in prayer has the unconstitutional purpose of advancing and endorsing religion. This conduct also has the unconstitutional effect of endorsing religion: An objective observer would perceive Appellants' actions as sending a message that Officer Marrero-Méndez, because of his religious beliefs and refusal to take part in prayer, is regarded as an "outsider" and

The Supreme Court has permitted *legislative* bodies to open their meetings with invocations in both *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) – the only two prayer cases cited by Appellants – but these cases do not at all change the coercion analysis here.[7] The Supreme Court upheld these practices not because the prayers were not religious, *see Town of Greece*, 134 S. Ct. at 1818 (explaining that *Marsh* recognized that legislative prayers are "religious in nature"), but rather because of their unique history dating back to the adoption of the First Amendment. *See id.* at 1819 ("The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time."); *Marsh*, 463 U.S. at 787-88 ("The First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer."). Because "the First Congress provided for the appointment of chaplains only days after approving language for the First

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a disfavored "member[] of the political community." *See Santa Fe*, 530 U.S. at 309 (internal quotation marks omitted).

[7] Courts have declined to extend *Marsh* to prayer in other contexts. *See, e.g.*, *Indian River Sch. Dist.*, 653 F.3d at 280-82 (refusing to extend *Marsh* to school board meeting invocations); *Mellen*, 327 F.3d at 370 (declining to apply *Marsh* to military academy prayers because prayers did not and could not share *Marsh*'s "unique history" as "public universities and military colleges . . . did not exist when the Bill of Rights was adopted"); *Coles*, 171 F.3d at 380 (explaining that *Marsh* articulates a "one-of-a-kind rule" not applicable to school-board prayers); *Constangy*, 947 F.2d at 1149, 1152 (holding that *Marsh* does not allow for judge-led courtroom prayers).

Amendment," the Court reasoned that "the Framers considered legislative prayer a benign acknowledgment of religion's role in society." *Town of Greece*, 134 S. Ct. at 1819.

The PRPD, unlike the governmental bodies in *Town of Greece* and *Marsh*, is not a town council, state legislature, or other type of legislative body; and mandatory staff briefings and other departmental events are not akin to town board meetings or sessions of Congress, where attendance is largely voluntary. There is no comparable history of prayer in this context.

More importantly, even if there were such a history, nothing in *Marsh* or *Town of Greece* authorizes the government to violate the longstanding, well-established constitutional prohibition on religious coercion. On the contrary, the Supreme Court has made clear that legislative prayer itself is still subject to the core prohibition against coercion and that legislative bodies may not penalize individuals who choose not to take part in prayers. In *Town of Greece*, the Court clarified, "The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." 134 S. Ct. at 1826. The Court upheld the prayers in *Town of Greece*, in part, because there was no indication that "town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were

received differently depending on whether they joined the invocation or quietly declined." *Id.* at 1826. There, "[i]n no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished." *Id.* Had the town done so, it would have "violate[d] the Constitution." *Id.*

By contrast, Appellants did exactly what the Court in *Town of Greece* said would violate the Constitution. They directed Officer Marrero-Méndez to participate in a prayer. When he objected, they forced him to remain present for the prayer, singled him out for opprobrium as a non-believer, and then further punished him by removing his service weapon and demoting him. This conduct clearly violates the Court's guidance in *Greece* as well as the coercion test set forth in *Kerr* and applied by the District Court. Indeed, because the courts have made it abundantly clear that the government may *never* punish an individual for refusing to profess particular religious beliefs or participate in religious activity, and because this principle is central to our understanding of the Establishment Clause, Appellants' conduct should be deemed coercive under any coercion test formulated or applied by this Court.

II. THE LAW PROHIBITING APPELLANTS' CONDUCT WAS CLEARLY ESTABLISHED, AND APPELLANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Appellants argue that they are entitled to qualified immunity because Appellee "did not cite, and we have found no judicial precedent or authority adjudicating the constitutionality of an *ad hoc* prayer at the end of a meeting of a police regiment in a parking lot in the context of a state police department whose personnel is about to perform an intervention …." Appellants' Opening Br. 24 (emphasis removed). Even putting aside Appellants' mischaracterization of the facts alleged here, Appellee is not required to produce a case with facts identical to those alleged in the Complaint to prevail on qualified immunity. He need only show that, "in light of pre-existing law," the Appellants were "on notice" that their conduct was unlawful. *See Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002) (internal quotation marks omitted). As the Supreme Court has explained:

> [O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding.

Id. at 741 (citing *United States v. Lanier*, 520 U.S. 259 (1997)).

To that end, the law can be "clearly established" even if there are "notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct at

issue violated constitutional rights." *Lanier*, 520 U.S. at 270. Accordingly, in *Limone v. Condon*, 372 F.3d 39, 43 (1st Cir. 2004), this Court ruled that several law enforcement officers were not entitled to qualified immunity from claims that the officers had developed a prosecution witness knowing he would perjure himself and falsely implicate appellees in a murder. The Court rejected appellants' argument that the law was not clearly established because no case directly on point existed at the time, holding that the "inability to identify a . . . scenario that precisely mirrors the scandalous facts of this case [does not] ensure the success of the appellants' claims of qualified immunity." *Id*. at 48.

Noting that "[t]here is no requirement that the facts of previous cases be materially similar to the facts *sub judice* in order to trump a qualified immunity defense," the *Limone* Court emphasized that "[g]eneral statements of the law are capable of conveying fair warning" and that, "in some situations, 'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'" *Id.* (quoting *Lanier*, 520 U.S. at 271). Despite the lack of directly on-point precedent, the Court concluded that existing precedent "provided reasonable law enforcement officers fair warning that framing innocent persons would violate the constitutional rights of the falsely accused" and that "[no] reasonable law enforcement officer would have thought it permissible to frame somebody for a crime he or she did not commit." *Id.* at 48, 50 (internal

quotation marks omitted). *See also Haley v. City of Boston*, 657 F.3d 39, 50-51 (1st Cir. 2011) ("To be sure, this scenario is not precisely the same as that portrayed in any of the . . . precedents. But variations between the fact pattern of a case and the fact patterns of earlier cases do not mean that the earlier cases should be disregarded."); *Suboh v. Dist. Attorney's Office*, 298 F.3d 81, 94 (1st Cir. 2002) ("We have no doubt that there is a clearly established constitutional right at stake, although we have found no case exactly on all fours with the facts of this case. The difference in contexts in which the right is discussed in the case law does not mean such a right does not exist.").

The inquiry into whether "existing case law gave the defendants fair warning that their conduct violated the plaintiff's constitutional rights" must "encompass[] not only Supreme Court precedent, but all available case law." *Suboh*, 298 F.3d at 93. This includes "federal cases outside [of the First] circuit." *Wilson v. City of Boston*, 421 F.3d 45, 56-57 (1st Cir. 2005).

While there is no case involving a police department's chastising, disarming, and demoting of an officer for his refusal to participate in an official prayer delivered in a parking lot before a planned intervention, Appellants Opening Br. 24, Appellee has pointed to longstanding precedent clearly stating that the government may not, without running afoul of the Establishment Clause's prohibition on religious coercion, penalize individuals for their failure to subscribe

to particular religious beliefs or engage in religious exercise. The courts' commitment to this fundamental principle has been unwavering, and it applies with "obvious clarity" to Appellants' conduct here such that a reasonable officer could not have understood Appellants' treatment of Officer Marrero-Méndez to have been permissible in any sense. In *Phillips*, 81 F.3d at 1211, for instance, the Second Circuit rejected the prosecutor's qualified-immunity argument that "he did not violate any clearly established constitutional rights because he and his colleagues knew of no case holding that requiring an accused to swear innocence on a bible in church was impermissible." The court held that, although there was no case directly on point, "[t]he right of an individual not to be forced to participate in a religious ceremony was clearly established" and "any reasonable person . . . would be fully aware of the right of a citizen to be free from governmental coercion of religious exercise." *Id*. at 1212. *Cf. Inouye*, 504 F.3d at 715 n.12 ("The result in the case before us might well have been the same without any on-point case law, because there is no Supreme Court or Ninth Circuit case, of which we are aware, upholding government-mandated participation in religious activity *in any context*.") (emphasis added).

Moreover, the case law available to Appellants at the time of the challenged events specifically applied this principle to police departments' treatment of their employees and officers. *See Venters*, 123 F.3d at 970 ("It is readily apparent . . .

that coercing a person to conform her beliefs or her conduct to a particular set of religious tenets can run afoul of both the establishment as well as the free exercise clauses."); *Milwaukee Deputy Sheriffs' Assoc.*, 513 F. Supp. 2d 1014 (discussed *supra* pp. 19-20). Thus, there was no question that Appellants could neither force their subordinate, Officer Marrero-Méndez, to stand and observe a prayer until it ended nor punish him because he would no longer take part in official prayers.

Appellants do not cite any of this applicable precedent in their brief. Nor do they point to one case permitting the government to punish or penalize an individual for his failure to submit to religious exercise. In fact, Appellants completely ignore the federal courts' coercion cases. Instead, relying on a lengthy discussion of religious-display cases, they argue that they are entitled to qualified immunity because Establishment Clause law is "confusing, contradictory, and seemingly at odds with each other." Appellants' Op. Br. 15. This case does not center on religious displays, however; and, whatever confusion or uncertainty may exist regarding religious displays is of no moment here given the courts' clear, consistent repudiation of religiously coercive conduct by the government.[8]

Seizing upon the district court's implication that '"giving the subordinate the ability to opt out'" of official prayers may have alleviated the coercion,

[8] As discussed above, *Town of Greece* also did not engender any confusion in the law regarding religious coercion. The Supreme Court reaffirmed there that coercive prayer practices can never pass constitutional muster. *See supra* pp. 31-33.

(Appellants' Opening Br. 30 (quoting Addendum 13)), Appellants argue that this Court's qualified-immunity analysis should focus only on whether they should have known that, "by asking [Appellee] to separate from the group, but remain nearby while they finished, they were actually compelling him to participate." *See id*. at 18, 29-30. This argument, however, is based on more factual quibbling. As discussed above, Officer Marrero-Méndez's version of the facts – not Appellants' – must be taken as true and construed in the light most favorable to him. *See supra* pp. 21-26; *see also Maldonado*, 568 F.3d at 271 (concluding that the appellant's "version of what happened is . . . inconsistent with the factual allegations of the complaint, which we must take as true," and affirming the district court's denial of qualified immunity on Fourth Amendment claim). To the extent that Appellants proffer a different interpretation of the facts or dispute certain allegations, they must reserve those arguments for the summary judgment and/or trial phases of the case.

At this stage, the District Court correctly concluded, viewing the facts in the light most favorable to Officer Marrero-Méndez, that Appellants ordered him to leave the formation, but commanded him to remain present for the duration of the prayer and chastised him for his different religious beliefs. *See supra*, pp. 21-26. Moreover, within a few hours of Officer Marrero-Méndez's objection and refusal to pray, Appellants stripped him of his service weapon, and, after he filed a formal

complaint, Appellants effectively demoted him. *Id.* Appellants' formulation of the question before the Court improperly ignores these key facts. The law governing qualified immunity and motions to dismiss does not, as Appellants seek to do here, "permit a defendant to hijack the plaintiff's complaint and recharacterize its allegations so as to minimize his or her liability." *Limone*, 372 F.3d at 46.

When Appellants' conduct occurred, there was simply no reasonable legal debate in the law that the government may not punish or otherwise penalize an individual for his or her refusal to take part in religious exercise. In light of precedent existing at the time, no reasonable official could have believed that it was permissible to require Officer Marrero-Méndez to take part in prayer and then, when he objected and refused to pray, to punish him by chastising and humiliating him, permanently disarming him, and effectively demoting him.[9] And, even were this Court to conclude otherwise, as the District Court correctly held, Appellants' qualified immunity would extend only to Appellee's claim for damages, not his

[9] As noted above, the case law provides that, even absent Appellants' punitive treatment of Officer Marrero-Méndez, coercive pressures would remain where prayer is delivered at the direction of commanding officers, as part of a mandatory briefing, during which officers are organized into a military-style formation. *See supra* p. 26. Furthermore, to the extent that the District Court suggested, in dicta, that a lack of coercion would have rendered Appellants' conduct permissible, that dicta was flawed because coercion is not necessary to assert a valid claim for violation of the Establishment Clause. *See supra* p. 28 n.5. *Kaplan v. City of Chicago*, No. 05 C 2001, 2009 WL 804066, at *2 (N.D. Ill. Mar. 27, 2009), does not counsel otherwise. There, the prayers took place during community-wide meetings, and the court found that police-department officials had not planned, initiated, or otherwise endorsed the prayers. *Id.* at *4.

claim for equitable relief. *See* Addendum to Appellants' Opening Br. 11-12 (citing *Lugo v. Alvarado*, 819 F.2d 5, 7 (1st Cir. 1987)).

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court affirm the District Court's denial of Appellants' Motion to Dismiss on grounds of qualified immunity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Fed. R. Civ. P. 32(a)(7)(B). This brief contains 9,492 words according to the word processing system used by the American Civil Liberties Union Foundation.

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CERTIFICATE OF SERVICE

I hereby certify that, on April 6, 2015, I filed the foregoing brief with this Court, by using the CM/ECF system, which will send notification of such filing to all counsel of record. In addition, paper copies of the foregoing brief will be sent today by U.S. Mail to counsel for Appellants, Margaruta Mercado-Echegaray and Andrés Gonzalez-Berdecia, at the Department of Justice, Commonwealth of Puerto Rico, P.O. Box 9020192, San Juan, P.R. 00902-0192 and via email to marmercado@justicia.pr.gov and angonzalez@justicia.pr.gov.

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