

IN THE UNITED STATES COURT
FOR THE DISTRICT OF PUERTO RICO

JONATHAN HERNÁNDEZ-
ZORRILLA,

Plaintiff,

v.

RICARDO ROSSELLÓ-NEVARES ET
AL.,

Defendants.

Civ. No.: 19-1397 (SCC)

OPINION AND ORDER

On April 27, 2019, Plaintiff Jonathan Hernández-Zorrilla filed this action against the Commonwealth of Puerto Rico (“the Commonwealth”), the then-governor of Puerto Rico, Ricardo Roselló-Nevarés¹, and various members of the Puerto Rico Police Department (“PRPD”)² in their official and personal capacities under 42 U.S.C. § 1983 for violations of his First, Fifth and Fourteenth Amendment rights, as well as for certain state law violations. *See* Docket No. 1.³ The Commonwealth moved to dismiss Plaintiff’s claims in their

¹ Co-Defendant Roselló-Nevarés has not answered nor moved to dismiss Plaintiff’s claims against him and is therefore not included in this Opinion and Order.

² In the Amended Complaint, Plaintiff refers to the PRPD as the Puerto Rico Police Bureau (“PRPB”). For purposes of this Opinion and Order, the Court uses the more common title, “PRPD.”

³ On April 29, 2019, Plaintiff filed an Amended Complaint. *See* Docket No. 5.

entirety, arguing that it is immune from suit under the Eleventh Amendment. See Docket No. 16. Plaintiff opposed. See Docket No. 20. Co-Defendants Reinaldo Bermúdez, Auxiliary Commissioner of the PRPD; Juan Cáceres-Méndez, Chief Commander of the San Juan Division of the PRPD; Luis Colón, Commander of the PRPD; Henry Escalera, Commissioner of the PRPD; and Luis Hernández, Director of Tactical Operations (also known as “SWAT”) (collectively, the “Supervisory Defendants”) also filed a Motion to Dismiss, under Fed. R. Civ. P. 12(b)(6) and claiming qualified immunity. See Docket No. 26.⁴ Plaintiff also opposed that motion. See Docket No. 20.⁵ For the reasons stated herein, the Commonwealth’s Motion to Dismiss is GRANTED, and the Supervisory Defendants’ Motion to Dismiss is GRANTED IN PART and DENIED IN PART.

I. Historical Background

In July 2008, the United States Department of Justice (“DOJ”) commenced an investigation into the practices of the PRPD. Docket No. 5 at pg. 22. The result of the investigation was a report (the “DOJ Report”) that found that the PRPD has regularly deprived the citizens of Puerto Rico of their

⁴ The Court will refer to all the moving defendants collectively as “Defendants.”

⁵ Due to a minor filing error, the Supervisory Defendants refiled their Motion to Dismiss after Plaintiff filed his opposition to that motion. However, because the newly-filed Motion to Dismiss is identical to the original except for a correction in Plaintiff’s name, Plaintiff’s opposition serves as an opposition to that second Motion to Dismiss.

constitutional rights and will continue to do so if not addressed. *Id.*

On June 17, 2013, the DOJ and the government of Puerto Rico entered into a judicial settlement agreement (the “Agreement”) known as the “Agreement for the Sustainable Reform of the Puerto Rico Police Department” in the U.S. District Court for the District of Puerto Rico. *Id.* at pgs. 16-17. The Agreement ended a civil suit brought by the DOJ in 2012 in response to rampant police misconduct by the PRPD and seeking reform “in order to promote constitutional policing, enhance public and officers’ safety, and increase community confidence.” *Id.* at pg. 17. The Agreement mandates that the PRPD shall ensure that supervisors provide close and effective supervision to each officer under their command, as well as direction and guidance to improve constitutional practice. *Id.* Moreover, supervisory personnel are to closely review and report events of use of force and other police activity. *Id.* The Agreement also requires the filing of administrative complaints in the event of unlawful use of force as well as trainings on police constitutional practices for PRPD officers. *Id.*

II. Factual Background

Plaintiff Jonathan Hernández-Zorrilla, who was 28 years old at the time of the relevant events, alleges that on May 1, 2018, during the Puerto Rico National March against the Oversight, Management and economic Stability Act (“PROMESA”) and the Stability Board (also known as *La*

Junta), he arrived at Hato Rey, San Juan, Puerto Rico to sell water and refreshments to the protestors that were participating in the event. Docket No. 5 at pg. 10. Upon witnessing a confrontation between PRPD officers and protestors, which resulted in the officers throwing tear gas into the crowd, Plaintiff ran from the scene with his partner, Katiria Fontanéz. *See id.* at pg. 11. Plaintiff was hit by the tear gas, causing respiratory issues and irritated skin and eyes. *See id.* The effect of the tear gas forced him to stop running, as he could no longer see properly. *See id.* A passer-by assisted him by pouring a liquid substance over his face and gave him cash to distribute water to others around him who were also suffering from the effects of the tear gas. *See id.* The passer-by also helped Plaintiff move out of the fray to a corner in front of the Liberty Cable of Puerto Rico building. *See id.* at pg. 12.

Plaintiff alleges that while sitting on that corner, a masked police officer in a green uniform ordered him to move, but because he could not see or breath well due to the tear gas, Plaintiff was unable to follow the order. *See id.* According to Plaintiff, several officers also dressed in green uniforms then brutally attacked him, shooting him rubber bullets or pellets at close range. *See id.* While Plaintiff was unable to discern the identities of the officers, he alleges that the green uniforms they wore were consistent with those worn by the “Tactical Operations Unit” or “Swat Team” of the PRPD. *See id.* He alleges he received the first shot between his stomach and chest, while yelling to the officers that he had done nothing

wrong and that he was only trying to sell water and refreshments. *See id.* He was then shot in the head, causing him to turn around to protect himself, at which time he was shot in the back and buttocks. Plaintiff did not resist the officers, and, after the alleged attack, he was left bleeding and laying in pain on the corner of the street. *See id.* at pg. 13.

After several minutes, Ms. Fonantéz found Plaintiff and he was eventually treated for his wounds at Doctors' Center Hospital in San Juan. *See id.* While at the hospital, Plaintiff alleges that he was interviewed by a group of PRPD officers, who noted that his wounds were consistent with those produced by rubber pellets, which they claimed are not employed by the PRPD. *See id.* at pg. 14. However, Plaintiff alleges that the ACLU found rubber pellet casings at the scene of the protests and that the doctor that treated him commented that the wounds appeared to be "caused by the police." *Id.* While none of the projectiles penetrated his body, Plaintiff was prescribed an antibiotic for his wounds and sent home. *Id.* at pg. 15.

Plaintiff brought this action under 42 U.S.C. § 1983, the Constitution of Puerto Rico and the Puerto Rico Civil Code against a number of state and PRPD officials, several unidentified police officers, the then-governor of Puerto Rico and the Commonwealth of Puerto Rico seeking declaratory and injunctive relief, as well as damages.

III. Analysis

A. Motion to Dismiss Standard

Defendant the Commonwealth of Puerto Rico moves to dismiss Plaintiffs claims under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and all Defendants seek dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Because dismissal under these two rules takes into consideration “the same basic principles,” we need only articulate those principles once, under the well-established Rule 12(b)(6) standard. *Lyman v. Baker*, 954 F.3d 351, 359-60 (1st Cir. 2020).

The First Circuit has devised a two-step analysis for considering a Rule 12(b)(6) motion to dismiss under the context-based “plausibility” standard established by the Supreme Court. *See Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) (discussing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). First, the court must “isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements.” *Schatz c. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012). While a complaint need not give detailed factual allegations, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678-79.

Second, the court must then “take the complaint’s well-[pleaded] (*i.e.*, non-conclusory, non-speculative) facts as true, drawing all reasonable inferences in the pleader’s favor, and see if they plausibly narrate a claim for relief.” *Schatz*, 669 F.3d at 55. Plausible means something more than merely possible, an assessment the court makes by drawing on its judicial experience and common sense. *Id.* (citing *Iqbal*, 556 U.S. at 678-79). To survive a Rule 12(b)(6) motion, a plaintiff must allege more than a mere “formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555. However, the Supreme Court has clarified that it does “not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570.

B. *Plaintiff’s § 1983 Claims*

Plaintiff alleges that Defendants violated his rights under the First, Fourth and Fourteenth Amendments and seeks relief under 42 U.S.C. § 1983. Section 1983 “is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.” *Baker v. McCollan*, 443 U.S. 137, 145 n.3 (1979); see *Lockhart-Bembery v. Sauro*, 498 F.3d 69, 74 (1st Cir. 2007). To state a valid § 1983 claim a plaintiff must allege that (1) he was deprived of a federal right; and (2) the person who deprived him of that right acted under color of state law. *Santiago v. Puerto Rico*, 655 F.3d 61, 68 (1st Cir. 2011). A defendant has acted under color of state law if he has abused his power

“possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *United States v. Classic*, 313 U.S. 299, 326 (1941).

The constitutional standard that governs a claim alleging excessive force is the Fourth Amendment’s “objective reasonableness” standard. *Graham v. Connor*, 490 US. 386, 388 (1989).⁶ Plaintiff’s claims under the Fourteenth Amendment are inapplicable and are therefore dismissed with prejudice.

The Court will first analyze which claims are barred by state sovereign immunity as guaranteed by the Eleventh Amendment. Next, as to those claims not precluded, the Court will assess whether Plaintiff has sufficiently alleged supervisory liability as to the Supervisory Defendants. The Court will then evaluate Plaintiff’s claims for injunctive and declaratory relief and, finally, address the remaining state-law claims.

1. Eleventh Amendment Sovereign Immunity

The Commonwealth of Puerto Rico argues that, because it is entitled to Eleventh Amendment sovereign immunity, Plaintiff’s claims should be dismissed in their entirety.⁷ We agree. Plaintiff argues, as a threshold matter, that “it is an

⁶ Plaintiff’s states in the Amended Complaint that Defendants violated his Fourteenth Amendment rights. However, his claims are for excessive use of force by officers of the PRPD, which are governed by the Fourth Amendment.

⁷ The Commonwealth of Puerto Rico also argues that Plaintiff’s claims are time-barred for failure to comply with Puerto Rico Law No. 104. *See* Docket No. 16, pg. 8. However, because we find that the Commonwealth is immune from the present suit on Eleventh Amendment grounds, we do not reach the issue of Plaintiff’s compliance with Law No. 104.

open question whether the Eleventh Amendment even applies to Puerto Rico.”⁸ Docket No. 20 at pg. 2. However, it is long-held in this Circuit that Puerto Rico, despite the lack of formal statehood, enjoys the protection of the Eleventh Amendment “in all respects.” *Ramírez v. Puerto Rico Fire Service*, 715 F.2d 694, 697 (1st Cir. 1983); see *Redondo Const. v. Puerto Rico Highway and Transp. Auth.*, 357 F.3d 124, 125 n.1 (1st Cir. 2004); *De Leon Lopez v. Corporación Insular de Seguros*, 931 F.2d 116, 121 (1st Cir. 1991).

The Eleventh Amendment provides that private individuals may not sue states in federal court. U.S. Const. amend. XI. See *Toledo v. Sánchez*, 454 F.3d 24, 31 (1st Cir. 2006). Nevertheless, there are two exceptions to that guarantee. See *Pinero v. Puerto Rico*, 453 F.3d 48, 52 (1st Cir. 2006). First, Congress can abrogate this immunity provided that it makes “its intention to abrogate unmistakably clear in the language of the statute” and acts “pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment.” *Id.* Second, the state itself can waive its Eleventh Amendment immunity in three ways: “(1) by a clear declaration that it intends to

⁸ Plaintiff cites *Puerto Rico v. Sánchez-Valle*, 136 S.Ct. 1863 (2016) to support this proposition. However, we find that case inapposite to the issue of Eleventh Amendment sovereign immunity. The Court in *Sánchez-Valle* was faced with the issue of whether the United States and Puerto Rico were “separate sovereigns” for purposes of the Double Jeopardy Clause and therefore could both prosecute a defendant for the same offense without violating that provision. *Id.* at 1867. In conducting its analysis, the Court acknowledged that the idea of “sovereignty” in the double jeopardy context “does not bear its ordinary meaning.” *Id.* at 1870. Thus, we decline to extrapolate an analysis used in an extremely narrow and unique context to contradict well-settled First Circuit precedent.

submit itself to the jurisdiction of a federal court or administrative proceeding; (2) by consent or participation in a federal program for which waiver of immunity is an express condition; or (3) by affirmative conduct in litigation.” *Ramos-Pinero v. Puerto Rico*, 452 F.3d 48, 51 (1st Cir. 2006) (quoting *New Hampshire v. Ramsey*, 366 F.3d 1, 15 (1st Cir. 2004)). None of those exceptions apply here, and Plaintiff does not argue otherwise. Thus, the immunity provided by the Eleventh Amendment is correctly afforded to the Commonwealth in the present case.

Plaintiff seeks both declaratory and equitable relief, as well as damages. While sovereign immunity does not preclude declaratory or prospective equitable relief against state officers who are sued in their official capacity, *see Ex Parte Young*, 209 U.S. 123 (1908), “in the absence of consent, waiver, or abrogation, the Eleventh Amendment bars suit against states themselves regardless of the form of relief sought.” *Irizarry-Mora v. University of Puerto Rico*, 647 F.3d 9, n.1 (1st Cir. 2011) (citing *Pennhurst State Sc. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)). Therefore, this Court lacks subject matter jurisdiction to hear any of Plaintiff’s claims against the Commonwealth and Plaintiff has failed to state a claim upon which relief can be granted as to that Defendant. Accordingly, all of Plaintiff’s claims against Defendant the Commonwealth of Puerto Rico are dismissed with prejudice.

Furthermore, it is well-settled law that state sovereign immunity under the Eleventh Amendment also extends to

“alter egos” or instrumentalities” of the State. *Fresenius Med. Care Cardio Vascular Res., Inc. v. Puerto Rico and Caribbean and Cardiovascular Center Corp.*, 322 F.3d 56 (1st Cir. 2003). Specifically, this Court has repeatedly held that the PRPD is an “alter ego” of the State and thus, immune from monetary liability in federal court. *See Nieves Cruz v. Com. of Puerto Rico*, 425 F. Supp. 2d 188, 192 (D.P.R. 2006); *Sánchez Ramos v. Puerto Rico Police Dep’t*, 392 F. Supp. 2d 167, 177 (D.P.R. 2005); *Cestero v. Rosa* 996 F. Supp. 133, 142-43 (D.P.R. 1998); *see also Reyes v. Supervisor of Drug Enf’t Admin.*, 834 F.2d 1093, 1097-98 (1st Cir. 1987) (noting that damages against the PRPD are precluded by the Eleventh Amendment).

Likewise, state officials in their official capacities are considered instrumentalities of the State, as a suit against a state official in his or her official capacity is a suit against the State. *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Pagán-García v. Rodríguez*, No. 14-1385 DRD, 2015 WL 5084640, at *6 (D.P.R. Aug. 27, 2015). In the instant case, Plaintiff is seeking monetary damages and injunctive and declaratory relief from the Supervisory Defendants, who are all PRPD officers, in both their official and personal capacities. Applying the above principles, Eleventh Amendment Immunity also bars Plaintiff’s § 1983 claims seeking monetary damages against the Supervisory Defendants in their official capacity.

Accordingly, Plaintiff’s § 1983 claims against the Commonwealth, as well as his § 1983 claims against the

Supervisory Defendants in their official capacity, are dismissed with prejudice.

2. Supervisory Liability

In contrast to the standard for liability in their official capacity, government officials can be liable for § 1983 claims in their personal capacity. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). However, Supervisory Defendants argue that dismissal of Plaintiff's § 1983 claims is warranted because Plaintiff does not allege that Supervisory Defendants themselves took actions to purposely violate Plaintiff's constitutional rights. Conversely, Plaintiff argues that the Supervisory Defendants can be held liable under a theory of supervisory liability.⁹

For a claim of supervisory liability under 42 U.S.C. § 1983, a plaintiff must show that (1) "one of the supervisor's subordinates abridged the plaintiff's constitutional rights"; and (2) "the supervisor's action was affirmatively linked to that behavior in the sense that it could be characterized as supervisory encouragement, condonation, or acquiescence or gross negligence amounting to deliberate indifference." *Guadalupe-Baez v. Pesquera*, 819 F.3d 509, 515 (1st Cir. 2016).

⁹ Plaintiff makes separate claims against the Supervisory Defendants for failure to properly train and retrain and failure to take remedial action. Docket No. 5 at pgs. 26-27. We include those claims in our supervisory liability analysis, as training and punishing their subordinates falls under the supervisory responsibilities of the Supervisory Defendants. *See Maldonado-Denis v. Castillo-Rodríguez*, 23 F.3d 576, 582-83 (1st Cir. 1994) (explaining that failure to properly train can be the basis for supervisory liability under § 1983).

A supervisor may not be held liable under § 1983 on the theory of *respondeat superior*, nor can his liability rest solely on his position of authority. *Ocasio-Hernández v. Fortuño*, 640 F.3d 1, 16 (1st Cir. 2011). The supervisor’s liability must be premised on his own acts or omissions, but he need not directly engage in a subordinate’s unconstitutional behavior. See *Guadalupe-Baez*, 819 F. 3d at 515; *Febus-Rodríguez v. Betancourt-Lebrón*, 14 F.3d 87, 91-92 (1st Cir. 1994). To establish a claim of supervisory liability, a plaintiff must show that the “official supervise[d], train[ed], or hire[d] a subordinate with deliberate indifference toward the possibility that deficient performance of the task eventually may contribute to a civil rights deprivation.” *Camilo-Robles v. Zapata*, 175 F.3d 41, 44 (1st Cir. 1999). Deliberate indifference¹⁰ is shown where (1) there exists “a grave risk of harm”; (2) the official has “actual or constructive knowledge of the risk”; and (3) the official fails to take “easily available measures to address that risk.” *Camilo-Robles v. Hoyos*, 151 F.3d 1, 7 (1st Cir. 1998). It requires a showing that “it would be manifest to any reasonable official that his conduct was very likely to violate an

¹⁰ Defendants take the position that the Supreme Court departed from the “deliberate indifference” standard as part of the analysis of supervisory liability claims under § 1983 in *Ashcroft*. Docket No. 26, pg. 8; see *Ashcroft*, 556 U.S. 662 (2009). We disagree. The Supreme Court in that case rejected the argument that mere knowledge of a subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution, a position that is consistent with prior § 1983 jurisprudence. *Ashcroft*, 556 U.S. at 677. The Supervisory Defendants cite *Maldonado v. Fontanes*, 568 F.3d 263, 274 n.7 (1st Cir. 2009), in support of their position, but the First Circuit in that case declined to rule on the issue and it therefore does not change our analysis.

individual's constitutional rights." *Germany v. Vance*, 868 F.2d 9, 18 (1st Cir 1989); *see also Febus-Rodríguez*, 14 F.3d at 92. Actual notice of wrongful conduct is not required because a supervisor "may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness." *Maldonado-Denis*, 23 F.3d at 582; *see also Feliciano-Hernández v. Pereira-Castillo*, 663 F.3d 527, 533 (1st Cir. 2011) (noting that notice may be actual or constructive).

Furthermore, a supervisor may be held liable for the constitutional violations of his subordinates where "an affirmative link between the behavior of a subordinate and the action or inaction of his supervisor exists such that the supervisor's conduct led inexorably to the constitutional violation." *Fontanes*, 568 F.3d at 275 (internal quotation marks omitted); *see Guadalupe-Baez*, 819 F.3d at 515 ("Causation remains an essential element, and the causal link between a supervisor's conduct and the constitutional violation must be solid."). This affirmative link can be shown through "a known history of widespread abuse sufficient to alert a supervisor to ongoing violations." *Maldonado-Denis*, 23 F.3d at 582. But it must truly show a "widespread abuse"; "isolated instances of unconstitutional activity are ordinarily insufficient to show deliberate indifference." *Ramírez-Lliveras v. Rivera-Merced*, 759 F.3d 10, 20 (1st Cir. 2014).

The First Circuit has found that the DOJ Report is sufficient evidence of a "widespread abuse" so as to put the

supervisors of the PRPD on notice of ongoing violations. *Guadalupe-Baez*, 819 F.3d at 512, 516-17. In *Guadalupe-Baez*, the plaintiff brought a § 1983 action in Puerto Rico against police officers and their supervisors after the victim was allegedly shot by the police officers without justification. 819 F.3d at 513. The First Circuit held that for purposes of the defendants' motion to dismiss, the plaintiff's allegations were sufficient to show liability against the superintendent, because he was ultimately responsible "for overseeing and directing all administrative, operational, training and disciplinary aspects of the [PRPD]." *Id.* at 516. The court recognized the PRPD's "tarnished history of civil rights violation," including a pattern of PRPD officers exercising force in violation of the Fourth Amendment. *Id.* at 512. The court took into consideration the DOJ Report that led to the Agreement discussed here, and found that the DOJ Report, along with the alleged unconstitutional acts by the officers, was enough to create a plausible inference that the Superintendent "either condoned or at least acquiesced in the offending conduct" that was affirmatively linked to the harm suffered by the plaintiff. *Id.* at 516. The court stated that the existence of the DOJ report put the Superintendent on notice that he may become liable as a supervisor if his acts and omissions contributed to the continuation of the incidents described in the DOJ Report. *Id.* at 517. The court further explained that to claim that he was not aware of the substantial risk of serious harm to the plaintiff "would constitute deliberate indifference

to the reality of the dysfunction that [he] inherited when he took over as Superintendent of the PRPD.” *Id.* at 516.

Similarly, in *Rolón-Merced v. Pesquera*, the court found that plaintiff’s allegations that the PRPD’s supervisors had failed to implement “nationally accepted policies,” along with the officer’s alleged actions of various constitutional violations, was enough to meet the affirmative link test to survive the motion to dismiss. No. 14-1757, 2017 WL 888219, at *7-8 (1st Cir. Mar 6, 2017). Because the PRPD held pertinent information as to the training programs and disciplinary actions against the officers, the plaintiff was not required to provide specific details as to each of the supervisory defendant’s roles in implementing the policies and rules. *Id.* at *21.

In this case, it is not contested by the parties that Plaintiff has alleged that unnamed PRPD officers used excessive force against Plaintiff as he sold water at the National March in violation of his Fourth and First Amendment rights. Thus, the first prong of supervisory liability, requiring that one of the supervisor’s subordinates abridged the Plaintiff’s constitutional rights, is met. *See Guadalupe-Baez*, 819 F.3d at 515. The only issue remaining is whether the supervisors’ actions or inactions were affirmatively linked to the harm suffered by Plaintiff. *Id.*

Like the plaintiffs in *Guadalupe-Baez* and *Rolón-Merced*, Plaintiff has sufficiently plead facts to establish an affirmative link between the constitutional violation committed by the

subordinate officers that allegedly used excessive force on Plaintiff and the Supervisory Defendants at this stage. The DOJ Report and subsequent Agreement, cited by Plaintiff in the Amended Complaint, were sufficient to put the Supervisory Defendants on notice of the widespread constitutional violations being committed by PRPD officers and the risk of harm to Plaintiff, just as the Report in *Guadalupe-Baez* was sufficient to put the PRPD superintendent on notice of the widespread issue of police brutality and of his potential liability as supervisor. In the Amended Complaint, Plaintiff alleges that the Supervisory Defendants are “required to closely monitor the actions of police officers under their command; including events involving use of force, arrests, detentions, searches and seizures.” Docket No. 5 at pgs. 19-20. Plaintiff alleges that the Supervisory Defendants, especially in light of the DOJ Report and the Agreement, instituted policies that resulted in inadequate selection and training of PRPD officers, as well as failed to properly punish incidents of unwarranted violence by those officers, all of which directly resulted in the deprivation of Plaintiff’s constitutional rights. *Id.* at pgs. 21-22. Specifically, Plaintiff alleges that co-Defendant Pesquera gave unlawful orders to his subordinates, including co-Defendants Escalera, Hernández, Colón and Cáceres, who also supervise subordinate officers, to organize an “ambush” on Plaintiff in violation of his constitutional rights. *Id.* at pgs. 18-19. Therefore, at this preliminary stage, Plaintiff has plead

sufficient facts to state a claim of supervisory liability against the Supervisory Defendants in their personal capacity.

The Supervisory Defendants argue that they are protected from Plaintiff's claims against them in their personal capacities by the doctrine of qualified immunity. Officials are entitled to qualified immunity unless (1) "the facts that a plaintiff has alleged or shown make out a violation of a constitutional right" and (2) "the right at issue was 'clearly established' at the time of [their] alleged conduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Thus, the qualified immunity inquiry is highly fact-dependent. Accordingly, we find that further development of the facts is necessary in order to evaluate the merits of the qualified immunity defense here, and therefore that defense does not bar Plaintiff's claims against the Supervisory Defendants at this preliminary stage. *See Giragosian v. Bettencourt*, 614 F.3d 25, 29 (1st Cir. 2010) ("It is not always possible to determine before any discovery has occurred whether a defendant is entitled to qualified immunity, and courts often evaluate qualified immunity defenses at the summary judgment stage."); *El Día v. Governor Rosselló*, 165 F.3d 106, 110-11 (1st Cir. 1999) (explaining that the qualified immunity defense may be raised at subsequent stages in the same case, even where it has been previously rejected).

After analyzing the Amended Complaint in the light most favorable to the nonmoving party, the Court finds that Plaintiff has plead sufficient facts to "raise the right to relief"

under his § 1983 supervisory liability claim “above the speculative level.” *Twombly*, 550 U.S. at 544. Thus, Plaintiff’s § 1983 monetary claims survive as to the Supervisory Defendants in their personal capacity.

C. Injunctive and Declaratory Relief

In addition to monetary damages, Plaintiff also seeks a declaratory judgment declaring that Defendants’ actions violate both the U.S. Constitution and the Puerto Rico Constitution and Puerto Rico tort law, as well as “run afoul” of the Agreement. Docket No. 5 at pg. 29. He also seeks preliminary and permanent injunctive relief prohibiting PRPD officers from continuing their unconstitutional conduct and requiring Defendants “to develop and apply policies and procedures that will ensure protection of Plaintiff’s rights . . . and prevent similar future events as those narrated in this complaint . . .” *Id.* Finally, Plaintiff requests that this Court issue an advisory order that the Commonwealth negotiate an amendment to the Agreement “to incorporate the establishment of a permanent independent civilian oversight mechanism that would allow independent citizens’ participation overseeing police practices.” *Id.* at 30. While the Supervisory Defendants do not explicitly address Plaintiff’s requests for declaratory and injunctive relief, they do move to dismiss the Amended Complaint “in its entirety.” Docket No. 26 at pg. 17.

While the Eleventh Amendment provides immunity to state officers from claims for monetary damages, it does not “prohibit a party from bringing suit against a state officer in federal court for prospective declaratory or injunctive relief under federal law.” *Asociación De Suscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 24 (1st Cir. 2007) (citing *Ex Parte Young*, 203 U.S. at 155). Under the *Ex Parte Young* principle, an exception to Eleventh Amendment immunity exists for suits “against state officials when that suit seeks only prospective injunctive relief . . . to end a continuing violation of federal law.” *Mills v. Maine*, 118 F.3d 37, 54 (1997). However, Plaintiff must still demonstrate standing “for every form of relief sought.” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). “To justify an injunction when the incident now lies in the past, there must be a ‘real and immediate threat’ of future legal violations rather than an abstract or conjectural one.” *Asociación de Periodistas de P.R. v. Mueller*, 680 F.3d 70, 84 (1st Cir. 2012) (denying injunction requiring the FBI to implement policies and procedures to protect the media from “unwarranted attacks” because there was no indication that “repetition was likely”). A past harm does not alone entitle plaintiff to equitable relief unless there is a sufficient likelihood that they will be harmed again. *Id.* at 85. Furthermore, “the Supreme Court has been reluctant to afford private citizens standing to enjoin hypothetical future government conduct.” *Eves v. LePage*, 842 F.3d 133, 145 (1st Cir. 2016) (dismissing plaintiff’s

claims for injunctive relief because plaintiff's subjective fear of future harm was "too speculative" to survive the motion to dismiss); *see also L.A. v. Lyons*, 461 U.S. 95 (1983) (finding that plaintiff had no standing to seek injunctive relief to enjoin the police department from using chokeholds because he failed to prove "why he might be realistically threatened" by the use of chokeholds in the future).

Applying the above principles, the Court finds that Plaintiff does not have standing to seek an injunction to require Defendants to adopt a civilian oversight mechanism or develop specific policies and procedures. Plaintiff propounds no facts showing a "real or immediate threat" of suffering a similar injury in the future or any other basis for standing to pursue injunctive relief. Moreover, his request for declaratory relief essentially amounts to the Court announcing a decision on the merits of this action, which is not the purpose of a declaratory judgment; such judgments are meant to clarify parties' legal rights and obligations *before* acting upon them, not to proclaim the winner of a lawsuit based on prior actions. *See Ernst & Young v. Depositors Econ. Protection Corp.*, 45 F.3d 530, 534 (1st Cir. 1995). Thus, as there is no indication that Plaintiff's injury is likely to repeat and because the declaratory judgment he seeks is not appropriate, Plaintiff's request for injunctive and declaratory relief is dismissed with prejudice.

D. Pendent State-Law Claims

Having addressed all of Plaintiff's federal-law claims, all that remains are his claims under the Puerto Rico Constitution and Puerto Rico tort law. The Court has supplemental jurisdiction to hear state-law claims when, and if, the federal court has original jurisdiction in the action and the claims "form part of the same case or controversy." 28 U.S.C. § 1367(a). Because the Court does not dismiss all of Plaintiff's federal claims, Plaintiff's state-law claims survive Defendants' Motions to Dismiss.

I. Conclusion

Having carefully examined the arguments raised by the parties, co-Defendant the Commonwealth of Puerto Rico's Motion to Dismiss is GRANTED and the Supervisory Defendants' Motion to Dismiss is GRANTED IN PART and DENIED in PART. Specifically:

1. All of Plaintiff's claims against the Commonwealth of Puerto Rico are DISMISSED WITH PREJUDICE.
2. Plaintiff's Fourteenth Amendment claims are hereby DISMISSED WITH PREJUDICE.
3. Plaintiff's § 1983 claims against the Supervisory Defendants in their official capacity are hereby DISMISSED WITH PREJUDICE.
4. Plaintiff's § 1983 claims against the Supervisory Defendants in their personal capacity remain.
5. Plaintiff's claims seeking injunctive and declaratory relief are hereby DISMISSED WITH PREJUDICE.

6. Plaintiff's claims under Puerto Rico state law remain.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 25th day of September, 2020.

S/ SILVIA CARREÑO-COLL

UNITED STATES DISTRICT COURT JUDGE