No. 16-3231

In the United States Court of Appeals for the Tenth Circuit

MARY ANNE SAUSE,

Plaintiff – Appellant,

v.

TIMOTHY J. BAUER, ET AL.,

Defendants – Appellees.

Appeal from the United States District Court for the District of Kansas, Kansas City Division, Case No. 2:15-cv-09633 (Judge Julie A. Robinson)

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Statutes & Rules

Constitutional Provisions

Other Authorities

STATEMENT OF RELATED CASES

There are no prior or related appeals. *See* Tenth Cir. R. 28.2(C)(1).

INTRODUCTION

The right to worship in the privacy of one's own home, free from governmental interference, is a fundamental right—secured to every American by the First and Fourteenth Amendments. As the Supreme Court has recognized repeatedly, this foundational principle is enshrined directly in the text of the First Amendment's Free Exercise Clause.

Mary Anne Sause, proceeding pro se, alleged that two Louisburg police officers commanded her to stop praying—while in the privacy of her own home. She also alleged that the officers forced her to stop praying not in furtherance of a legitimate law enforcement objective, but instead so they could continue to berate and harass her.

The district court dismissed her complaint. Despite her allegations, the court concluded that the officers were entitled to qualified immunity because the officers' command to stop praying "d[id] not constitute a burden on her ability to exercise her religion." App. 71.

Even worse, the district court's dismissal was with prejudice and without leave to amend. By ruling that Ms. Sause was not entitled to even a single opportunity to remedy the purported deficiencies in her initial pro se complaint, the district court effectively denied her a

meaningful day in court. *See Gee v. Pacheco*, 627 F.3d 1178, 1195 (10th Cir. 2010) (dismissal with prejudice "proper only where it is obvious that the plaintiff cannot prevail on the facts [s]he has alleged and it would be futile to give h[er] an opportunity to amend").

The district court ruled Ms. Sause was not entitled to leave to amend because it believed her "allegations [were] far from stating a plausible claim." App. 74–75. It appears the court reached its conclusion based not on the facts Ms. Sause alleged in her complaint, but instead on facts asserted by the officers in their answer. *Compare* App. 71 (Opinion) ("[The officers] merely instructed her to stop praying while [they] were in the middle of talking to her about a noise complaint they had received."), *and* App. 22 (Answer) ("[The officers] asked her to quit praying so that [they] could get information from her to issue her a Notice to Appear so that they could clear the scene."), *with* App. 13–14 (Complaint) ("stop praying" command issued not for legitimate, law enforcement purpose, but so officers could continue harassing her).

This was error both because a court must "accept the allegations of the complaint as true and construe those allegations, and any reasonable inferences that might be drawn from them, in the light most favorable to

the plaintiff," *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007), and because a court's review is limited to the facts pleaded in the complaint—it is error to consider (or treat as true) assertions made in the answer. *See Casanova v. Ulibarri*, 595 F.3d 1120, 1124–26 (10th Cir. 2010).

* * *

The district court's conclusion that being forced to stop praying in one's own home—at the command of a police officer—"does not constitute a burden on [Ms. Sause's] ability to exercise her religion" is particularly worrisome. App. 71. To echo Justice Alito's recent sentiments: "If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern." *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2433 (2016) (Alito, J., joined by Roberts, C.J., and Thomas, J., dissenting from denial of certiorari).

All Ms. Sause seeks is a meaningful day in court as she attempts to vindicate her religious liberty rights. Regardless of whether she ultimately will prevail on the merits of her claims, she plausibly alleged that the officers unlawfully interfered with her constitutionally protected religious liberty—the right to pray in her own home. *See Abell v. Sothen*, 214 F. App'x 743, 750 (10th Cir. 2007) ("The issue is not whether a

plaintiff will ultimately prevail but whether [she] is entitled to offer evidence to support the claims.") (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). That is sufficient to satisfy Rule 8(a)(2)'s requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief."

Accordingly, this Court should reverse and remand: Ms. Sause plausibly alleged that the officers violated her clearly established First Amendment right to pray in her own home and to be free from official retaliation for exercising that right. The district court erred by ruling otherwise. At the very least, this Court should remand for entry of dismissal with leave to amend her complaint to remedy any perceived deficiency.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction in this 42 U.S.C. § 1983 case under 28 U.S.C. § 1331. The court entered final judgment on June 28, 2016, dismissing Ms. Sause's complaint with prejudice. Ms. Sause timely filed a notice of appeal on July 15, 2016. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Does the First Amendment protect the right to pray in one's home free from governmental interference? (App. 70–71.)

2. Did Ms. Sause plausibly allege that Officers Stevans and Lindsey violated her clearly established First Amendment rights by commanding her—under threat of arrest, and without any law-enforcement-related justification—to stop praying in her own home? (App. 70–71.)

3. Did the district court abuse its discretion by dismissing Ms. Sause's pro se complaint with prejudice in light of this Court's admonition that dismissal should be granted with leave to amend if it is at all possible that a plaintiff could state a claim for relief? (App. 74–75.)

STATEMENT OF THE CASE

I. Factual Background

On November 22, 2013, two Louisburg, Kansas police officers—Officer Jason Lindsey and Officer Lee Stevans[1]—arrived at Ms. Sause's home, purportedly in response to a noise complaint. App. 12, 17. Ms. Sause did not initially answer her door. App. 12. She later explained to the officers that she did not answer because the officers failed to identify themselves and she could not see them through her inoperable peephole. App. 14. She explained that, for her safety, she does not answer her door when she cannot tell who is there. App. 14

The officers eventually returned to Ms. Sause's home and demanded she let them in. App. 12–13. When Ms. Sause came to the door, the officers angrily asked why she refused to let them in earlier. App. 13. In response, she held up her copy of the U.S. Constitution and Bill of Rights. App. 13. Officer Lindsey laughed and replied mockingly "that's nothing, it's just a piece of paper"—it "[d]oesn't work here." App. 13.

[1] Although the officers noted in their answer that it should be spelled Officer "Stevens," App. 21, this brief utilizes the "Stevans" spelling, which was adopted by the district court.

Once inside, Officer Lindsey continued to harass Ms. Sause, telling her the encounter would appear on the television show *COPS*. App. 13. Officer Stevans then left Ms. Sause's home; Officer Lindsey stayed with Ms. Sause and Sharon Johnson, a friend who was visiting. App. 13.

At this point Ms. Sause felt "extremely frightened." App. 13. Officer Lindsey accompanied Ms. Johnson into Ms. Sause's bedroom, to put Ms. Sause's service dog in its kennel. App. 13. Officer Lindsey refused to allow Ms. Sause to enter her bedroom, but she could overhear Officer Lindsey speaking to Ms. Johnson in an angry, threatening manner. App. 13. After twenty or thirty minutes, Officer Lindsey and Ms. Johnson emerged from Ms. Sause's bedroom—Ms. Johnson "appeared very scared." App. 13 (capitalization omitted).[2]

Officer Lindsey then told Ms. Sause "to get ready" because she "was going to jail." App. 13. Ms. Sause asked him why, and he responded "I don't know yet"—notwithstanding that the officers were purportedly responding to a noise complaint. App. 13, 17.

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[2] Ms. Sause's pro se complaint was hand written. To enhance the readability of this brief, some of the complaint's capitalization has been altered—consistent with sentence-style capitalization, *see The Chicago Manual of Style* § 8.156 (16th ed. 2010)—without notation.

Afraid and traumatized by the interaction, Ms. Sause requested Officer Lindsey's permission to pray. App. 13. After receiving permission, Ms. Sause knelt on her prayer rug and prayed. App. 13.

Officer Stevans returned and asked what Ms. Sause was doing. App. 13. Officer Lindsey laughed and replied mockingly: "She's praying." App. 13. Officer Stevans then commanded Ms. Sause to "get up" and "stop praying." App. 13–14. Ms. Sause complied.

Rather than address the purported noise complaint they were responding to, the officers continued to harass Ms. Sause. Officer Lindsey told her that she "need[ed] to move from here." App. 14. Ms. Sause, frightened and intimidated, asked why. App. 14. He responded: "You need to move back from where you came from . . . no one likes you here." App. 14. Ms. Sause informed the officers that she had no money to move—she was on disability and was living in government-subsidized housing. App. 14.

The officers then began flipping through a booklet, searching for a violation with which to charge Ms. Sause. App. 14, 17. Officer Lindsey would point at a charge in the book, and Officer Stevans would shake his head "no." App. 14.

Eventually, the officers decided to issue Ms. Sause tickets for "Interference with Law Enforcement" and "Disorderly Conduct." App. 14. Officer Stevans explained Ms. Sause was being cited for "not answering [her] door when [the officers] came out [the] first time," even though she explained that she did not answer because the officers did not identify themselves and she could not see them through her broken peephole (which she demonstrated). App. 14. She also explained that she does not answer when she cannot tell who is there "for [her] protection," because she previously had been raped. App. 14. The officers then continued their harassment, asking Ms. Sause repeatedly to show them any tattoos or scars she had, including scars from a double mastectomy she underwent as part of her treatment for breast cancer. App. 14. Even though this experience was "very humiliating [and] very embarrassing," Ms. Sause complied. App. 14. Eventually, the officers left Ms. Sause's home.

Ms. Sause reported the incident to the officers' supervisors on several occasions. App. 14–15. But, to her knowledge, there has never been any investigation, and the officers have not received any reprimand or punishment for their misconduct.

To this day, Ms. Sause continues to fear for her safety and her lack of peace of mind at home, on account of the officers' intimidation and threats of charges and jail time. App. 17. She also continues to fear retaliation. App. 17. Since the incident described above, Ms. Sause was "[t]hreatened again by Officer Lindsey [and] lectured [that] 'Freedom of Speech' means nothing." App. 15, 17.

II. Procedural History

Ms. Sause filed her pro se complaint on November 20, 2015, against Officer Stevans, Officer Lindsey, several other Louisburg police officers, and the current and former mayors of Louisburg. App. 7. Her complaint recounted her interactions with Officer Stevans and Officer Lindsey (described above), the other defendants' failure to investigate or otherwise address the constitutional violations perpetrated by those officers, and other incidents not relevant to this appeal. App. 7–19.

Ms. Sause sought damages, as well as injunctive relief. App. 16–17 (asserting wrongs alleged continue to occur, and explaining "[n]o money can replace violating my . . . constitutional rights"—the officers "[i]ntimidat[ed] and threaten[ed] me with charges and jail," which

continues to cause "fear[] to this day for my safety, peace in my home" on account of "retaliation").

On January 18, 2016, the defendants filed an answer and a motion to dismiss Ms. Sause's complaint. App. 21, 25. In support of dismissal, the defendants argued that the First Amendment does not apply to the officers' conduct "because they are not members of Congress or federal officials." App. 32. They also argued that the command to stop praying "does not constitute a burden upon [Ms. Sause's] religious beliefs or practices" because "[i]t is not the conduct contemplated by the free-exercise clause of the First Amendment." App. 32–33. Finally, they asserted that the officers were entitled to qualified immunity. App. 35–36 ("[E]ven if a [constitutional] violation is identified, [Ms. Sause] cannot maintain her heavy burden of demonstrating that the right was 'clearly established' at the time of the conduct.").

On February 2, 2016, Ms. Sause filed her opposition to the motion to dismiss, arguing that she would be able to prove the facts alleged in her complaint after discovery. App. 42–46. She explained that "Officer Stevans did violate [her] religious practices" and that "Officer Lindsey did nothing to prevent nor stop [him]." App. 44 ("Silent prayer is between

one[']s higher power and self. No one can say stop praying. This is a protected right under the US Constitution, upon [my] religious beliefs."); *see also* App. 43 ("[T]his was silent prayer on a prayer rug . . . Officer Stevans did state stop praying."). She also emphasized that the command to stop praying "was coercive or compulsory in nature." App. 44. Finally, she argued that the officers were not entitled to qualified immunity because there was no legitimate law-enforcement justification for their behavior. App. 44–45 ("Qualified immunity does not apply [to] malicious conduct."); *see also* App. 42.

The district court dismissed Ms. Sause's complaint on June 20, 2016. App. 64, 75. Relevant to this appeal,[3] the court ruled that Ms. Sause's complaint "does not state a plausible First Amendment claim against Officer Stevans." App. 71. The court reasoned that although "Officer Stevans's instruction to Plaintiff to stop praying may have

[3] This district court also disposed of several claims it believed were fairly included in Ms. Sause's complaint, but that are not at issue in this appeal. These include Ms. Sause's Fourth Amendment claim against Officer Lindsey, as well her failure-to-investigate and Americans with Disabilities Act claims. App. 70, 72–73. The court dismissed these claims on qualified immunity grounds. App. 70, 72–73. Her claims against the mayors were dismissed because respondeat superior claims are not cognizable under § 1983 and she failed to allege facts supporting municipal liability. App. 73. Finally, her claims against the Louisburg Police Department were dismissed because it is not a legal entity capable of being sued. App. 73.

offended her, it does not constitute a burden on her ability to exercise her religion." App. 71. It also concluded that Ms. Sause failed "to provide any allegations that would suggest Officer Stevans's actions coerced her into conduct contrary to her religious beliefs, or that he otherwise prevented her from practicing her religion." App. 71. "Rather," the court ruled, Officer Stevans "merely instructed her to stop praying while the officers were in the middle of talking to her about a noise complaint they had received." App. 71.[4]

The court accordingly dismissed Ms. Sause's damages claim against Officer Stevans on qualified immunity grounds. App. 71 ("Because Plaintiff has not established that Officer Stevans violated her clearly established rights, the Court finds that he is entitled to qualified immunity and the claim against him is dismissed."). It did not address expressly either Ms. Sause's allegation that Officer Lindsey violated her First Amendment rights or her claim for injunctive relief. *Cf.* App. 64 (recognizing "Plaintiff seeks compensatory and punitive damages and

[4] It appears the district court reached this conclusion based on facts asserted in the officers' answer, rather than by interpreting the facts alleged in Ms. Sause's complaint in the light most favorable to her. *Compare* App. 22 (Answer) ("Officer Stevens . . . asked [Ms. Sause] to quit praying so that he could get information from her to issue her a Notice to Appear so that they could clear the scene.").

injunctive relief under 42 U.S.C. § 1983 for alleged violations of the First and Fourth Amendments to the U.S. Constitution").

The district court concluded by ordering Ms. Sause's complaint dismissed with prejudice, on the ground that "leave to amend would be futile" because "to the extent Plaintiff's factual allegations are discernable, they are far from stating a plausible claim." App. 74–75.[5]

SUMMARY OF THE ARGUMENT

The right to pray in the privacy of one's home free from governmental interference is a clearly established, fundamental right guaranteed by the First and Fourteenth Amendments. So too is the right to be free from official retaliation for exercising one's First Amendment rights.

Ms. Sause plausibly alleged that Officer Stevans and Officer Lindsey violated her clearly established rights by forcing her—without justification—to stop praying in her home. But the district court dismissed her original, pro se complaint with prejudice. Accordingly,

[5] Ms. Sause previously had moved for leave to amend, which the district court denied for failure to comply with the local rules on April 26, 2016. App. 62–63.

this Court should reverse and remand this case to the district court for further proceedings.

The district court's dismissal should be reversed both because the court failed to construe the facts Ms. Sause alleged in her complaint in the light most favorable to her and because it accepted as true facts asserted in the officers' answer. In addition, the court erroneously construed Ms. Sause's complaint to assert First Amendment claims only against Officer Stevans (rather than both officers), and did not expressly resolve her injunctive-relief claim against the officers. (If Ms. Sause plausibly alleged a First Amendment violation, her injunctive-relief claim would remain viable even if the officers were entitled to qualified immunity on her damages claims—qualified immunity is inapplicable to claims for equitable relief. *See Morse v. Frederick*, 551 U.S. 393, 400 n.1 (2007).)

Alternatively, this Court should reverse and remand with instructions to enter dismissal with leave to amend. Granting dismissal with prejudice was an abuse of discretion because Ms. Sause proceeded pro se below and the court never gave her the opportunity to remedy any deficiencies in her complaint.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6). *See McDonald v. Wise*, 769 F.3d 1202, 1210 (10th Cir. 2014). "[D]ismissal under Rule 12(b)(6) 'is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice.'" *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006) (quoting *Duran v. Carris*, 238 F.3d 1268, 1270 (10th Cir. 2001)).

Because Ms. Sause proceeded pro se, this Court "must construe [her] complaint liberally, holding [her] to a less stringent standard than formal pleadings drafted by lawyers." *Butler v. Compton*, 158 F. App'x 108, 110 (10th Cir. 2005). "This rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Id*. (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)); *see Walker v. Schult*, 717 F.3d 119, 124 (2d Cir. 2013) (pro se

complaints "must be construed liberally, 'to raise the strongest arguments [they] suggest'").[6]

"To survive a motion to dismiss based on qualified immunity, the plaintiff must allege sufficient facts that show—when taken as true—the defendant plausibly violated his constitutional rights, which were clearly established at the time of violation." *Schwartz v. Booker*, 702 F.3d 573, 579 (10th Cir. 2012).

A plaintiff plausibly alleges that her constitutional rights were violated when she "pleads facts adequate to draw a reasonable inference that the defendant is liable for the alleged misconduct." *McDonald*, 769 F.3d at 1210. This Court "accept[s] the allegations in the complaint as true and construe[s] those allegations and any reasonable inferences therefrom in the light most favorable to [the plaintiff]." *Tennyson v. Carpenter*, 558 F. App'x 813, 817 (10th Cir. 2014) (quoting *French v.*

[6] "[L]iberal construction of the pleadings is particularly appropriate where, as here, there is a pro se complaint raising civil rights issues." *Jehovah v. Clarke*, 798 F.3d 169, 176 (4th Cir. 2015); *see Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) ("[Courts] have an obligation where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt."); *Jacobs v. Ramirez*, 400 F.3d 105, 106 (2d Cir. 2005) ("[W]hen the plaintiff proceeds *pro se*, as in this case, a court is obliged to construe his pleadings liberally, particularly when they allege civil rights violations.").

Adams Cty. Detention Ctr., 379 F.3d 1158, 1159 (10th Cir. 2004)); *see also Duncan v. Hickenlooper*, 631 F. App'x 644, 648 (10th Cir. 2015) (in qualified immunity context, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized"). At the end of the day, "[t]he issue is not whether a plaintiff will ultimately prevail but whether [she] is entitled to offer evidence to support the claims." *Abell v. Sothen*, 214 F. App'x 743, 750 (10th Cir. 2007) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

A constitutional right is clearly established when "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). "Usually, this requires either 'a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'" *Estate of Reat v. Rodriguez*, 824 F.3d 960, 965 (10th Cir. 2016). "But an earlier decision need not be 'materially factually similar or identical to the present case; instead, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id*. That is, this Court "look[s] to see if 'existing precedent . . .

placed the statutory or constitutional question beyond debate.'" *Id*. (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011)).

A district court's decision to dismiss with prejudice is reviewed for abuse of discretion. *Cohen v. Longshore*, 621 F.3d 1311, 1313 (10th Cir. 2010). Such dismissal "is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend." *Callen v. Wyo. Dep't of Corr.*, 608 F. App'x 562, 565 (10th Cir. 2015) (quoting *Gee v. Pacheco*, 627 F.3d 1178, 1195 (10th Cir. 2010)); *see also Tennyson*, 558 F. App'x at 817 ("Claims should not be dismissed with prejudice unless 'amendment would necessarily be futile.'") (quoting *Milligan v. Archuleta*, 659 F.3d 1294, 1296 (10th Cir. 2011)).

This is especially true when the plaintiff proceeds pro se. *See Panicker v. State Dep't of Agric.*, 498 F. App'x 755, 757 (10th Cir. 2012) ("Courts should give leave to amend freely, especially when the plaintiff is proceeding pro se."); *see also Brown v. N.M. Dist. Court Clerks*, 141 F.3d 1184 (10th Cir. 1998) (unpublished table disposition) ("[B]ecause 'pro se litigants are to be given reasonable opportunity to remedy the defects in their pleadings,' the district court erred in dismissing plaintiff's complaint with prejudice, without first giving him an opportunity to

amend his complaint to cure any deficiencies.") (internal citation omitted) (quoting *Hall*, 935 F.2d at 1110 n.3).

ARGUMENT

I. The First Amendment Protects the Right to Pray in One's Own Home—and That Right is Clearly Established.

It is beyond cavil that the First Amendment's Free Exercise Clause "secure[s] religious liberty in the individual" by "prohibiting any invasions thereof by civil authority." *Sch. Dist. v. Schempp*, 374 U.S. 203, 222–23 (1963).

The right to pray, free from government interference, is one of the most fundamental religious liberties secured by the First Amendment. *See*, *e.g.*, *United States v. Ballard*, 322 U.S. 78, 87 (1944) ("Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased."); *Davis v. Beason*, 133 U.S. 333, 342 (1890) ("The first amendment . . . allow[s] every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose . . . and to exhibit his sentiments in such form of worship as he may think proper.").

And when that right is exercised "in the privacy of a person's own home"—"the last citadel of the tired, the weary, and the sick"—

protections against government intrusion are at their apex. *See Stanley v. Georgia*, 394 U.S. 557, 564–65, 568 (1969) (government's power to regulate First Amendment activity "simply does not extend to . . . [an] individual in the privacy of his own home"); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) ("[P]rivacy of the home is certainly of the highest order in a free and civilized society.").

1. It is axiomatic that the Founding Fathers adopted the First Amendment's Free Exercise Clause "to secure religious liberty." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (quoting *Engel v. Vitale*, 370 U.S. 421, 430 (1962)); *see also Freedom from Religion Found., Inc. v. Thompson*, 920 F. Supp. 969, 972 (W.D. Wis. 1996) ("Religious freedom is basic to this nation."); *Borchert v. City of Ranger*, 42 F. Supp. 577, 581 (N.D. Tex. 1941) ("[F]reedom of religion in America is truly an established fact."). As the Supreme Court has explained, "[n]othing but the most telling of personal experiences in religious persecution suffered by our forebears could have planted our belief in liberty of religious opinion any more deeply in our heritage." *Schempp*, 374 U.S. at 214 (internal citation omitted).

The Free Exercise Clause "secure[s] religious liberty in the individual by . . . withdraw[ing] from [governmental] power, state and federal, the exertion of any restraint on the free exercise of religion." *Id.* at 222–23; *see Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) ("The structure of our government has . . . secured religious liberty from the invasions of the civil authority.") (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 730 (1871)).[7]

2. The right to pray is indispensable to the right to religious liberty. It is beyond debate that the right to pray free from governmental interference is protected by the Free Exercise Clause. *See*, *e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("[The Free Exercise Clause] safeguards the free exercise of the chosen form of religion . . . . [by] embrac[ing] two concepts,—freedom to believe and freedom to act.");

[7] The Supreme Court has "decisively settled" that the First Amendment "has been made wholly applicable to the States by the Fourteenth Amendment." *Schempp*, 374 U.S. at 215–16 (citing cases). And it is well established that its protections are enforceable against state and local government officials—like Officers Stevans and Lindsey—through § 1983. *See Monroe v. Pape*, 365 U.S. 167, 172–72 (1961) ("There can be no doubt . . . Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."); *see also Shrum v. City of Coweta*, 449 F.3d 1132, 1140–43 (10th Cir. 2006) (Free Exercise Clause "applies to exercises of executive authority no less than it does to the passage of legislation").

Chaplinsky v. New Hampshire, 315 U.S. 568, 570–71 (1942) ("Freedom of worship" is "protected by the First Amendment" and is "among the fundamental personal rights and liberties which are protected . . . from invasion by state action.").

As one court put it: "The right to worship free from governmental interference lies at the heart of the First Amendment." *McCurry v. Tesch*, 738 F.2d 271, 275 (8th Cir. 1984); *see Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses."); *United States v. Brooks*, 24 F. Cas. 1244, 1245 (C.C.D.C. 1834) ("Every man has a perfect right to worship God in the manner most conformable to the dictates of his conscience.").

This, of course, should come as no surprise: "[T]hose who formed this nation or immigrated to it left their homelands to escape religious persecution seeking the right to worship without government interference." *Thompson*, 920 F. Supp. at 972; *see Schempp*, 374 U.S. at 214 ("This freedom to worship was indispensable in a country whose people came from the four quarters of the earth and brought with them a diversity of religious opinion."); *see also Norris v. Newton*, 18 F. Cas.

322, 326 (C.C.D. Ind. 1850) ("No earthly power has a right to interpose between a man's conscience and his Maker. He has . . . an inalienable and absolute right, to worship God according to the dictates of his own conscience. For this he alone must answer, and he is entirely free from all human restraint to think and act for himself.").

As the Supreme Court has made clear, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("To satisfy the commands of the First Amendment, [government action] restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests.").

3. When one exercises the right to pray privately, protections against governmental intrusion are nearly absolute. *See Tompkins v. Cyr*, 995 F. Supp. 664, 681 n.10 (N.D. Tex. 1998) ("[T]he right to engage in quiet and reflective prayer without being subjected to unwarranted intrusion is an essential component of freedom of religion.").

That is, although one's right to pray publicly may be restrained in certain circumstances by the Establishment Clause—namely, when that prayer would constitute governmental endorsement of religion—private prayer is free from such restraints. *See*, *e.g.*, *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1151 & n.* (4th Cir. 1991) (although judge could not offer public prayer from bench, he was "free to recite a personal prayer in . . . privacy . . . before he goes on the bench"). As several courts have recognized:

> All individuals . . . retain the right to pray and worship as they see fit in private and non-official settings. Any court order to the contrary would run counter to the First Amendment's Free Exercise and Free Speech Clauses, and to the freedom of religion and freedom of conscience that have been at the core of American liberty since before the United States of America was founded as a nation.

Hinrichs v. Bosma, 410 F. Supp. 2d 745, 750 (S.D. Ind. 2006); *see also Summers v. Adams*, 669 F. Supp. 2d 637, 649 n.21 (D.S.C. 2009) ("[T]he Free Exercise Clause . . . *protects individuals* from governmental interference (and, thus, prohibits interference with private acts of worship)."); *Schultz v. Medina Valley Indep. Sch. Dist.*, 2012 WL 517518, at *1 (W.D. Tex. Feb. 9, 2012) ("Any American can pray, silently or

verbally, seven days a week, twenty[-]four hours a day, in private as Jesus taught.").

4. The right to pray privately is at its zenith when that right is exercised in the sanctity of one's own home. *See Pahls v. Thomas*, 718 F.3d 1210, 1234 (10th Cir. 2013) ("First Amendment protections . . . are especially strong where an individual engages in [First Amendment] activity from his or her own private property.") (ellipsis in original) (quoting *Jones v. Parmley*, 465 F.3d 46, 56 (2d Cir. 2006) (Sotomayor, J.)).

The Supreme Court has described "the unique nature of the home" in its constitutional jurisprudence—it is "the last citadel of the tired, the weary, and the sick." *Frisby*, 487 U.S. at 484; *see Stanley*, 394 U.S. at 564 ("[F]undamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy"—particularly in "a person's own home"). And this Court has recognized that "[a] special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there." *Pahls*, 718 F.3d at 1234 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994)); *see also St. David's Episcopal Church v. Westboro*

Baptist Church, Inc., 921 P.2d 821, 830 (Kan. Ct. App. 1996) ("[O]ne's place of worship 'would place a close second to one's residence when it comes to the right to worship and communicate with the maker of one's choice in a tranquil, private and serene environment.'")

Consistent with these principles, courts consistently have recognized that the First Amendment prohibits state actors from "hinder[ing] or prevent[ing] worship in homes." *LeBlanc–Sternberg v. Fletcher*, 143 F.3d 748, 759 (2d Cir. 1998); *see also*, *e.g.*, *Constangy*, 947 F.2d at 1151 & n.* (all Americans are "free to recite a personal prayer in the privacy of [their] home"); *State v. Cameron*, 498 A.2d 1217, 1228 (N.J. 1985) (Clifford, J., concurring) ("Nothing can be more deeply personal than Mr. Cameron's desire to worship in the manner at issue here. He is at home. He is in prayer. . . . He is entitled to be left alone."); *cf. Olmer v. City of Lincoln*, 192 F.3d 1176, 1185–86 (8th Cir. 1999) (Bright, J., dissenting) ("[L]ike the privacy of the home, the right of freedom to worship is one long-recognized by our society. The First Amendment protects this fundamental right from government interference. The Declaration of Independence recognizes it as an unalienable right that permits individuals to pursue happiness. This nation's history alone

shows us that the fundamental right to worship is as important as the right to privacy within the home.").

Perhaps the Supreme Court explained it best in *Schempp*:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. . . . [That] rule itself is clearly and concisely stated in the words of the First Amendment.

374 U.S. at 226.

Accordingly, as numerous courts—across the nation and throughout history—have clearly established, the First Amendment's Free Exercise Clause protects a person's right to pray in the privacy of her own home free from governmental interference.

II. Ms. Sause Plausibly Alleged That the Officers' Conduct Violated Her First Amendment Rights to Pray in Her Own Home and to Be Free from Retaliation for Exercising That Right.

Ms. Sause alleged that she was praying in the privacy of her own home when the officers—who already had told her that the Constitution is "just a piece of paper" that "doesn't work here"—began mocking her prayer. They then commanded her, under threat of arrest, to stop

praying. But this command was not justified by a legitimate law enforcement interest—the officers forced her to stop praying so they could continue to harass her.

These facts are sufficient to plausibly allege that the officers violated two of her First Amendment rights: The right to pray in her home and the right to be free from retaliation for exercising that right.

Yet the district court dismissed her complaint. In doing so, the court failed to construe the facts Ms. Sause alleged in the light most favorable to her—instead, it relied on facts asserted in the defendants' pleadings. *See Tennyson*, 558 F. App'x at 817 (district court must "accept the allegations in the complaint as true and construe those allegations and any reasonable inferences therefrom in the light most favorable to [the plaintiff]") (quoting *French*, 379 F.3d at 1159). This Court should reverse the district court's judgment and remand for further proceedings.

A. The Officers' Command to Stop Praying Violated Ms. Sause's First Amendment Rights.

A review of Ms. Sause's complaint—which must be "liberally construe[d]," *Casanova v. Ulibarri*, 595 F.3d 1120, 1125 (10th Cir. 2010)—demonstrates that she alleged the following facts: Officers Lindsey and Stevans demanded entry to her home and told her that her

"Constitution booklet and Bill of Rights" were "just a piece of paper" that "doesn't work here." App. 13. Officer Lindsey then "mock[ed]" her, and "threatened" that their interaction was going to be on *COPS*. App. 13. Officer Stevans then left Ms. Sause's home. App. 13.

In Officer Stevans's absence, Officer Lindsey denied Ms. Sause access to her bedroom, berated Ms. Sause's friend—frightening them both—and told Ms. Sause she "was going to jail," even though he "d[id]n't know yet" why (despite the fact that the officers were allegedly responding to a noise complaint). App. 13, 17. "[E]xtremely frightened" for her friend and for her own safety, Ms. Sause sought and obtained Officer Lindsey's permission to pray. App. 13. She then knelt on her prayer rug and prayed silently. App. 13.

When Officer Stevans returned, he demanded to know what Ms. Sause was doing. App. 13. Officer Lindsey laughed and, "in a mocking tone," informed him that Ms. Sause was praying. App. 13. Officer Stevans then commanded her to "get up" and "stop praying." App. 13–14.

Having successfully forced Ms. Sause to stop praying, the officers proceeded not to engage in a legitimate law enforcement activity—but instead continued to harass Ms. Sause. App. 14. Officer Lindsey told her

she "need[ed] to move from here . . . back from where [she] came from." App. 14. After Ms. Sause, understandably upset, inquired as to why, Officer Lindsey stated "because no one likes you here." App. 14.

After this inappropriate, offensive, and entirely unnecessary exchange, the officers began to flip through their booklet to identify an offense with which to charge Ms. Sause—a process that did not require Ms. Sause's involvement and easily could have been undertaken while she continued in silent prayer. App. 14. After an extended back-and-forth between themselves, *see* App. 14 ("Lindsey would point in book; Stevans would shake [his] head no."), the officers eventually settled on two charges. Only then did the officers finally issue two tickets to Ms. Sause, neither of which was related to the alleged noise complaint to which they were responding.

These facts are sufficient to plausibly allege that the officers violated her First Amendment rights both to pray in her own home free from governmental interference and to be free from official retaliation for exercising that right.

1. Forcing Ms. Sause to Stop Praying, in the Absence of a Legitimate Law Enforcement Purpose, Violated Her First Amendment Rights.

The facts alleged by Ms. Sause establish a clear violation of her First Amendment right to pray in her home, free from unjustified governmental interference.

The First Amendment prohibits law enforcement officers from interfering with an individual's religious liberty—including the right to pray at home—at least where that interference is not justified by a legitimate law enforcement objective. *See McTernan v. City of York*, 564 F.3d 636, 647–51 (3d Cir. 2009); *see also Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a . . . religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."); *cf. Young v. Coughlin*, 866 F.2d 567, 570 (2d Cir. 1989) (even a "prisoner's first amendment right to the free exercise of his religious beliefs may only be infringed to the extent that such infringement is 'reasonably related to legitimate penological interests'").

1. This Court has ruled that a "plaintiff states a claim [that her] exercise of religion is burdened if the challenged action is coercive or

compulsory in nature." *Fields v. City of Tulsa*, 753 F.3d 1000, 1009 (10th Cir. 2014); *see* App. 71 & n.29 (citing *Fields*); *see also Yellowbear v. Lampert*, 741 F.3d 48, 55–56 (10th Cir. 2014) ("This court has explained that a burden on a religious exercise rises to the level of being 'substantial' when (at the very least) the government . . . prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief.").

Here, Ms. Sause alleged that Officer Stevans burdened her exercise of religion by commanding her "to stop praying" and to "get up" from her prayer rug. App. 13–14. Yet the district court concluded that the command "to stop praying . . . does not constitute a burden on [Ms. Sause's] ability to exercise her religion," because she failed to allege that "Officer Stevans's actions coerced her . . . [or] otherwise prevented her from practicing her religion." App. 71. This conclusion is inconsistent with both Ms. Sause's complaint and the rulings of numerous courts.

Ms. Sause understood the command to "stop praying" to be "coercive or compulsory." App. 43–44. She reasonably interpreted it—as any similarly situated person would have—as carrying the threat of arrest should she fail to comply. App. 13–14; *see*, *e.g.*, *United States v. Allen*,

813 F.3d 76, 88 (2d Cir. 2016) ("The command of an officer, legally entitled to make an arrest . . . is, and should be, a sufficient exercise of authority to require the suspect to comply with that command."); *United States v. Flowers*, 336 F.3d 1222, 1226 n.2 (10th Cir. 2003) ("[A] reasonable person confronted by . . . a command by one of the officers . . . would have believed that he had to . . . submit to the show of authority."). Her understanding of the command is further bolstered by the fact that the officers had already *explicitly* threatened to arrest her for reasons they "d[id]n't know yet." App. 13; *see Hartley v. Wilfert*, 918 F. Supp. 2d 45, 53 (D.D.C. 2013) ("[Officer] Wilfert's words . . . sought to intimidate her and to deter her from speaking—*the same effect as a threat of arrest*.") (emphasis added).

And it is well established that an officer's threat of arrest burdens one's exercise of religion—precisely because it is "coercive or compulsory." *See Fields*, 753 F.3d at 1009; *see also McTernan*, 564 F.3d at 647–51 (ruling threat of arrest unconstitutionally burdened Free Exercise rights); *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1056 (7th Cir. 2004) ("The Supreme Court has often noted that a realistic threat of arrest is enough to chill First Amendment rights.") (citing cases); *Barich*

v. City of Cotati, 2015 WL 6157488, at *1 (N.D. Cal. Oct. 20, 2015) ("No reasonable trier of fact could doubt that a person of ordinary firmness would be deterred by the threat of arrest.") (citing *Hodgkins*, 355 F.3d at 1056).

But perhaps the easiest way to see that the officers' command burdened Ms. Sause's right to pray is to look at its effect: Ms. Sause complied and stopped praying. That is, the officers' command to stop praying burdened her religious liberty because it "prevent[ed] [Ms. Sause] from participating in an activity motivated by a sincerely held religious belief." *Yellowbear*, 741 F.3d at 55–56.

2. When law enforcement officers interfere with a person's religious liberty, their actions must be justified by a legitimate law enforcement interest. *See McTernan*, 564 F.3d at 647–51; *Hernandez*, 490 U.S. at 699; *see also Yoder*, 406 U.S. at 215; *Hialeah*, 508 U.S. at 546.

Here, Ms. Sause alleged that the officers lacked a legitimate law enforcement justification when they forced her to stop praying. After mocking her for praying and forcing her to stop, the officers proceeded not to question her about or otherwise investigate the alleged noise complaint—instead choosing to continue their harassment. App. 13–14.

The district court's supposition to the contrary—that the officers "merely instructed her to stop praying while [they] were in the middle of talking to her about a noise complaint," App. 71—has no basis in the complaint. Rather, it appears that the district court relied on the officers' answer, in which they asserted that Officer Stevans "asked her to quit praying so that he could get information from her to issue her a Notice to Appear so that they could clear the scene." App. 22.[8]

Viewing the complaint in the light most favorable to Ms. Sause, she alleged that the officers forced her to stop praying so they could harass her, tell her to "move back [to] where she came from," and flip through their book of charges, which did not require her attention or participation. App. 14. That is, the officers' decision to force Ms. Sause

[8] The conflict between the two versions of an event may properly be resolved in discovery or at trial. "At this stage of the proceedings," however, not only is "[a court's] review is limited to the Complaint," but Ms. Sause is entitled to have all reasonable inferences from the facts she alleged construed in her favor. *Mayfield v. Bethards*, 826 F.3d 1252, 1256 (10th Cir. 2016); *see also Casanova*, 595 F.3d at 1125–26 (reversing dismissal because "the court did not restrict itself to looking at the complaint"—"it not only considered [the defendant's] answer but even treated as true the answer's assertion[s]").

to stop praying was not justified by a compelling law enforcement interest. *See McTernan*, 564 F.3d at 647–51.[9]

Courts faced with allegations of similarly blatant, irreverent disregard for a citizen's constitutional liberties have easily concluded that the plaintiff stated a plausible First Amendment claim. *See*, *e.g.*, *McCurry v. Tesch*, 824 F.2d 638, 642 (8th Cir. 1987) ("The District Court noted that, absent a court order, no reasonable law-enforcement officer would think that he could carry praying people out of a church without violating their First Amendment rights."[10]); *Johnson v. Brown*, 581 F. App'x 777, 779, 781 (11th Cir. 2014) ("[Plaintiff's] Free Exercise claim is plausible" where he alleged "prison officials interrupted [his] prayers and ordered him to stop praying and leave"); *McTernan*, 564 F.3d at 647–51;

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[9] Put another way, the command to stop praying was neither neutral nor generally applicable. *See*, *e.g.*, *McTernan*, 564 F.3d at 647–51 (threating to arrest plaintiff who was engaging in religiously motivated conduct subject to strict scrutiny); *Snell v. City of York*, 564 F.3d 659, 666 & n.8 (3d Cir. 2009); *see also Fifth Ave. Presbyterian Church v. City of N.Y.*, 293 F.3d 570, 574–76 (2d Cir. 2002) (strict scrutiny applied where officers forcibly dispersed homeless from sleeping on Church property). In addition, under "the 'hybrid rights' exception: when a free exercise claim is coupled with some other constitutional claim (such [as] a free speech claim), heightened scrutiny may be appropriate." *Axson–Flynn v. Johnson*, 356 F.3d 1277, 1294–95 (10th Cir. 2004).

[10] The first time the Eighth Circuit addressed this case, it ruled that any such court order "would be patently unconstitutional." *See McCurry*, 738 F.2d at 274–75; *see also McCurry*, 824 F.2d at 642 ("On the prior appeal, . . . [we] held that the order did not authorize what the officers did.").

Arroyo Lopez v. Nuttall, 25 F. Supp. 2d 407, 409 (S.D.N.Y. 1998) ("[Prison official] violated [prisoner's] First Amendment rights by shoving him and disrupting his prayer . . . without justification or provocation."); *Walker v. Fasulo*, 2015 WL 1959190, at *2, *4 (D. Nev. Apr. 29, 2015) (plaintiff stated colorable Free Exercise claim where "[b]ased on the allegations, jail officials prevented Plaintiff from praying").

2. Retaliating against Ms. Sause—by Threatening to Arrest Her—for Praying Also Violated Her First Amendment Rights.

Ms. Sause also plausibly alleged that the officers violated the Constitution by retaliating against her for exercising her First Amendment rights. Yet the district court failed to address this allegation in concluding that she "has not made a plausible claim that her First Amendment rights were violated." App. 71.[11]

The First Amendment prohibits law enforcement officers from retaliating against a person for engaging in First Amendment–protected activity. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("Official

[11] At the very least, this counsels for remand. *See Tennyson*, 558 F. App'x at 823 ("Where an issue has been raised, but not ruled on, proper judicial administration generally favors remand for the district court to examine the issue initially.") (quoting *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1238 (10th Cir. 2005)).

reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,' and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions.") (alteration in original) (internal citation omitted).

As "[t]his Court has repeatedly stated, '[a]ny form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom.'" *Collopy v. City of Hobbs*, 27 F. App'x 980, 985 (10th Cir. 2001) (quoting *Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001)).

1. To state a claim for First Amendment retaliation, a plaintiff must allege:

> (1) that [she was] engaged in constitutionally protected activity; (2) that [the officer's] actions caused [her] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that [the officer's] adverse action was substantially motivated as a response to [her] exercise of constitutionally protected conduct.

Perez v. Ellington, 421 F.3d 1128, 1131–32 (10th Cir. 2005).

2. Ms. Sause plausibly alleged that the officers violated her First Amendment right to be free from retaliation: First, Ms. Sause alleged that she was engaged in constitutionally protected activity—she was silently praying in her home. *Id*.

Second, the officers' "adverse action"—commanding her to stop praying or face arrest—"was substantially motivated as a response to [her] exercise of constitutionally protected conduct," private prayer in her home. *Id.* Indeed, the command came immediately after Officer Lindsey mocked her for praying and expressly informed Officer Stevans that she was engaged in prayer. And Ms. Sause alleged that the officers issued the command without a legitimate law enforcement justification. *See Collopy*, 27 F. App'x at 986 (establishing "retaliatory intent . . . typically rais[es] an issue of fact, not law").

Third, the officers' command would chill a person of ordinary firmness from continuing to pray. *Perez*, 421 F.3d at 1131–32. As explained above, a reasonable person would interpret that command as having been made under threat of arrest. *See Allen*, 813 F.3d at 88; *Flowers*, 336 F.3d at 1226 n.2; *see also Hartley*, 918 F. Supp. 2d at 53; *Lewis v. McCracken*, 782 F. Supp. 2d 702, 709–10 & n.5 (S.D. Ind. 2011)

(plaintiff ordered "to leave the Sidewalk" was "threatened with arrest"); *Bounds v. Hanneman*, 2014 WL 1303715, at *8–9 & n.5 (D. Minn. Mar. 31, 2014) ("[A] request coupled with an (even subtle) threat of arrest is an unconstitutional retaliation.") (citing *Hodgkins*, 355 F.3d at 1056).

And, as explained above, it is well established that a threat of arrest would chill a person of ordinary firmness from continuing to engage in First Amendment protected activity. *See Hodgkins*, 355 F.3d at 1056 (citing cases); *McGlone v. Bell*, 681 F.3d 718, 731 (6th Cir. 2012) ("His First Amendment rights have also been objectively chilled by the threat of arrest."); *Hartley*, 918 F. Supp. 2d at 53 ("[T]here is substantial caselaw in which the *threat* of an arrest—even in the absence of an actual arrest—is sufficient to chill speech, in violation of the First Amendment.") (citing cases).[12] That is, Ms. Sause plausibly alleged that the officers infringed

[12] Even were the officers' command not a threat of arrest, Ms. Sause plausibly alleged that the officers' harassment would chill an ordinary person. As this Court has recognized, "[t]he effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable." *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1119 (10th Cir. 2004) (citing *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)). In addition, "the plaintiff's actual response to the retaliatory conduct," although not dispositive, "provides some evidence of the tendency of that conduct to chill First Amendment activity." *Bennett v. Hendrix*, 423 F.3d 1247, 1255 (11th Cir. 2005) (quoting *Constantine v. Rectors & Visitors of Geo. Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005)). Here, the officers' conduct chilled Ms. Sause's First Amendment activity—in response to their command, she stopped praying.

her First Amendment rights by retaliating against her for exercising her religious liberty. *See Collopy*, 27 F. App'x at 985.

B. The District Court Improperly Limited Ms. Sause's First Amendment Claim to Officer Stevans.

Ms. Sause plausibly alleged that both officers violated her First Amendment rights. App. 13–14 (alleging Officer Lindsey both actively participated in—and failed to stop Officer Stevans from—violating her rights); *see also* App. 44 ("Officer Stevans did violate my religious practices and Officer Lindsey did nothing to prevent nor stop [him]."). Yet the district court construed her First Amendment claim as applying only against Officer Stevans. *See* App. 71 ("Plaintiff's Complaint does not state a plausible First Amendment claim against Officer Stevans."); *see also* App. 71–73 (addressing other claims alleged against Officer Lindsey).

That was error. This error too seems to have stemmed from the district court's reliance on the officers' pleadings. *Compare* App. 32 (Answer) (asserting Ms. Sause raised claims "against Officer Stevens for his alleged violation of the free exercise clause of the First Amendment arising out of his statement to her to 'stop praying.' She makes no allegations in her complaint against any of the other defendants in this regard.").

Even though it was Officer Stevans who said the words "get up" and "stop praying," Ms. Sause alleged a plausible First Amendment claim against Officer Lindsey, based on at least two clearly established theories of liability.

1. Officer Lindsey actively participated in both interfering with and retaliating against Ms. Sause's exercise of her First Amendment rights—even though Officer Stevans issued the order to stop praying. As explained in *Estate of Booker v. Gomez*, where multiple officers "actively participate[]" in a "coordinated" manner, each officer involved can be held liable jointly for a constitutional violation. 745 F.3d 405, 422 (10th Cir. 2014). That is certainly the case here.

As alleged in Ms. Sause's complaint, Officer Lindsey (in Officer Stevans's presence) told Ms. Sause that the Constitution "doesn't work here," threatened that the encounter would appear on *COPS*, and mockingly informed Officer Stevans that Ms. Sause was praying. App. 14. The two officers, together, created the threatening atmosphere. Officer Lindsey should not escape liability because he left the words "stop praying" to his partner. Because Ms. Sause alleged that Officer Lindsey "made an important affirmative contribution" to the constitutional

violation, she has stated a claim against him. *Specht v. Jensen*, 832 F.2d 1516, 1524 (10th Cir. 1987).

2. Even if Officer Lindsey did not actively participate in violating Ms. Sause's First Amendment rights, he may be held liable for failing to prevent Officer Stevans from doing so.

As this Court has explained: "It is widely recognized that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence." *Reid v. Wren*, 57 F.3d 1081 (10th Cir. 1995) (unpublished table disposition) (quoting *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994)); *see also Hall v. Burke*, 12 F. App'x 856, 861–62 (10th Cir. 2001) (quoting *Anderson* and "agree[ing]" principle "is clearly established"). Thus, "an officer who is present but fails to intervene to prevent another law enforcement official from infringing a person's constitutional rights is liable if the 'officer had reason to know . . . that any constitutional violation has been committed by a law enforcement official[] and the officer had a realistic opportunity to intervene to prevent the harm from occurring.'" *Reid*, 57 F.3d at 1081 (alterations in original) (quoting *Yang v. Hardin*, 37 F.3d 282, 285 (7th

Cir. 1994)). Put another way, "a bystanding officer, by choosing not to intervene, *functionally participates in the unconstitutional act of his fellow officer*." *Randall v. Prince George's Cty.*, 302 F.3d 188, 204 n.24 (4th Cir. 2002) (emphasis added).[13]

Officer Lindsey was present for Officer Stevans's unconstitutional command that Ms. Sause stop praying and easily could have intervened. Instead, he "functionally participated" in the order and immediately resumed his harassing behavior. Accordingly, under a bystander theory of liability, Officer Lindsey is also responsible for the violation of Ms. Sause's First Amendment rights. "Any rule to the contrary would permit officers to ignore their duty to enforce the law." *Id.* at 204.

* * *

At base, Ms. Sause's allegations are simple. She was silently praying in her home when Officer Stevans—upon seeing Ms. Sause kneeling on her prayer rug and learning from Officer Lindsey that she

[13] The "bystander liability" theory arises most frequently in excessive force cases. But multiple courts, citing *Anderson* and other cases, have explained that "other constitutional violations also may support a theory of bystander liability." *Whitley v. Hanna*, 726 F.3d 631, 647 n.11 (5th Cir. 2013); *see also Randall*, 302 F.3d at 204 n.23 ("Although bystander liability decisions have usually involved excessive force claims, use of the bystander liability theory has not been so limited.").

was praying—commanded her to stop. Fearing arrest if she failed to comply, Ms. Sause stopped praying—even though the officers' command was unsupported by any legitimate law enforcement interest. The officers' unjustified actions violated her clearly established right to pray in her own home and to be free from official retaliation for exercising that right.

III. The Officers Are Not Entitled to Qualified Immunity against Ms. Sause's Damages Claim or Her Request for Injunctive Relief.

As explained above, Ms. Sause plausibly alleged that both officers violated her clearly established First Amendment rights to pray in the privacy of her own home and to be free from official retaliation for exercising that right.[14] Thus, neither is entitled to qualified immunity from her claims that seek money damages.

Nor are the officers entitled to qualified immunity from her claims for injunctive relief: "Qualified immunity shields public officials from money damages only"—not from equitable remedies. *See Morse*, 551 U.S. at 400 n.1.

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[14] In ruling for the officers, the district court did not conclude that Ms. Sause's First Amendment rights were not clearly established. Instead, as explained above, it ruled for them on the ground that Ms. Sause failed to allege "a plausible claim that her First Amendment rights were violated." App. 71.

1. As explained above, Ms. Sause plausibly alleged that both Officer Stevans and Officer Lindsey violated her clearly established First Amendment right to pray privately in her home, free from unjustified governmental interference. *See supra* Parts I–II.A.1; *see also Reat*, 824 F.3d at 965 (right clearly established "if 'existing precedent . . . placed the statutory or constitutional question beyond debate.'") (alteration in original).

2. The right to be free from official retaliation for exercising one's First Amendment rights is also clearly established, as both the Supreme Court and this Court have recognized. *See, e.g.*, *Hartman*, 547 U.S. at 256 ("[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions."); *Collopy*, 27 F. App'x at 985 ("This Court has repeatedly stated, 'Any form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom.'") (quoting *Smith*, 258 F.3d at 1176 and *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000)).

This is especially true where, as here, no legitimate non-retaliatory ground supports the officers' threat to arrest Ms. Sause if she did not stop praying. *See Hartman*, 547 U.S. at 256 ("Some official actions . . . might well be unexceptionable if taken on other grounds, but when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution.").

This Court accordingly should reverse the district court's qualified immunity–based dismissal of Ms. Sause's First Amendment claim for compensatory and punitive damages. *See* App. 71.

3. The district court recognized that Ms. Sause sought "injunctive relief" for the officers' violation of her First Amendment rights.[15] But it did not separately dispose of that claim.

Instead, it dismissed all of her claims against Officers Stevans and Lindsey on qualified immunity grounds—even though "qualified immunity . . . does not protect [government officials] from injunctive

[15] Ms. Sause confirmed in her complaint that "the wrongs alleged . . . are continuing to occur at the present time," that "[n]o money can replace violating [her] . . . constitutional rights," and that she "fear[s] to this day" further "retaliation." App. 16–17. She also specifically alleged that Officer Lindsey had "[t]hreatened [her] again," telling her "'Freedom of Speech' means nothing." App. 17.

remedies." *Jones v. City & Cty. of Denver*, 854 F.2d 1206, 1207 n.2 (10th Cir. 1988); *see Morse*, 551 U.S. at 400 n.1 ("Qualified immunity shields public officials from money damages only. In this case, Frederick asked not just for damages, but also for declaratory and injunctive relief. [A] decision on qualified immunity grounds would dispose of the damages claims, but Frederick's other claims would remain unaddressed.") (internal citation omitted). To the extent the district court implicitly resolved Ms. Sause's claim for injunctive relief, it did so on the ground that Ms. Sause "has not made a plausible claim that her First Amendment rights were violated." App. 71. But, as explained above, this conclusion is incorrect—Ms. Sause's allegations plausibly suggest that both officers violated her First Amendment rights. *See supra* Parts II.A–B.

Accordingly, this Court should reverse the dismissal of Ms. Sause's claim for injunctive relief against the officers in their individual capacities.[16] And such reversal is proper regardless of whether Ms.

[16] Although Ms. Sause understands that Officer Stevans is no longer a member of the Louisburg Police Department, *see* App. 64; *see also* App. 8, she also understands that he is currently a member of the Miami County Sheriff's Department, which has jurisdiction over Louisburg. App. 8. Thus, an injunction enjoining Officer Stevans from continuing to violate Ms. Sause's First Amendment rights under color of law remains appropriate.

Sause's First Amendment rights were clearly established—as explained above, qualified immunity does not shield against claims for equitable relief. *See*, *e.g.*, *Lane v. Franks*, 134 S. Ct. 2369, 2383 (2014) (affirming dismissal of plaintiff's damages claim on qualified immunity grounds, but reversing dismissal of claim for injunctive relief because plaintiff plausibly alleged a violation of his First Amendment rights); *Morse*, 551 U.S. at 400 n.1; *see also Dean v. Byerley*, 354 F.3d 540, 558 n.14 (6th Cir. 2004) ("[E]ven if Byerley were entitled to the defense of qualified immunity, the defense would only shield him from liability for Dean's claim for damages, not from Dean's claim for equitable relief, and thus would not end the action.").

IV. At the Very Least, Ms. Sause—a Pro Se Plaintiff—Should Have the Opportunity to Amend Her Complaint.

Even if this Court concludes that Ms. Sause's complaint did not satisfy Rule 12(b)(6)'s plausibility standard, this Court should reverse and remand with instructions to dismiss Ms. Sause's complaint with leave to amend. This would give Ms. Sause the opportunity to amend her complaint to remedy any deficiencies.

"[A]s a general rule, a pro se party should be given leave to amend" if the district court concludes that her initial complaint fails to state a

claim. *Cain v. Aragon*, 632 F. App'x 517, 518 (10th Cir. 2016). This Court has "previously explained that a court 'should dismiss *with leave to amend* . . . if it is at all possible that the [plaintiff] can correct the defect in the pleading or state a claim for relief." *Staats v. Cobb*, 455 F. App'x 816, 817–18 (10th Cir. 2011) (ellipsis in original) (quoting *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1131 (10th Cir. 1994)).

A district court acts within its discretion when dismissing a claim without granting leave to amend "only where it is obvious that the plaintiff cannot prevail on the facts [she] has alleged and it would be *futile* to give [her] an opportunity to amend." *Gee*, 627 F.3d at 1195 (emphasis added); *see also Hall*, 935 F.2d at 1110 n.3 ("[P]ro se litigants are to be given reasonable opportunity to remedy the defects in their pleadings.").

Even where a plaintiff's allegations "are missing some important element," a pro se plaintiff like Ms. Sause "should be allowed to amend [her] complaint" if amendment could cure the defect. *Gee*, 627 F.3d at 1195; *see also Callen*, 608 F. App'x at 565 (quoting *Gee* and remanding to allow pro se plaintiff to file amended complaint with clearer factual allegations).

The district court abused its discretion by dismissing Ms. Sause's complaint with prejudice. The court concluded that "leave to amend would be futile" because Ms. Sause's claims were difficult to "discern[]" and "far from stating a plausible claim." App. 74–75.

To the extent the district court found Ms. Sause's pro se allegations difficult to discern, the appropriate remedy was to identify the shortcomings and give her a fair opportunity to clarify her claims—not to dismiss the case with prejudice. *See Gee*, 627 F.3d at 1186 ("[O]rdinarily the dismissal of a pro se claim under Rule 12(b)(6) should be without prejudice, and a careful judge will explain the pleading's deficiencies so that a [plaintiff] with a meritorious claim can then submit an adequate complaint.") (internal citation omitted).

But more importantly, Ms. Sause's complaint states a plausible claim. As explained above, Ms. Sause alleged that Officers Stevans and Lindsey commanded her to stop praying, under threat of arrest. And they did so without any legitimate law-enforcement justification. This is a plain violation of her clearly established First Amendment rights to pray in her own home and to be free from official retaliation for exercising that right. At the very least, Ms. Sause's "factual allegations are close to

stating a claim," so she "should be allowed to amend [her] complaint." *Id.* at 1195.

Accordingly, this Court should, at a minimum, remand for entry of dismissal with leave to amend her complaint. This would enable her to have a meaningful day in court as she attempts to vindicate her fundamental, constitutionally protected right to religious liberty.

CONCLUSION

This Court should reverse the judgment of the district court, reinstate Ms. Sause's First Amendment claims against Officers Stevans and Lindsey, and remand for further proceedings. At a minimum, this Court should remand with instructions to enter dismissal with leave to amend her complaint to clarify her allegations and remedy any deficiencies.

STATEMENT REGARDING ORAL ARGUMENT

The Court should grant oral argument. This appeal presents important questions regarding the right to pray in the privacy of one's home, free from unjustified governmental interference.

Additionally, this appeal is the first point in this litigation where Ms. Sause is represented by counsel. Oral argument from capable counsel will assist the Court as it analyzes Ms. Sause's claims and construes her key allegations. Ms. Sause submits that this Court will benefit from argument on the multiple, subtle legal issues involved in this appeal.

Dated: September 28, 2016

Respectfully submitted,

/s/ *Bradley G. Hubbard*

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in 14-point New Century Schoolbook, a proportionally spaced typeface, using Microsoft Word 2016. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,309 words, excluding the parts exempted from brief requirements under Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ *Bradley G. Hubbard*
Bradley G. Hubbard

CERTIFICATE OF DIGITAL COMPLIANCE

I hereby certify that (1) all required privacy redactions have been made, *see* Tenth Cir. R. 25.5, (2) any required paper copies to be submitted to the Court are exact copies of the electronically submitted version, *see* ECF User's Manual, II.I.b, and (3) the electronic submission was scanned for viruses with Symantec Endpoint Protection, version 12.1.6, updated September 28, 2016, and is free of viruses. *See id*. II.I.c.

/s/ *Bradley G. Hubbard*
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CERTIFICATE OF SERVICE

I hereby certify that, on September 28, 2016, a true and correct copy of the foregoing brief was served via the Court's CM/ECF system on all counsel of record.

/s/ *Bradley G. Hubbard*
Bradley G. Hubbard

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARY ANNE SAUSE,

Plaintiff,

v.

LOUISBURG POLICE DEPT., CHIEF OF POLICE TIMOTHY J. BAUER, ET AL.,

Defendant.

Case No. 15-CV-9633-JAR-TJJ

MEMORANDUM AND ORDER

Plaintiff Mary Anne Sause, proceeding *pro se*, filed this civil action against the Louisburg, Kansas, Police Department, Louisburg Chief of Police Timothy Bauer, Louisburg Police Officers Jason Lindsey and Brent Ball, former Louisburg Chief of Police Ron Anderson, former Louisburg Police Officer Stevans, current Louisburg Mayor Marty Southard, and former Louisburg Mayor Travis Thompson. Plaintiff seeks compensatory and punitive damages and injunctive relief under 42 U.S.C. § 1983 for alleged violations of the First and Fourth Amendments to the U.S. Constitution and the Americans with Disabilities Act of 1990 ("ADA").

Specifically, Plaintiff contends that Officer Ball, former Chief Anderson, and Chief Bauer failed to investigate or follow up on alleged assaults by Plaintiff's neighbors and complaints she made about other police officers. Plaintiff alleges that she was the victim of assaults by several residents of her apartment complex. Plaintiff claims that charges as to these assaults are "missing," and Plaintiff was given no protection after several requests for an internal investigation. Plaintiff further alleges that when Officers Stevans and Lindsey responded to a noise complaint at her apartment, Officer Stevans prohibited her from praying in violation of the First Amendment, and Officer Lindsey prevented her from entering her bedroom in violation of

the Fourth Amendment. Plaintiff alleges the officers intimidated her and threatened to charge her with crimes, and Plaintiff claims that she fears for her safety.

Defendants moved the Court to dismiss Plaintiff's Complaint (Doc. 18) pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim because Defendants are entitled to qualified immunity and because the Louisburg, Kansas, Police Department is not an entity subject to suit. For the reasons explained below, the Court grants Defendants' Motion to Dismiss.

I. Factual Background

Unless otherwise stated, the following facts are drawn from Plaintiff's Complaint and construed in the light most favorable to Plaintiff.[1] While investigating a noise complaint at Plaintiff's apartment building on November 22, 2013, Officers Lindsey and Stevans arrived at Plaintiff's front door and became angry when Plaintiff did not immediately answer or allow them entry. The officers left and returned, asking Plaintiff why she would not let them in. Plaintiff answered the door and picked up a Constitution booklet and copy of the Bill of Rights, which she keeps near her front door. Officer Lindsey mockingly told Plaintiff, "[T]hat's nothing, it's just a piece of paper. Doesn't work here."[2] Officer Stevans did not stop him from making these comments, and Stevans left the apartment shortly after.

Officer Lindsey then allegedly put on a body camera before he entered Plaintiff's apartment and threatened that Plaintiff would be on the TV show "Cops." Plaintiff's friend was in the apartment with her, and she went to Plaintiff's bedroom to put Plaintiff's dog in its kennel. Officer Lindsey went into the bedroom as well. Officer Lindsey refused to let Plaintiff enter her bedroom, and she heard him talking to her friend in a threatening, angry voice. He told Plaintiff

[1] *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007).

[2] Doc. 1 at 7.

to get ready because she was going to jail. When Plaintiff asked why, Officer Lindsey told her he did not know yet, but the bond would be $2,000.

Plaintiff allegedly asked Officer Lindsey if she could pray, and upon his approval, knelt on her prayer rug. Officer Stevans reappeared at Plaintiff's apartment while she was praying and mockingly told her to get up and stop praying. Officer Lindsey then told Plaintiff she needed to move from her apartment because no one likes her there. Plaintiff responded that she was on disability and lived in government-subsidized housing, so she did not have money to move.

The officers cited Plaintiff for disorderly conduct and interfering with law enforcement for refusing to open her door when they first knocked, despite Plaintiff's explanation that she could not see out of the peep hole and she did not answer her door for her protection.

Plaintiff also claims the officers asked her to show them her scars and tattoos. After being asked three or four times, Plaintiff allegedly lifted her shirt to show them that she had a double mastectomy.

Plaintiff states that Officer Lindsey has been threatening her since March 2015. Plaintiff has allegedly been requesting an internal investigation with former Chief Anderson since March 2015 and current Chief Bauer since September 21, 2015. Plaintiff claims she met with Chief Anderson in his office in 2015.

Plaintiff claims that on September 21, 2015, she met with Chief Bauer at his office to discuss her request for an internal investigation. She allegedly told Chief Bauer that Officer Lindsey's abuse had gone on long enough and she feels unsafe. She alleges that Chief Bauer dismissively responded that he had 4,300 other citizens to deal with. Plaintiff claims that on October 8, 2015, she gave Chief Bauer a notarized letter at a public forum; Chief Bauer allegedly

shook Plaintiff's hand and told her he would have an answer to her questions within five days, but he never followed through.

Plaintiff alleges that she has been assaulted by residents of her apartment building but charges are "missing." She claims she wanted to report these assaults to another police officer, but Officer Ball threatened to give her a citation for disorderly conduct to prevent her from reporting the assaults. Plaintiff allegedly reported this incident but is "missing [a] report and witness statements." Plaintiff states that former Chief Anderson was aware of the incident with Officer Ball. She also claims that Mayor Southard and former Mayor Thompson were aware of her complaints about the police officers. She alleges that the mayors employ or employed the police officer defendants.

II. Discussion

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[3] It must provide sufficient factual allegations to "give the defendant fair notice" of the grounds for the claim against them.[4] To survive a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6), a complaint must include "enough facts to state a claim to relief that is plausible on its face," rather than just conceivable, and "raises a right to relief above the speculative level."[5] Under the plausibility standard, if allegations "are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'"[6] The plausibility standard does not require a showing of probability that a defendant has acted unlawfully, but requires "more than a

[3]Fed. R. Civ. P. 8(a)(2).

[4]*Twombly*, 550 U.S. at 555.

[5]*Id.* at 570, 555.

[6]*Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570).

sheer possibility."[7] As the Supreme Court has explained, "[a] pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"[8] All of the plaintiff's factual allegations are presumed true and construed in a light most favorable to the plaintiff.[9] There might be "greater bite" and "greater likelihood of failures in notice and plausibility" in § 1983 cases against individual government actors because complaints generally include complex claims against several defendants.[10]

Because Plaintiff is a *pro se* litigant, the Court construes her pleadings liberally and holds them to a less stringent standard than those drafted by lawyers.[11] However, the Court may "not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf."[12]

A. Qualified Immunity

Defendants argue that Plaintiff's Complaint should be dismissed because Officers Lindsey, Ball, and Stevans, as well as Chief Bauer and former Chief Anderson, are entitled to qualified immunity. Under the doctrine of qualified immunity, government officials who perform discretionary functions are shielded from individual liability unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would

[7] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[8] *Id.* (quoting *Twombly*, 550 U.S. at 555, 557).

[9] *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

[10] *Robbins*, 519 F.3d at 1249.

[11] *Whitney v. New Mexico*, 113 F.3d 1170, 1173 (10th Cir. 1997) (citing *Gagan v. Norton*, 35 F.3d 1473, 1474 (10th Cir. 1994)).

[12] *Id.* at 1173–74 (citing *Hall*, 935 F.2d at 1110).

have known."[13] The doctrine is not just a defense to liability, but rather provides immunity from lawsuits altogether.[14] Accordingly, the qualified immunity defense must be resolved "at the earliest possible stage of litigation."[15] "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'"[16] Because qualified immunity is the "norm" in private actions against public officials, there is a presumption of immunity when the defense is raised.[17] When a defendant claims qualified immunity, the plaintiff bears a heavy burden of showing (1) the defendant's violation of a constitutional or statutory right; and (2) that the "infringed right at issue was clearly established at the time of the allegedly unlawful activity such that a reasonable [official] would have known that his or her challenged conduct was illegal."[18] For the court to resolve the issue of qualified immunity at the earliest possible stage of litigation, a plaintiff's complaint must allege enough facts to make clear the grounds on which his or her claims rest.[19]

A government official may be personally liable under § 1983 if a plaintiff shows that the officer, acting under color of state law, deprived the plaintiff of his or her federal rights.[20] To demonstrate that a clearly established right has been infringed, a plaintiff may direct the court "to cases from the Supreme Court, the Tenth Circuit, or the weight of authority from other circuits."[21] At the same time, an action can violate a clearly established right even if there is no

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[13]*Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[14]*Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

[15]*Robbins*, 519 F.3d at 1249 (quoting *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987)).

[16]*Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

[17]*Pahls v. Thomas*, 718 F.3d 1210, 1227 (10th Cir. 2013) (citing *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010)).

[18]*Martinez v. Carr*, 479 F.3d 1292, 1294–95 (10th Cir. 2007).

[19]*See Robbins*, 519 F.3d at 1249 (citing *Twombly*, 550 U.S. at 598 n.2).

[20]*Ward v. Lenexa, Kan. Police Dep't*, No. 12-2642-KHV, 2014 WL 1775612, at *5 (D. Kan. May 5, 2014).

[21]*Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006).

specific case addressing that exact action.[22] The unlawfulness of the action at issue must be apparent even if that action has not specifically been held to be unlawful.[23] The question of whether a right is clearly established must be answered "in light of the specific context of the case, not as a broad general proposition."[24] The plaintiff must be able to "demonstrate that 'every reasonable official would have understood'" that his or her actions violated the law.[25]

1. Claims against Defendants Ball, Anderson, and Bauer

Plaintiff's claim against Defendant Ball rests on her allegation that he did not properly investigate her assault complaint. Her claims against Defendants Anderson and Bauer are based on her contention that they refused to investigate her complaints about other officers. Generally, citizens do not have a constitutional or statutory right to compel a state to investigate grievances or crimes against them.[26] The state may not discriminate in the way it protects its citizens, but there is no constitutional right to police protection.[27] Because failing to investigate or follow up on Plaintiff's complaints did not violate any clearly established constitutional or federal rights, Defendants Ball, Anderson, and Bauer are entitled to qualified immunity. Accordingly, Plaintiff's claims against those officers are dismissed.

2. Claim Against Defendant Stevans

Plaintiff claims that Officer Stevans violated her First Amendment rights by telling her to stop praying. The Court construes Plaintiff's First Amendment claim as alleging a violation of the Free Exercise Clause. The Free Exercise Clause of the First Amendment "protects the right

[22]*Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

[23]*Id.*

[24]*Saucier v. Katz*, 533 U.S. 194, 201 (2001).

[25]*Wilson v. City of Lafayette*, 510 F. App'x 775, 777 (10th Cir. 2013) (quoting *al-Kidd*, 563 U.S. at 741).

[26]*See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989); *see also Griego v. City of Albuquerque*, 100 F. Supp. 3d 1192, 1225 (D.N.M. 2015).

[27]*Price-Cornelison v. Brooks*, 524 F.3d 1103, 1114 (10th Cir. 2008).

of every person to choose a religion to practice without state compulsion."[28] To establish a Free Exercise claim, a plaintiff must allege facts that, if true, would illustrate that the challenged government action created a burden on the exercise of religion.[29] The exercise of religion is burdened when the challenged government action is coercive or compulsory.[30] A plaintiff "must allege facts showing she was coerced into [conduct] contrary to her religious beliefs."[31]

Plaintiff's Complaint does not state a plausible First Amendment claim against Officer Stevans. Officers Stevans and Lindsey were investigating a noise complaint in Plaintiff's building, which led them to her apartment. While Officer Stevans's instruction to Plaintiff to stop praying may have offended her, it does not constitute a burden on her ability to exercise her religion. Plaintiff fails to provide any allegations that would suggest Officer Stevans's actions coerced her into conduct contrary to her religious beliefs, or that he otherwise prevented her from practicing her religion. Rather, he merely instructed her to stop praying while the officers were in the middle of talking to her about a noise complaint they had received. The Court thus finds that Plaintiff has not made a plausible claim that her First Amendment rights were violated. Because Plaintiff has not established that Officer Stevans violated her clearly established rights, the Court finds that he is entitled to qualified immunity and the claim against him is dismissed.

3. Claims Against Defendant Lindsey

a. Fourth Amendment

Plaintiff alleges that Officer Lindsey violated her Fourth Amendment rights by refusing to let her enter her bedroom while he was in her apartment. That claim is not sufficient to

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[28] *Martin v. City of Wichita*, No. 98-4145-RDR, 1999 WL 1000501, at *4 (D. Kan. Oct. 27, 1999).

[29] *Fields v. City of Tulsa*, 753 F.3d 1000, 1009 (10th Cir. 2014).

[30] *Id.*

[31] B*auchman v. W. High Sch.*, 132 F.3d 542, 557 (10th Cir. 1997) (internal quotation marks omitted).

establish a Fourth Amendment violation. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[32] Plaintiff's Complaint indicates that she permitted the officers to enter her apartment. She does not allege that either of the officers searched her apartment or her person. The officer's alleged refusal to allow Plaintiff to enter her bedroom while she was being questioned by the officers does not constitute a violation of her Fourth Amendment rights. Plaintiff has thus failed to show that Officer Lindsey violated a clearly established right; the Court finds that he is entitled to qualified immunity and Plaintiff's Fourth Amendment claim is dismissed.

b. ADA Claim

Finally, to the extent Plaintiff alleges that Officer Lindsey discriminated against her because of her disability when he allegedly told her she should move out of her apartment, that claim is also dismissed. The ADA forbids discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[33] Officer Lindsey's comment to Plaintiff does not constitute discrimination. Plaintiff herself made a connection between his comment and her alleged disability by responding to Officer Lindsey that she could not afford to leave her apartment because she is disabled. She does not allege facts to show that the officer had any ability or intention to force her to move from her apartment. He merely made a mean comment that Plaintiff's neighbors did not like her and she should move away. The Complaint does not

[32] *Herring v. United States*, 555 U.S. 135, 139 (2009).

[33] 42 U.S.C. § 12182(a) (1990).

adequately allege that his comment had anything to do with Plaintiff's disability[34] and does not constitute discrimination within the meaning set forth in the ADA. Plaintiff has therefore failed to allege that Officer Lindsey violated any clearly established rights, and her claim is dismissed.

4. Claims Against Defendants Southard and Thompson

Plaintiff's claims against Defendants Southard and Thompson, the current and former mayors of Louisburg, also warrant dismissal. She alleges that they employed the defendant police officers, and apparently seeks to hold them accountable for the officers' alleged actions. As the Court has already shown, Plaintiff fails to plausibly allege that any of the defendants has violated her rights. Even if the police officer defendants had committed violations of her rights, however, courts generally do not hold government officials liable for violations committed by employees.[35] Rather, the municipality itself might be held liable if a plaintiff is able to show that the actions were the result of an official government policy.[36] This standard implicitly recognizes that police officers are generally employed by a municipality itself, not by individual mayors or government officials. Plaintiff does not allege any facts that would support a claim of municipal liability, nor does she make any specific allegations of wrongdoing by Defendants Southard and Thompson. The claims against them are therefore dismissed.

B. The Louisburg, Kansas Police Department is Not an Entity Subject to Suit

The Court also finds that Plaintiff's claim against the Louisburg, Kansas Police Department must be dismissed because it is not a legal entity capable of being sued. Under Kansas law, agencies of a city do not have the capacity to sue or be sued unless a statute or

[34]And in fact, Plaintiff does not allege facts in her Complaint that show she is disabled within the meaning of the ADA; she merely states in a conclusory fashion that she is disabled.

[35]*See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663–64 (1978).

[36]*Id.* at 694.

ordinance expressly gives such authority.[37] Plaintiff has not pointed the Court to such a statute or ordinance. And "[t]his Court has routinely dismissed actions against city police departments because they are not entities capable of being sued."[38] Accordingly, Plaintiff's claim against the Louisburg, Kansas Police Department is dismissed for Plaintiff's failure to state a claim for which relief can be granted.

C. Leave to Amend

"[A] *pro se* litigant bringing suit *in forma pauperis* is entitled to notice and an opportunity to amend the complaint to overcome any deficiency unless it is clear that no amendment can cure the defect."[39] Leave need not be granted if amendment would be futile.[40] However, if the *pro se* plaintiff's factual allegations are close to stating a claim but are missing some important element, the Court should allow him leave to amend.[41]

As described above, to the extent Plaintiff's factual allegations are discernable, they are far from stating a plausible claim. Plaintiff's response to Defendants' Motion to Dismiss merely restates the same allegations she makes in her Complaint. She contends that she will be able to prove all of her factual allegations through discovery. However, the purpose of qualified immunity is to shield government officials from liability as well as the process of discovery. Allowing discovery to proceed with the hope that Plaintiff will be able to prove her allegations is contrary to the purpose of the qualified immunity doctrine, especially where Plaintiff's

[37] *Hopkins v. State*, 702 P.2d 311, 316 (Kan. 1985); *Whayne v. Kansas*, 980 F. Supp. 387, 392 (D. Kan. 1997).

[38] *Ward v. Lenexa, Kan. Police Dep't*, No. 12-2642-KHV, 2014 WL 1775612, at *4 (D. Kan. May 5, 2014).

[39] *Denton v. Hernandez*, 504 U.S. 25, 34 (1992).

[40] *See Gee v. Pacheco*, 627 F.3d 1178, 1195 (10th Cir. 2010).

[41] *Id.* (citing *Hall*, 935 F.2d at 1110).

allegations are far from stating plausible claims. Accordingly, the Court finds that leave to amend would be futile.

IT IS THEREFORE ORDERED BY THE COURT that Defendants' Motion to Dismiss (Doc. 18) is **granted**.

IT IS SO ORDERED.

Dated: June 17, 2016

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE