[Oral Argument Requested]

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.

BRIEF OF APPELLEES TIMOTHY J. BAUER, JASON LINDSEY, BRENT BALL, RON ANDERSON, LEE STEVENS, MARTY SOUTHARD, AND TRAVIS THOMPSON

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
THE HONORABLE JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE
CASE NO. 15-CV-9633-JAR-TJJ

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CORPORATE DISCLOSURE STATEMENT

No corporate disclosure statement is required by Fed. R. App. P. 26.1.

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STATEMENT OF RELATED CASES

There are no prior or related appeals to this matter.

JURISDICTIONAL STATEMENT

On November 20, 2015, *pro se* plaintiff Mary Anne Sause filed her Complaint alleging civil rights violations in the District Court of Kansas. Aplt. App. at 7-20. The civil rights violations she asserted included, but were not limited to, allegations that one or more law enforcement officers violated her rights under the First Amendment Free Exercise Clause. *See* Aplt. App. at 7-20. The District Court had subject matter jurisdiction to hear Ms. Sause's First Amendment claims under 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

On June 20, 2016, the District Court entered its Memorandum and Order granting with prejudice Defendants' Motion to Dismiss. *See* Aplt. App. at 64-75. With respect to her claims asserting violations of her rights under the First Amendment Free Exercise Clause, the District Court found that Ms. Sause failed to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) and that the law enforcement officer against whom she asserted that claim was qualifiedly immune. The District Court did not find Ms. Sause asserted First Amendment claims against the other law enforcement officer, but found him qualifiedly immune as to the allegations asserted against him. Aplt. App. at 64-75. On June 28, 2016, the District Court entered judgment against Ms. Sause. Aplt. App. at 76.

On July 15, 2016, Ms. Sause filed a notice of appeal, which was timely filed. Fed. R. App. P. 4(a)(1)(A). Ms. Sause's appeal is from a final Judgment, which disposed of all of her claims. This Court has jurisdiction to hear the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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STATEMENT OF THE CASE

On November 22, 2013, Ms. Sause asserts that two Louisburg, Kansas law enforcement officers, Officers Lindsey and Stevens,[1] arrived at her front door. Aplt. App. at 12. She did not answer her door the first time they requested entrance, but when they returned she allowed them inside her home. Aplt. App. at 12. Ms. Sause claims the officers appeared angry and asked her why she didn't answer her door the first time. Aplt. App. at 12-13. Ms. Sause asserts she picked up her constitution booklet and Bill of Rights, but that Officer Lindsey laughed and mocked her and Officer Stevens did nothing to stop him. Aplt. App. at 12-13. Ms. Sause states she understood at some point during their interaction that night that the officers were responding to a noise complaint. Aplt. App. at 17.

Ms. Sause claims that while Officer Lindsey was in her family room he had a body camera on and threatened to put her on the TV show "Cops." Aplt. App. at 13. Officer Stevens was not in the room at the time Officer Lindsey allegedly said this. Aplt. App. at 13.

[1] Officer Stevens' name is spelled "Stevans" by the District Court and Ms. Sause.

Ms. Sause also asserts Officer Lindsey told her to get ready because she was going to jail, that he did not know why, but that her bond would be $2,000. Aplt. App. at 13. Ms. Sause asked Officer Lindsey if she could pray, and he said yes. Aplt. App. at 13.

Officer Stevens returned to Ms. Sause's apartment and asked Officer Lindsey what she was doing. Aplt. App. at 13. Officer Lindsey allegedly responded mockingly, "she's praying." Aplt. App. at 13. Officer Stevens then told Ms. Sause to "get up" and "to stop praying." Aplt. App. at 13-14.

Ms. Sause next engaged in conversation with the officers. Aplt. App. at 14. She claims Officer Lindsey told her she needed to move back to where she came from because no one liked her here. Aplt. App. at 14. Ms. Sause responded that she was disabled and could not afford to move. Aplt. App. at 14. Ms. Sause alleges she was given one or more tickets for interfering with a law enforcement officer and disorderly conduct. Aplt. App. at 14. Ms. Sause then explained that the reason she did not answer the first time they knocked was that she could not see out of the peephole in her apartment and she claims the officers did not identify themselves. Aplt. App. at 14.

Ms. Sause alleges she has been threatened by Officer Lindsey since March of 2015, but does not state in what way. Aplt. App. at 14. She states she had requested of the current and former mayors and current and former

chiefs of police that an internal investigation be done on Officer Lindsey. Aplt. App. at 14-15. She believes no investigation was done. Aplt. App. at 15.

On November 20, 2015, Ms. Sause filed a Complaint *pro se*, alleging in part that Officer Stevens violated her rights under the First Amendment Free Exercise Clause when he told her to get up and to stop praying. Aplt. App. at 7-20. Ms. Sause also alleges she asserted the same claim against Officer Lindsey for doing nothing to stop Officer Stevens from saying those things. *See* Aplt. Brief at 43-47. In addition, Ms. Sause alleges she asserted First Amendment retaliation claims against both of these officers for allegedly threatening to arrest her if she did not stop praying. Aplt. Brief at 39-43.

On January 18, 2016, Defendants filed a Motion to Dismiss Ms. Sause's Complaint for failure to state a claim. Aplt. App. at 25-37. Ms. Sause requested and was granted an extension of time of 30 days to respond to the Motion to Dismiss. Aplt. App. at 4-5. On February 8, 2016, Ms. Sause filed her Response to the Motion to Dismiss. Aplt. App. at 38-47. In addition, on March 1, 2016, Ms. Sause filed a Motion for Leave to Amend the Complaint. Aplt. App. at 51-53. Ms. Sause failed to attach her proposed amended complaint to her Motion for Leave, as required under D. Kan. Rule 15.1(a)(2). *See* Aplt. App. at 51-53.

On April 26, 2016, the District Court entered a Memorandum and Order, ruling in part that Ms. Sause's Motion for Leave to Amend Complaint was denied without prejudice for her failure to comply with D. Kan. Rule 15.1(a)(2). Aplt. App. at 57-63. The Order specifically states Ms. Sause could file another motion to amend and attach her proposed amended complaint to comply with the federal and local rules. Aplt. App. at 62-63. Ms. Sause did not file another motion to amend and attach her proposed amended complaint. *See* Aplt. App. at 1-6.

On June 20, 2016, the District Court entered its Memorandum and Order granting with prejudice Defendants' Motion to Dismiss. *See* Aplt. App. at 64-75. With respect to her First Amendment Free Exercise claims, the District Court found that Ms. Sause failed to state a claim. Aplt. App. at 64-75. On June 28, 2016, the District Court entered judgment against Ms. Sause. Aplt. App. at 76.

Finally, Ms. Sause made clear in her brief that the only claims she appeals are those related to her purported First Amendment Free Exercise Clause claims. *See* generally, Aplt. Brief. She made no argument with respect to Defendants Timothy J. Bauer, Brent Ball, Ron Anderson, Marty Southard and Travis Thompson, and therefore the claims asserted by Ms. Sause against

those individuals at the District Court level are not addressed in Appellee's Brief.

SUMMARY OF THE ARGUMENT

The District Court's dismissal of Ms. Sause's claims and Complaint should be affirmed. To withstand a motion to dismiss, a complaint must contain enough allegations of fact to state a claim to relief that is plausible on its face. All well-pleaded facts and the reasonable inferences derived from those facts are viewed in the light most favorable to plaintiff. Conclusory allegations, however, have no bearing upon the court's consideration. The issue is not whether Ms. Sause will ultimately prevail, but whether she is entitled to offer evidence to support her claims.

Pro se pleadings, including petitions and pleadings, must be liberally construed. Liberal construction does not, however, require this court to assume the role of advocate for the pro se litigant. Ms. Sause is expected to construct her own arguments or theories and adhere to the same rules of procedure that govern any other litigant in this district. In addition, the court need not accept as true Ms. Sause's conclusory allegations. Therefore, the court is required to accept as true only Ms. Sause's well-pleaded and supported factual contentions.

The right protected under the First Amendment Free Exercise Clause is not unrestricted, and must be analyzed under the circumstances of each case. In this case, two law enforcement officers were responding to and

investigating a noise complaint in and near Ms. Sause's home. When Officer Stevens told Ms. Sause once to get up and stop praying, consulted with his fellow officer regarding issuing a citation, then issued citations, he was not violating Ms. Sause's First Amendment rights in telling her to stop praying. That characterization of the right protected under the First Amendment is too broad. Rather, the right protects one's ability to choose his or her religion. Ms. Sause failed to assert facts alleging a violation of her right to choose her religion, and there is no indication in making that finding that the District Court relied on any allegation or reasonable inference other than those contained in Ms. Sause's Complaint.

Furthermore, Ms. Sause's Complaint distinguishes between the claims asserted against Officer Lindsey and those asserted against Officer Stevens. The Court correctly concluded Ms. Sause had not asserted any First Amendment claim against Officer Lindsey.

Despite Ms. Sause's argument to the contrary, she did in fact have an opportunity to amend her Complaint but chose not to. Ms. Sause's Motion for Leave to Amend her Complaint was denied by the District Court without prejudice to the filing of a future motion to amend that attaches a proposed amended complaint and complies with the rules. Ms. Sause had nearly two months to attach an amended complaint to a new motion for leave to amend

but did not attempt it. The District Court's conclusion that an amendment would be futile was appropriate for this and the reasons stated in the Memorandum and Order.

Finally, because the District Court found that Ms. Sause failed to state a claim, her Complaint was properly dismissed with prejudice, including her equitable claims.

ARGUMENTS AND AUTHORITIES

I. Applicable Standard of Review

The following standard of review is applicable on appeal.

Motion to Dismiss Standard

The standard of review of a district court's dismissal of a complaint for failing to state a claim under Fed. R. Civ. P. 12(b)(6) is de novo. *Childs v. Miller*, 713 F.3d 1262, 1264 (10th Cir. 2013).

"The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's...complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

In *Iqbal*, the United States Supreme Court described a "two-pronged approach" for lower courts to follow when evaluating complaints challenged under Rule 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). First, a court should divide the allegations between factual and legal allegations; factual allegations should be accepted as true, but legal allegations should be disregarded. *Id.* at 678. Second, the factual allegations must be parsed for facial plausibility. *Id.* at 679. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570).

"The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, 'it stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Therefore, while a complaint "does not need detailed factual allegations," the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "[C]ourts should look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 n. 2 (10th Cir. 2007).

While "legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. A pleading that offers only "labels and conclusions" or "formulaic recitations of the elements of the cause of action will not do." *Id.* at 678 (quoting *Twombly*,

550 U.S. at 555). If the 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.'" *Robbins v. Oklahoma ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570).

The complaint's "factual allegations must be enough to raise a right to relief above the speculative level" and "to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 555, 570. In other words, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," dismissal is appropriate. *Twombly*, 550 U.S. at 558.

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988)(citations omitted); *Northington v. Jackson*, 973 F.2d 1518, 1523 (10th Cir. 1992). "[T]he complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims." *Carter v. United States*, 667 F.Supp.2d 1259, 1262 (D. Kan. 2009) (quoting *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)).

The Court affords a *pro se* plaintiff some leniency and must liberally construe the complaint. *Williams v. Potter*, 331 F.Supp.2d 1331, 1335-36 (D. Kan. 2004). While *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers, *pro se* litigants must follow the same procedural rules as other litigants. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992). The Court may not assume the role of advocate for a *pro se* litigant, nor should it provide additional factual allegations to round out a plaintiff's complaint or create a legal theory on a plaintiff's behalf. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

II. The First Amendment's Free Exercise Clause Protects One's Right to Choose a Religion from Government's Undue Restrictions, but it is not an Absolute or Unrestricted Right

Ms. Sause has framed her case as one that blends an individual's right to choose her religion with her right to pray—without interruption—in any given set of circumstances. The jumbling together of those two concepts confuses the right at issue here. To establish her First Amendment Free Exercise Clause claim, Ms. Sause must assert facts that would show the exercise of her religion had been burdened by the officers. The interruption of one prayer is not enough to state a claim under the First Amendment Free Exercise Clause. Ms. Sause has not alleged her religious practices have been forced to change after her encounter with the officers. She has not stated she

stopped praying or was prohibited from attending worship services, or even that she no longer prays in her home because of this incident. She merely asserted that, in the moment when Officer Stevens instructed her to stop praying, her prayer was interrupted. Defendants respectfully submit that the circumstances and claims asserted in Ms. Sause's Complaint do not state a claim for relief under the First Amendment Free Exercise Clause.

"The Free Exercise Clause of the First Amendment protects the right of every person to choose a religion to practice without state compulsion." *Martin v. City of Wichita, Kansas* 1999 WL 1000501, at *4 (D. Kan. Oct. 27, 1999). To establish a free-exercise claim, a plaintiff must show that the government has placed a burden on the exercise of her religious beliefs or practices. *Fields v. City of Tulsa*, 753 F.3d 1000, 1009 (10th Cir. 2014), *cert. denied sub nom. Fields v. City of Tulsa, Okla.*, 135 S. Ct. 714, 190 L. Ed. 2d 440 (2014), *citing Bauchman v. W. High Sch.*, 132 F.3d 542, 557 (10th Cir.1997). "A plaintiff states a claim [that his] exercise of religion is burdened if the challenged action is coercive or compulsory in nature." *Bauchman v. W. High Sch.*, 132 F.3d 542, 557 (10th Cir.1997).

In *Martin*, a female preacher set up a tent revival on the property of a church and worshiped there for several days. *Martin*, 1999 WL 1000501, at *1. After law enforcement apparently receiving complaints from a neighbor,

the plaintiff alleged law enforcement officers disrupted the service and detained her. *Id*. Several days later she was arrested and ticketed for violating the city noise ordinance and for failing to acquire a permit to set up the tent. *Id*. The court found that the allegations of disruption of plaintiff's revival service did not support her claim that plaintiff's observation of her religion was substantially burdened. *Id*. at *4. It noted, "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Id*., *quoting Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).

In the *Martin* case as in this case, the courts found no substantial burden on the person's religious belief or practice, and therefore did not need to analyze whether there was a compelling governmental interest justifying the burden. *See also Thiry v. Carlson*, 78 F.3d 1491, 1496 (10th Cir. 1996) *cert. denied*, 519 U.S. 821 (1996) (condemnation of gravesite also used as place of worship does not violate Free Exercise Clause).

Other courts weighing a stronger action taken by law enforcement than in Ms. Sause's case still found no substantial interference with or burden on the observation of one's religion. *See e.g., Klemka v. Nichols*, 943 F. Supp. 470, 478 (M.D. Pa. 1996) (finding plaintiff who was interrupted in a private

prayer vigil and taken into custody by law enforcement had not asserted claims sufficient to "demonstrate substantial interference with the observation of a central tenet of her religion" nor was she "significantly inhibited" from expressing her religious beliefs or practices).

Ms. Sause also cites to a Northern District of Texas case in arguing that protections against governmental intrusions on one's right to pray privately are "nearly absolute." *See* Appellant's Brief, p. 25, citing *Tompkins v. Cyr*, 995 F.Supp. 664, 681 n.10 (N.D. Tex. 1998). However, the reference to the *Tompkins* case compares law enforcement's investigation of a complaint to anti-abortion protestors picketing at a doctor's place of worship and home. *Id*. In the *Tompkins* case, the court analyzed the time, place and manner regulations of peaceful picketing activity. However, the court noted that there was overwhelming evidence that some of the defendant picketers engaged in behavior that was so extreme it would not find protection in the First Amendment. *Tompkins*, 995 F.Supp. at 675 (stating behavior like staking out plaintiffs' home and following them around town, trespassing on private property, and unprovoked and threatening physical confrontations with plaintiffs is not protected by the First Amendment at all). In the *Tompkins* case, the court held that focused picketing, such as standing in front of the home, could subject defendants to tort liability, as opposed to picketing

plaintiffs' work, church or through neighborhood marches. *Id*. at 681. Focused picketing can hardly be compared to an investigation conducted by law enforcement officials in the course of their job. Here, Ms. Sause has alleged that she was told to stop praying one time while law enforcement officers were investigating a noise complaint in her home. Aplt. App. at 14, 17. Although she asserts that she fears Officer Lindsey, she has not linked her fear of Officer Lindsey to any allegation she asserted regarding her religion.

Moreover, Ms. Sause's reliance on another Texas case purportedly announcing that "Any American can pray, silently or verbally, seven days a week, twenty[-]four hours a day, in private as Jesus taught or in large public events as Mohammed instructed," is puzzling because that quote was preceded in the opinion by the heading, "What This Case Has Not Been About." *See* Appellant's Brief, p. 26-27, *citing Schultz v. Medina Valley Independent School Dist.*, 2012 WL 517518, at *1 (W.D. Tex. Feb. 9, 2012).

The First Amendment's Free Exercise Clause protects an individual's right to choose a religion to practice. However, Ms. Sause's case relies on a premise much broader than that: that the First Amendment protects her right to pray in her home no matter the circumstances. She argues that not only does the First Amendment allow her to choose a religion to practice, she also has the right to choose the time, place and manner of prayer without exception.

As with limitations on one's First Amended right of free speech (e.g., yelling "fire!" in a crowded theater), there are reasonable limitations to one's right to practice one's religion. For example, an individual is prohibited from kneeling for prayer in the middle of a busy intersection without lest he subject himself to a ticket or worse. You cannot use your religion to shield yourself from compliance with laws whose purpose serve the welfare of others.

Ms. Sause's argument in her brief misses the mark. Officer Stevens' instruction to her to stop praying does not impede her right to practice her religion, it was simply necessary to complete a noise complaint violation. In fact, Ms. Sause's own sources support the notion that there can be reasonable limitations placed on one's right to worship. While Ms. Sause quotes *Davis v. Beason* in arguing that "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," the rest of the sentence reads in part, "not injurious to the equal rights of others," highlighting that one's First Amendment Free Exercise Clause rights have limitations grounded in the protection of others' rights. *Davis v. Beason*, 133 U.S. 333, 342 (1890) *abrogated by Romer v. Evans*, 517 U.S. 620 (1996). That case also notably states, "It was never intended or supposed that the

amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society." *Id*. Ms. Sause essentially argues that when you answer the door for law enforcement officers who are reporting to the site of a noise complaint, if you begin praying, you may not be interrupted in that prayer. That argument is illogical. It is precisely the peace, good order and morals of society that Officers Lindsey and Stevens were charged to resolve that day.

In Ms. Sause's case, even if she had voiced an objection to stopping her prayer when Officer Stevens asked her to (which she has not alleged she did), the act of stopping her prayer did not burden her free exercise of religion. "An invalid religious objection to an order that does not burden your free exercise of religion does not immunize you from punishment for violation of the order." *Fields v. City of Tulsa*, 753 F.3d 1000, 1009 (10th Cir. 2014), *cert. denied sub nom. Fields v. City of Tulsa, Okla.*, 135 S. Ct. 714, 190 L. Ed. 2d 440 (2014). Ms. Sause made clear that she did not begin to pray until after the officers were in her home. Aplt. App. at 13. She stopped praying when she was instructed to by Officer Stevens and did not request to pray again while the officers were there. *See* Aplt. App. at 13-19. Ms. Sause states that the officers engaged in a conversation with her, determined whether citations would be issued, and left. *See* Aplt. App. at 13-19. There was no burden of

her free exercise of her religion, and therefore even if she had objected to having to stop her prayer, it would not have prevented her from being punished for violating the order to stand up and stop praying.

Here, as will be discussed in more detail below, Ms. Sause's Complaint makes clear that the law enforcement officers were there to investigate a noise complaint. She allowed them to come into her apartment. Their investigation goes to the very issue of instilling the peace and good order of her neighborhood. Furthermore, Ms. Sause's allegations in her Complaint about being disturbed during her prayer to respond to questions by law enforcement during their investigation run directly contrary with the goal of instilling the peace and good order she apparently sought in requesting that law enforcement conduct internal investigations regarding her other claims. *See*, *e.g.*, Aplt. App. at 14-19.

Defendants respectfully submit that the First Amendment Free Exercise Clause protects the right of every person to choose his or her religion to practice. That right is protected from government's undue restriction, but is not without limitation. In this case, Ms. Sause failed to assert allegations necessary to state a claim of a violation of her First Amendment rights.

III. The Law Enforcement Officers Did Not Violate Ms. Sause's First Amendment Right to Choose a Religion

Ms. Sause incorrectly asserts in her brief that she was threatened with arrest after being told to stop praying. *See e.g.*, Aplt. Brief at p. 29-30. The timeline set forth in Ms. Sause's Complaint belies her argument that the law enforcement officers threatened to arrest her if she didn't stop praying. Even if a threat of arrest occurred, this argument is contrary to the timeline and statements articulated in her Complaint.

According to Ms. Sause, law enforcement arrived at her door as a response to a noise complaint. Aplt. App. at 17. Ms. Sause invited or allowed them in her home. Aplt. App. at 12.

According to Ms. Sause, one of the officers allegedly told her she was "going to jail" before she prayed. Aplt. App. at 13-14. After the alleged "going to jail" comment, there was no other "threat" of arrest. *See, e.g.,* Aplt. App. 12-19.

She asked to pray while they investigated, and she was allowed to do so. Aplt. App. at 13. At some point after she began praying, she was asked to stop. Aplt. App. at 13-14. She states the officers then began speaking to her about Theresa, the Manager who does not like her, and they suggested to Ms. Sause that she should move. Aplt. App. at 14. She then engaged the officers by asking them questions about their investigation and brought up her

disability. Aplt. App. at 14. Ms. Sause did not request to pray again. Ms. Sause did not bring up her choice of religion or complain that she was being coerced or restricted with respect to her religion. There was no more discussion at all between Ms. Sause and the officers regarding her religion, religious practices, or desire to pray. *See* Aplt. App. at 12-19.

In fact, she apparently took the officers' suggestion that she should move to imply that it was a violation of her Constitutional rights as a person with a disability, not an attack on her religious freedom. Aplt. App. at 14 ("[Officer Lindsey] stated [she should move] 'because no one likes you here' I said who said that he said 'Theresa' I said 'Theresa who' he states 'Manager here' I said That is against my Constitutional Rights. Officer Steven never told him to stop. He allowed Officer Lindsey to continue. As it was all recorded. I told them I was on Disability and this was government subsidized housing, for poor people and I had no money to move and it wasn't right.")

Even liberally construed, Ms. Sause's Complaint cannot be understood to include an allegation that the law enforcement officers threated to jail her if she didn't stop praying.

Moreover, it would not correctly reflect the facts as asserted in Ms. Sause's Complaint to analyze this case as one only of an individual praying in the privacy of her home. As she stated in her Complaint, Ms. Sause asked

one of the officers if she could pray after she asserts she was told she could be arrested. Aplt. App. at 13. That officer told her she could pray. Then when the other officer instructed her to stop praying, she engaged with the officers, asking them questions about their investigation, not about her choice of religion. The District Court properly construed Ms. Sause's allegations as stated in her Complaint, and the reasonable inferences therefrom, in the light most favorable to Ms. Sause in determining that the law enforcement officers did not violate her First Amendment right to choose and practice a religion.

A. The District Court Properly Concluded Officer Stevens' Instruction to Ms. Sause to Stop Praying While the Officers were Investigating a Complaint was not a First Amendment Violation

Ms. Sause argues Officer Stevens forced her to stop praying in violation of her First Amendment rights. The District Court correctly concluded the allegations on this subject failed to state a claim.

The extent of Officer Stevens' interaction with Ms. Sause can be boiled down to just a few exchanges: Ms. Sause answered her door after several attempts, after reentering the home and seeing Ms. Sause on the floor, Officer Stevens asked what she was doing, and upon learning she was praying, allegedly instructed her to "get up" and stated, "to stop praying." Aplt. App. at 13-14. Then Officer Stevens consulted with Officer Lindsey and

determined the appropriate charge for Ms. Sause ("Lindsey would point in book, Stevens would shake head no." Aplt. App. at 14.).

As stated earlier, the First Amendment Free Exercise Clause protects against the government's undue restriction of one's choice of religion, and is not a right without restriction. *Fields*, 753 F.3d at 1009. Here, according to Ms. Sause, Officer Stevens responded to a noise complaint, asked her to stop praying (having begun her prayer after the arrival of the officers), and consulted with his fellow officer to determine the charge. To argue there was no law enforcement-related justification for instructing Ms. Sause to stop praying ignores that Ms. Sause herself announced she knew why the officers arrived at her home. She knew they had responded to a noise complaint. *See* Aplt. App. at 17. While she may disagree that the noise complaint had merit, she has not alleged the noise complaint was a ruse that the officers made up. In fact, she argued in her Response to Defendants' Motion to Dismiss that the noise complaint could have been resolved if the officers had just asked her to turn her radio down, and that a "written warning" should have been the most that the officers did. Aplt. App. at 42.

Furthermore, in instructing Ms. Sause to stop praying while they finished their investigation, Officer Stevens did not threaten to arrest her, and Ms. Sause has not plead as much. According to Ms. Sause, none of the

individuals mentioned her religion or prayer after the moment Officer Stevens asked her to stop praying, and certainly not with respect to a threat that she would be punished for the religion she chose. She has also not argued that her religion required her to pray at that time of day.

The District Court properly found that Officer Stevens' action created no substantial burden on Ms. Sause's right to choose her religion, so there was no need to determine whether law enforcement was justified. That finding runs parallel to the *Martin* case.

In *Martin*, the court found that the allegations of disruption of plaintiff's revival service did not support her claim that plaintiff's observation of her religion was substantially burdened. *Martin*, 1999 WL 1000501 at *4. It noted, "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). In the *Martin* case as in this case, the courts found no substantial burden on the person's religious belief or practice, and therefore did not need to analyze whether there was a compelling governmental interest justifying the burden.

Furthermore, the District Court did not fail to address a First Amendment retaliation claim, nor did it improperly find that Ms. Sause

asserted no such claim. Ms. Sause fails to state all three of the elements of a claim of First Amendment retaliation. First, she failed to assert that her prayer, begun in the middle of a noise complaint investigation, was constitutionally protected activity.

Second, she failed to assert in her complaint and in her appellate brief how either officers' actions caused her any injury that would cause an ordinary person from practicing one's religion. The only officer she alleges she fears was the officer she did not assert violated her First Amendment rights ("…this has gone on long enough and I need answers due to fear of Officer Lindsey and I had to assure my safety in this community." Aplt. App. at 15).

Third, she did not identify which officer, what actions, or how such actions were substantially motivated in response to her choice of religion. The alleged comment about going to jail was made before Ms. Sause asked to pray, and then Officer Lindsey told her she could pray. Further, the argument that there was no legitimate law enforcement justification is contradicted by Ms. Sause's statements in her Complaint that the officers were there for a noise complaint, reviewed their ticket book and then issued her two citations. Aplt. App. at 14, 17.

Ms. Sause failed to state First Amendment Free Exercise Clause and retaliation claims against Officer Stevens, and therefore the District Court properly concluded her Complaint must be dismissed.

B. The District Court Properly Concluded Ms. Sause did not Articulate First Amendment Violation Claims against Officer Lindsey

Ms. Sause's argument that the District Court should have known that she alleged Officer Lindsey violated her First Amendment Free Exercise Clause right is directly contrary to what she stated in her Complaint. In the section designated for stating amounts claimed and reasons for the recovery of money damages, Ms. Sause separates the alleged violations of her First Amendment rights from those associated with "LIMITING ME in MY HOME." Aplt. App. at 16-17.

She starts each new allegation with the heading, then explains the circumstances or reasoning behind the allegation:

> To Tell Me to Stop praying. That is Between my God and me. That is my First AMMENDMENT (sic) Right **(R/E Stevens)**.
> Aplt. App. at 17 (emphasis added).

> To Prevent Me from going into my own Bedroom. LIMITING ME IN MY HOME, all over a Noise (Radio) Violation. **(Officer Lindsey)**.
> Aplt. App. at 17 (emphasis added).

Ms. Sause clearly asserts her First Amendment claim is against Officer Stevens and her claim related to being prevented from going to her bedroom is against Officer Lindsey. Ms. Sause has not appealed the Fourth Amendment and ADA-related claims the District Court believed she asserted against Officer Lindsey. Further, the interaction between Ms. Sause and Officer Lindsey regarding her prayer are very limited. Ms. Sause's complaint alleges that Officer Lindsey left her bedroom and joined her in her family room "per my request." Aplt. App. at 13. Then Officer Lindsey allegedly told Ms. Sause to "get ready, [Ms. Sause] was going to jail," but he did not yet know why. Aplt. App. at 13. It was then that Ms. Sause asked Officer Lindsey if she could pray, and he said, "Yes." Aplt. App. at 13.

Ms. Sause made no other allegations against Officer Lindsey in her Complaint regarding her prayer except that Officer Lindsey reported to Officer Stevens that she was praying. The District Court may not add allegations for her. "The Tenth Circuit Court of Appeals has explained "that, to state a claim in federal court, a complaint must explain what each defendant did to [the pro se plaintiff]; when the defendant did it; how the defendant's action harmed [the plaintiff]; and, what specific legal right the plaintiff believes the defendant violated." *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007). The court "will not supply additional

factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997) (citation omitted).

The District Court found that Ms. Sause "fails to provide any allegations that would suggest Officer Stevens's actions coerced her into conduct contrary to her religious beliefs, or that he otherwise prevented her from practicing her religion." Aplt. App. at 71. If Officer Stevens' instruction to Sause to stop praying was not a First Amendment violation, how can Officer Lindsey's failure to stop Stevens' instruction be a violation?

Here, Ms. Sause argues the Court ignored claims she asserted against Officer Lindsey, but just as she failed to provide allegations suggesting Officer Stevens' actions coerced her into conduct contrary to her religious beliefs, Ms. Sause failed to articulate how Officer Lindsey's actions or failures to act constituted a First Amendment violation.

IV. Ms. Sause Was Given the Opportunity to Amend Her Complaint but Failed to Do So

Ms. Sause argues in her final point that this Court should reverse the District Court's decision to dismiss her complaint with prejudice and remand with instructions to provide Ms. Sause leave to amend her complaint. Ms. Sause has ignored the fact that she was already provided that opportunity.

"Under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon." *Dopp v. Loring*, 54 F. App'x 296, 298 (10th Cir. 2002), citing *Neitzke v. Williams*, 490 U.S. 319, 329 (1989).

"In addition, pro se litigants are to be given reasonable opportunity to remedy the defects in their pleadings." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991); *Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir.1990); *Jaxon v. Circle K Corp.*, 773 F.2d 1138, 1140 (10th Cir.1985). However, the District Court has discretion to dismiss a pro se litigant's complaint without leave to amend. *See, e.g., Knight v. Mooring Capital Fund, LLC*, 749 F.3d 1180, 1190 (10th Cir. 2014) ("Although as a general rule, a pro se party should be given leave to amend, a district court acts within its discretion where it is obvious that the pro se litigant cannot prevail based upon the facts alleged and amendment would be futile.")

On November 20, 2015, pro se plaintiff Mary Anne Sause filed her Complaint alleging civil rights violations in the District Court of Kansas, accompanied by a motion for leave to proceed in forma pauperis and motion to appoint counsel. Aplt. App. at 7-20.

On January 18, 2016, Defendants filed a Motion to Dismiss Ms. Sause's Complaint for failure to state a claim. Aplt. App. at 25-37. Ms. Sause requested and was granted an extension of time of 30 days to respond to the Motion to Dismiss. Aplt. App. at 4-5. On February 8, 2016, Ms. Sause filed her Response to the Motion to Dismiss. Aplt. App. at 38-47. In addition, on March 1, 2016, Ms. Sause filed a Motion for Leave to Amend the Complaint. Aplt. App. at 51-53. Ms. Sause failed to attach her proposed amended complaint as required by D. Kan. R. 15.1(a)(2).

On April 26, 2016, the District Court entered a Memorandum and Order, ruling in part that Ms. Sause's Motion for Leave to Amend Complaint was denied without prejudice for her failure to comply with D. Kan. Rule 15.1(a)(2). The Order specifically states Ms. Sause could file another motion to amend and attach her proposed amended complaint to comply with the federal and local rules. Aplt. App. at 62-63.

On June 20, 2016, the District Court entered its Memorandum and Order granting Defendants' Motion to Dismiss with prejudice. Aplt. App. at 64-75.

Importantly, the District Court denied Ms. Sause's motion to amend her complaint "without prejudice to the filing of any future motion to amend that attaches a proposed amended complaint and complies with all applicable

Federal Rules of Civil Procedure and Local Rules." Aplt. App. at 62-63. Therefore, Ms. Sause was not denied her chance to amend her complaint. She simply failed to heed the advice of the Court. Without the proposed amended complaint attached to a motion to amend, Ms. Sause made it impossible for the Court to decide any other way than that an amendment to her complaint would be futile. *See Panicker v. State Dep't of Agric.*, 498 F. App'x 755, 757 (10th Cir. 2012) ("courts may refuse to give parties leave to amend 'upon a showing of … futility of amendment.'").

Ms. Sause also repeatedly argued in her Response to Defendants' Motion to Dismiss that she needed discovery to support her factual allegations. *See generally* Aplt. App. 38-47 ("With discovery Plaintiff would be afforded the opportunity to prove factual allegations above speculation level." Aplt. App. at 41.)

Not only was Ms. Sause on notice that her Complaint could be dismissed for failure to state a claim when Defendants' Motion to Dismiss was filed, but she was on notice a second time of her opportunity to remedy the defects in her Complaint when the Court denied her Motion for Leave to Amend her Complaint without prejudice with clear instructions on how to fix the problem. She had nearly two months to follow the roadmap the Court gave her and failed to take action. It was only then that the Court granted

Defendants' Motion to Dismiss. Ms. Sause's brief seems to ignore the fact that she had already been given a chance to amend her Complaint.

In the *Phillips* case, unlike this case, the pro se plaintiff was not provided an opportunity to remedy the defects in his complaint. On appeal, however, he failed to argue how those defects could have been corrected. That court pointed out that while the pro se plaintiff's pleadings will be construed liberally, the court "will not supply additional facts, [or] construct a legal theory for [a] plaintiff that assumes facts that have not been pleaded." *Phillips v. Pub. Serv. Co. of New Mexico*, 58 F. App'x 407, 409 (10th Cir. 2003), *citing Dunn v. White,* 880 F.2d 1188, 1197 (10th Cir.1989). The court in *Phillips* dismissed without prejudice the plaintiff's action, stating the plaintiff suffered no real disadvantage because he could have filed another complaint if he had a good faith basis to do so. *Id*.

In this case, Ms. Sause had an opportunity to amend her complaint by attaching the proposed amendment to another motion for leave to amend as prescribed by the Federal Rules of Civil Procedure and as indicated in the District Court's Memorandum and Order dated April 26, 2016. *See* Aplt. App. at 62-63. She declined to do so in the nearly two month period after the April 26, 2016 Order denying without prejudice her motion for leave to amend her

complaint and before the July 20, 2016 Memorandum and Order dismissing her case.

She also did not argue in her Motion for Leave to Amend her Complaint, nor has she argued in her appeal how she would amend her complaint to state a claim. *See* Aplt. App. at 51-53; Aplt Brief a 51-54. She argues instead that she has already stated a plausible claim (Aplt. Brief at 53-54) or that she needs discovery to show her factual allegations are "above speculative level." *See* Aplt. App. at 41.

Even Judge Lucero's dissent in *Phillips* would agree with the District Court's decision in this case. In the *Phillips* case, Judge Lucero's dissent points out "we have no idea whether Phillips's complaint could have been salvaged by amendment because the district court failed to address the issue." *Phillips*, 58 F. App'x at 410. He advocated for an approach in which the Court would analyze whether the plaintiff could possibly prevail on the facts alleged and determine that allowing the plaintiff an opportunity to amend the complaint would be futile. *Id.* .

The District Court's dismissal without prejudice of Ms. Sause's Motion for Leave to Amend her Complaint is consistent with the holding of the *Jaxon* case. *Jaxon v. Circle K Corp.*, 773 F.2d 1138, 1140 (10th Cir. 1985).

In *Jaxon*, the court concluded the *pro se* litigant should have been given an opportunity to obtain affiavits or verify his complaint before summary judgment was granted against him. *Jaxon*, 773 F.2d at 1140. "The rights of *pro se* litigants require careful protection where highly technical requirements are involved, especially when enforcing those requirements might result in a loss of the opportunity to prosecute or defend a lawsuit on the merits. District courts must take care to insure that *pro se* litigants are provided with proper notice regarding the complex procedural issues involved in summary judgment proceedings." *Id*., *citing Garaux v. Pulley*, 739 F.2d 437, 439 (9th Cir. 1984). The Tenth Circuit also noted that the denial in *Jaxon* of giving him time to put his response in proper form was a denial of a meaningful opportunity to remedy the defects in his pleading. *Jaxon*, 773 F.2d at 1140.

In this case Ms. Sause was given a meaningful opportunity to get her motion for leave to amend her complaint in proper form by attaching an amended complaint. *See* Aplt. App. at 62-63. The District Court provided an explanation that Ms. Sause could file her motion and attach the proposed amended complaint as required under the rule. Within the six month period Ms. Sause was on notice of the alleged flaws in her Complaint as asserted in Defendants' Motion to Dismiss, Ms. Sause was alerted again of her remedy in the Court's April Memorandum and Order. She failed to act on that in the

nearly two months before the Court entered its Order on the Motion to Dismiss.

Finally, Ms. Sause argues the *Gee* case supports her contention that she, like the plaintiff in *Gee*, should be given an opportunity to amend her complaint instead of having it be dismissed with prejudice. However, in the *Gee* case, the Tenth Circuit noted "[t]here is no indication that the district court considered allowing Mr. Gee to amend his complaint with regard to any of his allegations." *Gee v. Pacheco*, 627 F.3d 1178, 1195 (10th Cir. 2010). Here, as explained above, Ms. Sause requested an opportunity to amend her complaint by motion. Her failure to follow the rules in making that request was pointed out by the district court, and Ms. Sause had an opportunity for nearly two months to try again. She declined to do so. The District Court's decision to grant Defendants' Motion to Dismiss was therefore proper.

V. The District Court Properly Concluded Ms. Sause's Complaint Failed to State a Claim

Ms. Sause's argument regarding whether Officers Lindsey and Stevens are entitled to qualified immunity is unsupported. Her argument relies on the notion that she has won in proving it is "clearly established" she has a right to pray in her home while law enforcement officers speak with her about a noise complaint, and also that one or more of the officers violated that clearly established right by instructing her to stop praying. Defendants submit that

the District Court properly concluded that because Ms. Sause failed to establish that Officer Stevens violated her clearly established right, he was entitled to qualified immunity. As stated above, Defendants further submit that the District Court properly concluded that Ms. Sause did not state a First Amendment claim against Officer Lindsey.

Public officials like law enforcement officers enjoy qualified immunity in civil actions that are brought against them in their individual capacities and that arise out of the performance of their duties. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Because it is "the norm" in private actions against public officials, officials enjoy a presumption of immunity when the defense of qualified immunity is raised. *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010)(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)); *see also, Kerns v. Bader*, 663 F.3d 1173, 1180 (10th Cir. 2011))("Law enforcement officers are, of course, entitled to a presumption that they are immune from lawsuits seeking damages for conduct they undertook in the course of performing their jobs."). The purpose of qualified immunity is to shield government officials from liability as well as the process of discovery. *Anderson v. Creighton*, 483 U.S. 635, 646, n. 6 (1987) (quoting *Harlow*, 457 U.S. at 817 and *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996)) ("Defendants are permitted to appeal from the denial of a motion to dismiss on qualified

immunity grounds precisely to spare them the ordeal of discovery if the complaint fails to allege a constitutional violation or if the alleged violation was not clearly established."). Defendants raised this qualified immunity defense in its Motion to Dismiss. Aplt. App. at 25-37. The arguments raised in Defendants' Motion to Dismiss are based on Plaintiff's allegations in her Complaint, and not on evidence obtained through discovery. Aplt. App. at 94; *see also* Aplt. App. 7-20, *generally.*

In seeking to overcome that presumption Ms. Sause needed to make a two-part showing: First, that the law enforcement officer(s) violated her constitutional (or, in the case of a Section 1983 action, more generally, federally protected) rights; and second, that these rights were clearly established at the time of the alleged violation. *See*, *Lewis*, 604 F.3d at 1225; *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1312 (10th Cir. 2009). This standard, by design, "gives government officials breathing room to make reasonable, but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). The District Court's inquiry was, essentially, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the [defendant's] conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

The leap that Ms. Sause has made throughout her briefing regarding whether the officers' conduct violated her right is too great. Ms. Sause paints a picture of a woman praying pursuant to the tenants of her religion in her home while being verbally threatened by officers to stop her religious practices. Her argument ignores the reason why the officers were there and the conversation in which Ms. Sause engaged with them about the potential charges as well as other subjects she brought up (e.g., her disability). Under the circumstances outlined by Ms. Sause, no inference can be taken to lead the court to determine that her decision to pray, and Officer Stevens' instruction to stop, under these circumstances, was conduct that violated her rights.

Context matters in the "clearly established" inquiry as well. *See e.g.*, *Saucier*, 533 U.S. at 201 (holding that the "clearly established" analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition."). Thus, the court has instead held that:

> "[c]learly established" for purposes of qualified immunity means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent."
> *Wilson v. Lane*, 526 U.S. 603, 614-15 (1999).

Ms. Sause points to no case law in this Circuit that would have put these officers on notice that, under these circumstances, their actions (or inactions) violated Ms. Sause's First Amendment rights.

Finally, and perhaps most important, "a government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every "reasonable official would have understood that what he is doing violates the right." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2084, 2085 (2011)(emphasis added).

In this case, Ms. Sause failed to properly allege and demonstrate that Officers Lindsey or Stevens violated her First Amendment rights. Therefore, the District Court stopped its inquiry there. However, even if a violation was identified, Ms. Sause did not demonstrate the right was "clearly established" at the time of the conduct.

Ms. Sause's argument that even if her damages claims are dismissed, her request for injunctive relief survives is incorrect. Ms. Sause outlined her alleged damages in her Complaint. *See* Aplt. App. at 16-17. The only "damage" Ms. Sause associates with her First Amendment Free Exercise Clause right is the alleged damage she suffered for being told to stop praying. Aplt. App. 16-17. She has not alleged any ongoing damage associated with the instruction to stop praying. Moreover, once a motion to dismiss has been

granted for failure to state a claim, a plaintiff does not have the right to injunctive relief – the case is over. The District Court granted a stay on discovery and pretrial proceedings (with no objection filed by plaintiff) and could have used its discretion to stay an injunctive hearing. *See* Aplt. App. at 57-63. However, none was requested by Ms. Sause. *See generally,* Aplt. App. at 1-6. While it is the general policy in the District of Kansas to not stay litigation pending a ruling on a dispositive motion, *Wolfe v. United States*, 157 F.R.D. 494, 495 (D. Kan. 1994), it is appropriate for the court to do so until a pending dispositive motion is decided particularly when a party has asserted absolute and/or qualified immunity as an affirmative defense. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *Pfuetze v. State of Kansas*, 2010 W.L. 3718836 (D. Kan. Sept. 14, 2010). Ms. Sause did not raise the issue of holding an injunctive hearing; instead she opposed the stay on discovery after it had already been entered. The District Court addressed her motion, and then several weeks later, ruled on Defendants' motion to dismiss, ending the case.

CONCLUSION

Ms. Sause has failed to show the District Court committed error in its evaluation and ruling on Defendants' Motion to Dismiss. Defendants respectfully ask that this Court uphold the District Court's Memorandum and Order and Judgment, and that Ms. Sause's appeal be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,488 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify 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 has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman size 14 font and was converted to Portable Document Format (Adobe pdf).

I further certify that all required privacy redactions have been made.

I further certify that the hard paper copies of Brief of Appellee are exact copies of the ECF filed brief.

I further certify that the ECF submission was scanned for viruses with the most recent version of virus scanning program, Trend Micro Security

Agent, version 12.869.00, last updated 10/31/2016, and the digital version of the brief in Portable Document Format is virus free.

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ORAL ARGUMENT STATEMENT

Oral argument is necessary to permit this Court to fully and properly explore the important factual and legal issues in this case. The decisional process would be significantly aided by oral argument. Oral argument would also allow Defendants to preserve their opportunity to address and respond to any new arguments Ms. Sause might raise in a reply brief.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that the foregoing Brief of Appellee was filed electronically with the Clerk of the U.S. Court of Appeals for the Tenth Circuit on the 31st day of October, 2016. The undersigned hereby further certifies that an original and seven copies were delivered via overnight delivery with Fed Ex, to:

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I hereby certify that on October 31, 2016, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following and further certify that two copies of Brief of Appellees of Timothy J. Bauer, Jason Lindsey, Brent Ball, Ron Anderson, Lee Stevens, Marty Southard, and Travis Thompson was deposited on the 31st day of October, 2016, in the United States mail, postage prepaid:

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