No. 17–___

IN THE

# Supreme Court of the United States

MARY ANNE SAUSE,

*Petitioner*,

v.

TIMOTHY J. BAUER, ET AL.,

*Respondents.*

**On Petition for a Writ of Certiorari to United States Court of Appeals for the Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Law-enforcement officers stopped Mary Anne Sause from praying silently in her own home—not to further any legitimate law-enforcement interest, but "so they could harass her." App. 7a. The Tenth Circuit correctly "assume[d]" this conduct "violated Sause's rights under the First Amendment." App. 6a–7a.

Yet the Tenth Circuit nevertheless granted qualified immunity to the officers, solely on the ground that their alleged conduct was so obviously unconstitutional that there is no prior case law involving similar facts. *See*, *e.g.*, App. 8a (granting qualified immunity because "Sause doesn't identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here").

Does the Tenth Circuit's holding conflict with *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), which "expressly rejected a requirement that previous cases be 'fundamentally similar'" or involve "'materially similar' facts"? And does this error warrant summary relief? *See*, *e.g.*, *Tolan v. Cotton*, 134 S. Ct. 1861 (2014) (relying on *Hope*, 536 U.S. 730).

## PARTIES TO THE PROCEEDING

Petitioner is Ms. Mary Anne Sause, who was the plaintiff–appellant in the Tenth Circuit.

Respondents, who were defendants–appellees in the Tenth Circuit, are:

Timothy J. Bauer, Chief of Police of Louisburg, Kansas; Jason Lindsey, Police Officer of Louisburg, Kansas; Brent Ball, Police Officer of Louisburg, Kansas; Ron Anderson, Former Chief of Police of Louisburg, Kansas; Lee Stevens, Former Louisburg, Kansas Police Officer; Marty Southard, Mayor of City of Louisburg, Kansas; Travis Thompson, Former Mayor of City of Louisburg, Kansas.[1]

[1] Before this Court—as before the Tenth Circuit—Ms. Sause challenges the dismissal of her claims against only Stevens and Lindsey. App. 5a n.1.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Mary Anne Sause respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Tenth Circuit (App. 1a–19a) is reported at 859 F.3d 1270. The district court's memorandum and order (App. 20a–34a) is unreported, but available at 2016 WL 3387469.

## JURISDICTION

The U.S. Court of Appeals for the Tenth Circuit entered its judgment (App. 35a) on June 22, 2017. Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including November 17, 2017. *See* No. 17A252. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

42 U.S.C. § 1983 provides, as relevant here:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .”

## INTRODUCTION

This case presents one simple question: Would a reasonable police officer have known that forcing a citizen to stop praying silently in her home—absent *any* legitimate justification whatsoever—violated the First Amendment?

To ask that question is to answer it: "The principle that government may not . . . suppress religious belief or practice is so well understood that few violations are recorded in our opinions." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993).

Yet, that is precisely what Ms. Sause alleged in her complaint: Officers Stevens and Lindsey were "at her home while investigating a noise complaint." App. 3a. They told her that "the Constitution and Bill of Rights were 'nothing, [] just a piece of paper' that '[d]oesn't work here,'" and that "she was 'going to jail,' and, although they did not yet know why she would be going to jail, that her bond would be $2,000." App. 18a (Tymkovich, C.J., concurring) (alterations in original). "Understandably frightened" by the officers' "obviously unprofessional" conduct, Ms. Sause sought and received permission to pray. App. 3a–4a, 9a.

The officers then "interrupt[ed] their investigation," App. 8a, and "demanded that she '[g]et up' and '[s]top praying' only to tell her that she 'need[ed] to move from here,' 'to move back where [she] came from . . . because no one like[d] [her] here.'" App. 18a–19a (Tymkovich, C.J., concurring) (alterations in original). Lest there be any doubt, "issuing that command d[id] nothing to further their investigation." App. 7a, 9a ("they ordered her to stop praying so they could harass

her"). *See also* App. 19a (Tymkovich, C.J., concurring) ("Ms. Sause's allegations are inconsistent with any legitimate law enforcement purpose.").

The Tenth Circuit nevertheless ruled that the officers were entitled to qualified immunity—because their alleged conduct was so egregiously unconstitutional that no court "has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." App. 8a.

In doing so, the Tenth Circuit fundamentally misapprehended not only this Court's qualified-immunity jurisprudence, but the very purpose of qualified immunity itself. As this Court has explained, "qualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). Accordingly, "officials can still be on notice that their conduct violates established law *even in novel factual circumstances*." *Id.* at 741 (emphasis added) (rejecting "requirement that previous cases be 'fundamentally similar'" or have "'materially similar' facts").

The Tenth Circuit made two key rulings that, taken together, demonstrate that qualified immunity is not warranted: First, "it was clearly established that [Ms. Sause] had a 'right to pray in the privacy of [her] home free from governmental interference,' at least in the absence of 'any legitimate law enforcement interest.'" App. 7a. Second, the officers "ordered her to stop praying so they could harass her." App. 7a, 9a ("that command d[id] nothing to further their investigation").

In other words, the Tenth Circuit's own opinion demonstrates both that the officers had "fair warning"

that it was unlawful to interfere with Ms. Sause's prayer absent some legitimate law-enforcement interest and that, according to Ms. Sause's allegations, the officers did precisely that. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) ("'[T]he salient question . . . is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'") (alterations in original) (quoting *Hope*, 536 U.S. at 741).

This fundamental misapprehension of this Court's qualified-immunity jurisprudence warrants the special remedy of summary reversal. *See Tolan*, 134 S. Ct. 1861. Alternatively, the Court should grant the petition for a writ of certiorari, set the case for briefing, and reverse.

## STATEMENT OF THE CASE

1. "Obviously unprofessional" is how the Tenth Circuit described the officers' alleged conduct. App. 9a. They "acted with extraordinary contempt of a law abiding citizen" and "were more preoccupied with harassing Ms. Sause than with conducting a legitimate police investigation." App. 17a–18a (Tymkovich, C.J., concurring).

According to Ms. Sause's complaint, Officers Lee Stevens and Jason Lindsey arrived at Ms. Sause's apartment the evening of November 22, 2013, in response to a noise complaint. App. 3a. Ms. Sause had been listening to a talk-radio show.

Ms. Sause initially declined to grant the officers entry, because they had not identified themselves and her inoperable peephole prevented her from seeing who was at the door. App. 3a. The officers later returned and again demanded entry. After Ms. Sause

complied, the officers angrily asked why she initially refused to open the door. App. 3a. Ms. Sause showed them a copy of the Constitution and Bill of Rights that she keeps on display by her front door. App. 3a.

The officers then "told her the Constitution and Bill of Rights were 'nothing, [] just a piece of paper' that '[d]oesn't work here.'" App. 18a (Tymkovich, C.J., concurring) (alterations in original). After Stevens left the apartment (to speak with Ms. Sause's neighbor), Lindsey "told her to 'get ready' because she was 'going to jail,' and, although they did not yet know why she would be going to jail, that her bond would be $2,000." App. 18a.

"Understandably frightened," Ms. Sause sought and received Lindsey's permission to pray. She "knelt down on . . . [her] prayer rug" and began praying silently. App. 3a–4a (alterations in original).

"While Sause was still praying, Stevens returned and asked what she was doing." App. 4a. "Lindsey laughed and told Stevens 'in a mocking tone' that Sause was praying." App. 4a.

Stevens then "demanded that she '[g]et up' and '[s]top praying'"—"only to tell her that she 'need[ed] to move from here,' 'to move back where [she] came from . . . because no one like[d] [her] here.'" App. 18a (Tymkovich, C.J., concurring) (alterations in original). *See also* App. 7a–8a (the officers "interrupt[ed] their investigation to order [Ms. Sause] to stop engaging in religiously-motivated conduct" "so they could harass her").

The officers then "flipped through a booklet, seemingly searching for a violation with which to charge Ms. Sause, suggesting they were not going to proceed

with charges for any alleged noise violation." App. 19a (Tymkovich, C.J., concurring). The officers "repeatedly (i.e., three or four times) asked Ms. Sause to show them any tattoos or scars she had, including scars on her chest from a double mastectomy." App. 19a.

Eventually the officers issued Ms. Sause two tickets, which were unrelated to the alleged noise compliant, but instead "for not answering her door when the officers first approached." App. 19a. Only on their way out the door did the officers instruct Ms. Sause to turn down her radio, which had been playing throughout the entire interaction.

2. Proceeding pro se, Ms. Sause sued the officers under 42 U.S.C. § 1983 for violating her First Amendment rights. She sought damages and an injunction, because "the wrongs alleged . . . are continuing to occur at the present time" and because "Lindsey '[t]hreatened [her] again' sometime in March 2015 and '[l]ectured' her that '[f]reedom of [s]peech' means nothing." App. 11a (alterations in original).

The district court granted the officers' motion to dismiss, ruling that forcing Ms. Sause "to stop praying may have offended her," but "does not constitute a burden on her ability to exercise her religion." App. 29a–30a ("[they] merely instructed her to stop praying while the officers were in the middle of talking to her about a noise complaint they had received").

3. On appeal, Ms. Sause argued that the officers violated her clearly established First Amendment rights by forcing her to stop praying solely to harass her.

The Tenth Circuit "assum[ed]" that the officers "violated Sause's rights under the First Amendment

when, according to Sause, they repeatedly mocked her, ordered her to stop praying so they could harass her, [and] threatened her with arrest"—"'all over' a mere noise complaint." App. 6a–7a, 11a ("we assume that Sause's complaint adequately pleads a constitutional violation").

The Tenth Circuit also agreed with Ms. Sause that "it was clearly established that she had a 'right to pray in the privacy of [her] home free from governmental interference,' at least in the absence of 'any legitimate law enforcement interest.'" App. 7a (alteration in original) ("We don't disagree with Sause's articulation of these general rights.").

Despite acknowledging that Ms. Sause alleged that the officers "ordered her to stop praying so they could harass her"—not "to further their investigation," App. 7a, 9a—the Tenth Circuit nevertheless granted the officers qualified immunity, because Ms. "Sause doesn't identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." App. 8a–10a ("because Sause fails to identify—and our independent research fails to yield—any such authority, we . . . agree with the district court that [the officers are] entitled to qualified immunity"). *See also* App. 8a (explaining that "law isn't clearly established unless [a] court can 'identify a case where an officer acting under similar circumstances as [defendant] was held to have violated' [the] relevant constitutional right").

The court also denied Ms. Sause's request for injunctive relief, ruling that her "subjective fears, however genuine, are insufficient to establish standing." App. 14a.

Chief Judge Tymkovich wrote separately to denounce the "reprehensible" nature of the officers' alleged conduct—"the officers here acted with extraordinary contempt of a law abiding citizen and they should be condemned"—and to explain his view that the allegations "fit more neatly in the Fourth Amendment context." App. 17a (Tymkovich, C.J., concurring). As he explained, "although the officers' initial motives may have been legitimate, Ms. Sause's complaint indicates that the situation quickly devolved." Ap. 18a–19a ("If true, Sause's allegations are inconsistent with any legitimate law enforcement purpose capable of justifying . . . the alleged conduct.").

## REASONS FOR GRANTING RELIEF

The Tenth Circuit's decision fundamentally misapprehended this Court's qualified-immunity jurisprudence.

The court granted qualified immunity solely because the officers' alleged conduct was so egregiously unconstitutional that no court had addressed "a factual scenario even remotely resembling the one we encounter here." App. 8a, 10a ("Sause fails to identify—and our independent research fails to yield—any such authority.").

But this Court has "expressly rejected a requirement that previous cases be 'fundamentally similar'" or involve "'materially similar' facts." *Hope*, 536 U.S. at 741. Instead, the "'salient question . . . is whether the state of the law' at the time of an incident provided

'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" *Tolan*, 134 S. Ct. at 1866 (alterations in original) (quoting *Hope*, 536 U.S. at 741).

Had the Tenth Circuit applied the correct standard, it would have denied qualified immunity because any reasonable officer would have known that the officers' alleged conduct was unconstitutional. As the court acknowledged, "it was clearly established" that interfering with a citizen's prayer is unlawful—"at least in the absence of 'any legitimate law enforcement interest.'" App. 7a ("We don't disagree"). And that is precisely what the officers did: they "ordered her to stop praying so they could harass her," and their "command d[id] nothing to further their investigation." App. 7a, 9a. That is, the officers had fair notice that interfering with Ms. Sause's prayer without some legitimate justification was unconstitutional—and the officers allegedly did exactly that.

Summary reversal would allow the Court to clarify the law in these important areas—religious liberty and qualified immunity—while conserving its scarce resources. Given the frequency with which lower courts must grapple with claims of qualified immunity, the Court's guidance is critical to ensure that they do not continue to rely on a qualified-immunity standard that this Court has explicitly rejected.

## I. THIS CASE MERITS SUMMARY REVERSAL.

This Court frequently has exercised its "summary reversal procedure . . . to correct a clear misapprehension of the qualified immunity standard." *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004). *See also Mullenix v. Luna*, 136 S. Ct. 305 (2015); *Talyor v. Barkes*,

135 S. Ct. 2042 (2015); *Stanton v. Sims*, 134 S. Ct. 3 (2013). This Court has summarily reversed to remedy not only improper qualified-immunity denials, but also erroneous grants of qualified-immunity. *E.g.*, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017); *Tolan*, 134 S. Ct. 1861.[2] It should do so here as well.

In *Hope*, this Court reversed the Eleventh Circuit for making precisely the same error that the Tenth Circuit made here: granting qualified immunity because there were no "earlier cases with 'materially similar' facts." 536 U.S. at 733, 739 ("This rigid gloss on the qualified immunity standard . . . is not consistent with our cases.").[3] As the Court explained, it reversed because it had both "expressly rejected a requirement that previous cases be 'fundamentally similar'" and made clear "that officials can still be on notice that their conduct violates established law *even in novel factual circumstances*." *Id.* at 741 (emphasis added).

Here, the Tenth Circuit misinterpreted this Court's recent precedents as requiring it to grant

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[2] *See also Salazar–Limon v. City of Houston*, 137 S. Ct. 1277, 1282 (2017) (Sotomayor, J., dissenting from the denial of certiorari) ("We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity.") (citing cases); *id*. at 1278 (Alito, J., concurring in the denial of certiorari) ("The dissent has not identified a single case in which we failed to grant a similar petition filed by an alleged victim of unconstitutional police conduct.").

[3] *See also United States v. Lanier*, 520 U.S. 259, 269, 272 (1997) (by requiring "a factual situation that is 'fundamentally similar' . . . the Court of Appeals used the wrong gauge in deciding whether prior judicial decisions gave fair warning that [defendants'] actions violated constitutional rights").

qualified immunity "unless [it] can 'identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated' [the] relevant constitutional right." App. 7a–8a (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017)). Because Ms. Sause could not "identify a single case" that "found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here," the Tenth Circuit granted qualified immunity. App. 8a, 10a ("because Sause fails to identify—and our independent research fails to yield—any such authority, we conclude that . . . [the officers are] entitled to qualified immunity").

The Tenth Circuit did not cite *Hope*, let alone grapple with its admonition that qualified immunity can be defeated "even in novel factual circumstances," when it explained that qualified immunity was warranted because "this case presents a unique set of facts." App. 8a. *See also* App. 9a–10a & n.8 (questioning "continuing validity" of principle that "obviously egregious" conduct requires "less specificity . . . from prior case law'").

Summary reversal would allow this Court to correct the Tenth Circuit's clear misapprehension of the qualified-immunity standard and to clarify that *Hope* remains good law.

## II. QUALIFIED IMMUNITY CAN BE OVERCOME BY CONDUCT SO EGREGIOUS THAT NO PREVIOUS CASE HAS HELD UNLAWFUL THE DEFENDANTS' "PARTICULAR CONDUCT."

Ms. Sause alleged that the officers "ordered her to stop praying so they could harass her." App. 7a; App. 18a–19a (Tymkovich, C.J., concurring) (officers

demanded she stop praying "only to tell her that she 'need[ed] to move from here,' 'to move back where [she] came from . . . because no one like[d] [her] here'") (alterations in original). That is, her "allegations are inconsistent with any legitimate law enforcement purpose capable of justifying . . . the alleged conduct." App. 19a; App. 9a ("that command d[id] nothing to further their investigation").

The Tenth Circuit also agreed that any reasonable officer would have known that it was unconstitutional to interfere with an individual's prayer without some legitimate law-enforcement interest. App. 7a ("it was clearly established" that "interfer[ing]" with "right to pray" was unlawful—"at least in the absence of 'any legitimate law enforcement interest'").

The court nevertheless granted qualified immunity—because Ms. Sause "doesn't identify a single case" involving a "factual scenario" as egregiously unconstitutional as the officers' alleged conduct. App. 8a.[4]

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[4] Lest there by any doubt, even a cursory review of the Tenth Circuit's decision demonstrates that the lack of a case holding the officers' particular conduct unconstitutional was dispositive. *See*, *e.g.*, App. 8a ("Sause doesn't identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here."); App. 10a ("because Sause fails to identify—and our independent research fails to yield—any such authority, we conclude that the law isn't clearly established"); App. 10a ("Sause can *only* satisfy the clearly-established prong by citing a case or cases that make clear 'the violative nature of [the defendants'] *particular* conduct.") (first emphasis added; alteration in original); App. 15a ("defendants are nevertheless entitled to qualified immunity because Sause fails to identify *a case* that 'place[s] the . . . constitutional question beyond debate'") (emphasis added; alterations in original).

That ruling reflects a clear misapprehension of this Court's qualified-immunity jurisprudence. *Cf. Hope*, 536 U.S. at 741 (no qualified immunity if officers had "fair warning that their alleged [conduct] was unconstitutional").

1. The purpose of qualified immunity is "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001).

Accordingly, the "'salient question . . . is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" *Tolan*, 134 S. Ct. at 1866 (alterations in original) (quoting *Hope*, 536 U.S. at 741). *See also Reichle v. Howards*, 566 U.S. 658, 664–65 (2012) (asking whether "every 'reasonable official would [have understood] that what he is doing violates that right'") (alteration in original).

As this Court emphasized in *Hope*, "officials can still be on notice that their conduct violates established law even *in novel factual circumstances*." 536 U.S. at 741 (emphasis added). "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with 'materially similar' facts." *Ibid*.

This is true because "general statements of the law are not inherently incapable of giving fair and clear warning." *Ibid.* Similarly, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question

has [not] previously been held unlawful.'" *Ibid.* (alteration in original) (quoting *Lanier*, 520 U.S. at 270–71).

2. Given the clear and alarming egregiousness of the officers' alleged misconduct here, it is unsurprising that no court has had occasion to declare it unconstitutional. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) ("The unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason . . . that '[t]he easiest cases don't even arise.'") (quoting *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)).

Yet the Tenth Circuit ruled that the officers were entitled to qualified immunity precisely because Ms. Sause was unable to "identify a single case" finding "a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." App. 8a, 10a ("because Sause fails to identify—and our independent research fails to yield—any such authority, . . . [the officers are] entitled to qualified immunity").

The Tenth Circuit believed its ruling was compelled by this Court's recent precedents, which it erroneously interpreted as requiring a court to grant qualified immunity "unless [it] can 'identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated' [the] relevant constitutional right." App. 7a–8a (quoting *White*, 137 S. Ct. at 552). *See also* App. 10a ("Sause can only satisfy the clearly-established prong by citing a case or cases" addressing the officers' "*particular* conduct") (quoting *Mullenix*, 136 S. Ct. at 308).

The Tenth Circuit's error stemmed from its misapprehension that *Mullenix* and *White* overruled *sub*

*silentio Hope*'s admonition that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." 536 U.S. at 741. *See* App. 9a–10a & n.8 (questioning, in light of *Mullenix*, "continuing validity" of principle that "obviously egregious" conduct requires "less specificity . . . from prior case law") (citing *Aldaba v. Pickens*, 844 F.3d 870, 874 n.1 (10th Cir. 2016)).[5]

But neither *Mullenix* nor *White* purported to expressly overrule *Hope* and, as this Court has reminded lower courts, its "decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252–53 (1998).

Nor do *Mullenix* or *White* even call into question *Hope*'s admonition that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." 536 U.S. at 741. This Court summarily reversed in those cases because the courts of appeals had relied on qualified-immunity theories that this Court had already rejected. *See*

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[5] *See also Aldaba*, 844 F.3d at 874 n.1 ("To show clearly established law, the *Hope* Court did not require earlier cases with 'fundamentally similar' facts, noting that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.' . . . But the Supreme Court has vacated our opinion here and remanded for us to reconsider our opinion in view of *Mullenix*, which reversed the Fifth Circuit after finding that the cases it relied on were 'simply too factually distinct to speak clearly to the specific circumstances here.' We also note that the majority opinion in *Mullenix* does not cite *Hope v. Pelzer*. As can happen over time, the Supreme Court might be emphasizing different portions of its earlier decisions.") (internal citations omitted).

*White*, 137 S. Ct. at 552 ("we have held" that the cases "relied on" by Tenth Circuit "do not by themselves create clearly established law"); *Mullenix*, 136 S. Ct. at 309 ("this Court has previously considered—and rejected—almost th[e] exact formulation of the qualified immunity question" that Fifth Circuit relied on). In short, *Hope*'s central teaching—that certain egregious *factual scenarios* are so clearly unconstitutional that prior precedent on point is unnecessary and unlikely to exist—was not at issue in those cases.

3. Perhaps more importantly, unlike in certain areas of law (the Fourth Amendment, for example), the contours of the Free Exercise Clause are sufficiently clear that less specificity is required to afford officers fair notice. *Compare Brosseau*, 543 U.S. at 199 ("the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application"), *with Lukumi*, 508 U.S. at 523 ("The principle that government may not . . . suppress religious belief or practice is so well understood that few violations are recorded in our opinions.").

The "Fourth Amendment's text" and the cases interpreting it "are cast at a high level of generality." *Brosseau*, 543 U.S. at 199. *See also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) ("The Fourth Amendment provides an example of how qualified immunity functions with respect to abstract rights."). Accordingly, "specificity is especially important in the Fourth Amendment context." *Mullenix*, 136 S. Ct. at 308–09 ("this area is one in which the result depends very much on the facts of each case"). Because it is often "difficult for an officer to know whether a search or seizure will be deemed reasonable given the precise situation encountered" the "dispositive question" in

the Fourth Amendment context is "whether the violative nature of *particular* conduct is clearly established." *Ziglar*, 137 S. Ct. at 1866–67 (quoting *Mullenix*, 136 S. Ct. at 308).

The Free Exercise Clause, on the other hand, is much more concrete—it proscribes government action "prohibiting the free exercise" of religion. U.S. Const. amend. I. *Cf. Groh v. Ramirez*, 540 U.S. 551, 563 (2004) ("Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid."). Similarly, the "general constitutional rule already identified" in the Free Exercise context—that officers cannot burden religious exercise absent some legitimate government interest, *see* Part III.A.2—applies "with obvious clarity" to conduct burdening religious exercise with *no* justification. *Hope*, 536 U.S. at 741. *See Lukumi*, 508 U.S. at 523 ("The principle that government may not . . . suppress religious belief or practice is so well understood that few violations are recorded in our opinions.").

Accordingly, that a free-exercise case may present "a unique set of facts and circumstances," App. 8a, is unsurprising—given that the Free Exercise Clause's contours are so well understood—not an "important indication" that the officers "did not violate a 'clearly established right.'" App. 8a (quoting *White*, 137 S. Ct. at 552).

As this Court explained in *Lanier*, that the "easiest cases don't even arise" does not mean "that if such a case arose, the officials would be immune." 520 U.S. at 271. Put another way,

> some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt.

*Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015) (Gorsuch, J.) (citing *Northern v. City of Chicago*, 126 F.3d 1024, 1028 (7th Cir. 1997)). *See also Safford*, 557 U.S. at 377 ("unconstitutionality of outrageous conduct obviously will be unconstitutional"); *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 251 (2d Cir. 2001) ("in many instances, 'the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with' the well-recognized applications of the right at issue on the part of government actors") (quoting *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994)).

* * *

Ms. Sause alleged that the officers "ordered her to stop praying so they could harass her," App. 7a—blatantly disregarding a principle "so well understood that few violations are recorded." *Lukumi*, 508 U.S. at 523. Yet, the Tenth Circuit granted qualified immunity precisely because no court "has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." App. 8a. That ruling fundamentally misapprehends this Court's qualified-immunity jurisprudence and

should be summarily reversed. *Cf. Hope*, 536 U.S. at 741 (denying qualified immunity where "the violation was so obvious that our own Eighth Amendment cases gave respondents fair warning that their conduct violated the Constitution").

## III. EVEN WITHOUT PRECEDENT INVOLVING SIMILARLY EGREGIOUS FACTS, THE OFFICERS HAD CLEAR NOTICE THAT COMMANDING A CITIZEN TO STOP PRAYING SILENTLY IN HER HOME—ABSENT ANY JUSTIFICATION—WAS UNCONSTITUTIONAL.

### A. It Was Clearly Established That Government Actors Cannot Interfere with Religious Exercise Absent a Legitimate Justification.

Ms. Sause explained below that "it was clearly established that she had a 'right to pray in the privacy of [her] home free from governmental interference,' at least in the absence of 'any legitimate law enforcement interest.'" App. 7a (alteration in original). The Tenth Circuit "d[id]n't disagree," App. 7a—for good reason.

1. It is axiomatic that prayer—a quintessential form of religious exercise—is protected from governmental interference by the Free Exercise Clause. *See Lukumi*, 508 U.S. at 521 ("that government may not . . . suppress religious belief *or practice* is so well understood that few violations are recorded in our opinions") (emphasis added).[6]

[6] Courts throughout the country and throughout history have recognized that the Free Exercise Clause protects the right to pray from unjustified governmental interference. *See*, *e.g.*,

In determining whether the government has impermissibly interfered with a citizen's First Amendment rights by substantially burdening her religious exercise, courts focus "on the coercive impact of the government's actions." *Yellowbear v. Lampert*, 741 F.3d 48, 55 (2014) (Gorsuch, J.) ("the inquiry here isn't into the merit of the plaintiff's religious beliefs or the relative importance of the religious exercise"). *See also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775–79 (2014). A burden "rises to the level of being 'substantial' when" the government "prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief" or "present[s] an illusory or Hobson's choice where the only realistically possible course of action available . . . trenches on sincere religious exercise." *Yellowbear*, 741 F.3d at 55 (citing *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010), *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988), and *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981)). *See also Koger v. Bryan*, 523 F.3d 789, 802 (7th Cir. 2008) ("the prohibition against substantially burdening sincerely held religious beliefs is well-established in Free Exercise Clause cases").[7]

It would have been obvious to any reasonable officer that commanding a citizen to stop praying would

*Chaplinsky v. New Hampshire*, 315 U.S. 568, 570–71 (1942) ("Freedom of worship is similarly sheltered" "from invasion by state action"); *McCurry v. Tesch*, 738 F.2d 271, 275 (8th Cir. 1984) ("The right to worship free from governmental interference lies at the heart of the First Amendment."). This fundamental principle is undisputed.

[7] No one has challenged either the sincerity of Ms. Sause's religious beliefs or that her prayer was motivated by those beliefs.

substantially burden her religious exercise by forcing her to stop praying.[8]

2. This Court repeatedly has made clear that government action that substantially burdens a citizen's religious exercise is unconstitutional unless it furthers *some* legitimate government interest. *See*, *e.g.*, *Lukumi*, 508 U.S. at 531–32; *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). *See also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348–53 (1987).

As this Court reiterated in *Lukumi*, government action that substantially burdens religious exercise must be "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." 508 U.S. at 531–32. *See Koger*, 523 F.3d at 802–03 ("the difficult burden laid on a defendant who must show that its conduct was the 'least restrictive means of achieving some compelling state interest' *has been*

[8] The officers argued below that their command did not impose a substantial burden because they did not explicitly threaten to arrest Ms. Sause if she failed to comply. But any reasonable officer would have been well aware that his authoritative command was coercive—especially where, as here, the officers "convey a message that compliance with their request[] is required." *Florida v. Bostick*, 501 U.S. 429, 435 (1991). *See also 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"); *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."). *Cf. Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 (3d Cir. 2016) ("Although Mack concedes that the officers did not directly command him to cease praying, a burden can be 'substantial' even if it involves indirect coercion to betray one's religious beliefs.").

*established for decades*") (emphasis added) (quoting *Thomas*, 450 U.S. at 718).

Although the prohibition against substantially burdening religious exercise is "so well understood that few violations are recorded," *Lukumi*, 581 U.S. at 523, several circuit courts have held that officers violated the First Amendment by burdening citizens' religious exercise absent sufficient justification.

In *Fifth Avenue Presbyterian Church v. City of New York*, for example, the Second Circuit ruled that officers who dispersed homeless persons from church property violated the church's free exercise rights because the officers had neither "sufficiently shown the existence of a relevant law or policy that is neutral and of general applicability" that justified their actions nor demonstrated that their actions were "justified by a compelling state governmental interest." 293 F.3d 570, 576 (2d Cir. 2002) (rejecting interest in "preventing the Church from providing inadequate shelter nightly and encouraging homeless persons to avoid a safer, more civilized alternative"). *See also Fifth Ave. Presbyterian Church v. City of New York*, 177 F. App'x 198 (2d Cir. 2006) (affirming permanent injunction granted to church).

In *McTernan v. City of York*, the Third Circuit reversed summary judgment granted to an officer whose threat of arrest prevented a citizen from continuing to engage in religiously motived speech, ruling that the officer had not demonstrated that his actions were "'generally applicable' *and* 'neutral'" or justified by "a compelling government interest." 564 F.3d 636, 647–

51 & n.6 (3d Cir. 2009) (rejecting interest in "promoting traffic safety"). *See also Snell v. City of York*, 564 F.3d 659, 666 & n.8 (3d Cir. 2009) (same).

In *McCurry v. Tesch*, the Eighth Circuit ruled that officers violated the First Amendment by arresting citizens who were praying in a church—even though the officers acted pursuant to an injunction ordering the church to be closed and padlocked because it was used to operate "a school without complying with Nebraska school laws." 738 F.2d 271, 272, 275–76 (8th Cir. 1984) (rejecting interest in "preventing the operation of the unapproved church school"). On a subsequent appeal, the Eighth Circuit emphasized 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." *McCurry v. Tesch*, 824 F.2d 638, 641–42 (8th Cir. 1987).[9]

These cases clearly establish two principles that mandate reversal in this case: (1) it is clearly established that when an officer substantially burdens a citizen's religious liberty, he must have a persuasive and specific justification for doing so, and (2) some actions—like carrying praying people out of a church without a court order or ordering a woman to stop praying silently in her home without justification—

[9] That the Eighth Circuit ultimately granted the officers qualified immunity in *McCurry* is of no moment. There, a court order at least arguably "authorize[d] what these defendants did." 824 F.2d at 641–42. Here, the officers' conduct not only lacked judicial imprimatur but was "inconsistent with any legitimate law enforcement purpose." App. 19a (Tymkovich, C.J., concurring).

are so blatantly unlawful that qualified immunity is inappropriate.

The officers' alleged conduct here would have been obvious to any reasonable officer—under *any* level of scrutiny—for one simple reason. The officers have not demonstrated *any* justification for their actions consistent with Ms. Sause's allegations—let alone a compelling, narrowly tailored justification.[10]

3. The flagrant unlawfulness of the officers' conduct becomes even clearer when one considers cases brought by incarcerated persons: Courts routinely have denied qualified immunity to prison officials who engage in conduct similar to the conduct alleged here. It is disturbing that if Ms. Sause were incarcerated—

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[10] Strict scrutiny is appropriate because the officers have not attempted to "demonstrat[e] that a neutral law of general applicability justifies [their] actions." *Fifth Ave. Presbyterian Church*, 293 F.3d at 575. In addition, Ms. Sause alleged that the officers acted with religious animus—they not only laughed at and mocked her prayer but also explicitly commanded her to "stop praying." App. 7a. *See Brown v. Borough of Mahaffey*, 35 F.3d 846, 849–50 (3d Cir. 1994) ("government actions intentionally discriminating against religious exercise *a fortiori* serve no legitimate purpose"). *See also Lukumi*, 508 U.S. at 534, 547.

At a minimum—even assuming the officers' command was neutral and generally applicable—they still must show that it was "a reasonable means of promoting a legitimate public interest." *Bowen v. Roy*, 476 U.S. 693, 707–08 (1986). Given the procedural posture of this case, the officers cannot do even that—as the Tenth Circuit explained. App. 7a, 9a (the officers "ordered her to stop praying so they could harass her"—"not[] to further their investigation"); App. 19a (Tymkovich, C.J., concurring) ("Ms. Sause's allegations are inconsistent with any legitimate law enforcement purpose.")

rather than in the privacy of her own home—she likely would have prevailed below.

It is "clearly established" that even in the prison context officers "may not substantially burden inmates' right to religious exercise without *some* justification." *Salahuddin v. Goord*, 467 F.3d 263, 275–76 (2d Cir. 2006) (emphasis added). *See Young v. Coughlin*, 866 F.2d 567, 570 (2d Cir. 1989) ("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.'") (quoting *O'Lone*, 482 U.S. at 349, and citing *Cruz v. Beto*, 405 U.S. 319 (1972)). *See also Crowder v. Lash*, 687 F.2d 996, 1004 (7th Cir. 1982) ("A prisoner's right to the free exercise of his religion, limited only by a prison's legitimate security interests, was clearly established during the time Crowder was confined.").[11]

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[11] *See also Barnes v. Furman*, 629 F. App'x 52, 56 (2d Cir. 2015) ("it has been clearly established that burdens on prisoners' free exercise rights must be justified by a legitimate penological interest"); *Hall v. Ekpe*, 408 F. App'x 385, 388 n.3 (2d Cir. 2010) ("it was clearly established at the time of the alleged violation that prison officials may not substantially burden the right of free exercise 'without some justification'"); *Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir. 2005) ("law was clearly established that prison officials must have a legitimate penological interest before imposing a substantial burden on the free exercise of an inmate's religion, even when that inmate is in disciplinary segregation"); *Ford v. McGinnis*, 352 F.3d 582, 597–98 (2d Cir. 2003) (Sotomayor, J.) ("prior cases make it sufficiently clear that absent a legitimate penological justification, which for present purposes we must assume defendants were without, prison officials' conduct in denying Ford a feast imbued with religious import was unlawful"). *Cf. U.S. ex rel. Jones v. Rundle*, 453 F.2d 147, 149–

Accordingly, courts have repeatedly denied qualified immunity to prison officials who burden a prisoner's religious exercise "absent a legitimate penological justification." *Ford v. McGinnis*, 352 F.3d 582, 597–98 (2d Cir. 2003) (Sotomayor, J.) (denying one religious meal). *See Johnson v. Brown*, 581 F. App'x 777, 779–81 (11th Cir. 2014) (ordering prisoner "to stop praying"); *Arroyo Lopez v. Nuttall*, 25 F. Supp. 2d 407, 409–10 (S.D.N.Y. 1998) (disrupting "prayer when the inmate was praying quietly"). *Cf. Walker v. Fasulo*, 2015 WL 1959190, at *4 (D. Nev. Apr. 29, 2015) ("prevent[ing] Plaintiff from praying" and "threaten[ing] to send Plaintiff to disciplinary housing if he attempted to pray without permission").

* * *

Given that any reasonable prison official would have known that he cannot force an inmate to stop praying without justification, it strains credulity to suggest that the officers here lacked fair notice that forcing Ms. Sause (who was not even under arrest) to stop praying was unlawful—particularly considering that she was in the privacy of her own home. *Cf. Stanley v. Georgia*, 394 U.S. 557, 564–65, 568 (1969); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

### B. No Reasonable Officer Could Have Believed That Ordering a Citizen to Stop Praying So He Could Harass Her Was Constitutional.

As this Court has framed it, "the appropriate question is . . . whether a reasonable officer could have

51 (3d Cir. 1971) ("where religious freedoms are curtailed by prison officials, the Government must show compelling justification for such deprivations").

believed" that the alleged conduct was "lawful, in light of clearly established law and the information the officers possessed." *Wilson v. Layne*, 526 U.S. 603, 615 (1999). *See also Tolan*, 134 S. Ct. at 1866 (asking "'whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional") (quoting *Hope*, 536 U.S. at 741).

1. The Tenth Circuit recognized that "it was clearly established" that "interfer[ing]" with a citizen's "right to pray" was unconstitutional—"at least in the absence of 'any legitimate law enforcement interest." App. 7a. *See also* Part III.A. Ms. Sause plausibly alleged that the officers "ordered her to stop praying so they could harass her," App. 7a—"allegations [that] are inconsistent with any legitimate law enforcement purpose capable of justifying . . . the alleged conduct." App. 19a (Tymkovich, C.J., concurring). And no one would seriously contend that harassment—"obviously unprofessional" conduct that demonstrates "extraordinary contempt of a law abiding citizen"—is a legitimate law-enforcement interest. App. 9a, 17a.

Thus, the only question is whether the officers possessed some information that would have led them to believe that their otherwise egregiously unconstitutional behavior was lawful.

2. "Because this case was resolved on a motion to dismiss, the Court accepts the allegations in the complaint as true." *Hernandez*, 137 S. Ct. at 2005. Accordingly, at this stage in the case, any justification the officers might have had must be evident from the facts in Ms. Sause's complaint.

In the Tenth Circuit's view, the officers' "obviously unprofessional" conduct was permissible because they were "in the midst of a legitimate investigation":

> It certainly wouldn't be obvious to a reasonable officer that, in the midst of a legitimate investigation, the First Amendment would prohibit him or her from ordering the subject of that investigation to stand up and direct his or her attention to the officer—even if the subject of the investigation is involved in religiously-motivated conduct at the time, and even if what the officers say or do immediately after issuing that command does nothing to further their investigation.

App. 9a.

Although there are exigent circumstances that may justify intruding on a citizen's constitutional rights, it is black-letter law that merely being "in the midst of a legitimate investigation" is not such a circumstance.

And, as Ms. Sause's complaint makes clear, the officers faced no exigencies that might otherwise justify infringing upon her right to pray.

There were no concerns for their safety: the officers had already secured Ms. Sause's home, and she was on her knees, silently praying—which they had given her permission to do. App. 4a.[12]

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[12] *Cf. City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775 (2015) (officers faced "dangerous circumstances"; plaintiff "had a weapon and had threatened to use it to kill three people"); *Stanton*, 134 S. Ct. at 4 (officer "fear[ed] for [his] safety"; made "split-second decision") (alterations in original); *Ryburn v. Huff*,

Nothing required the officers to make split-second decisions: they had been at Ms. Sause's home well "beyond the time reasonably required to complete the legitimate police objective justifying the encounter." App. 17a (Tymkovich, C.J., concurring).[13]

There were no concerns about evidence being destroyed: the officers were responding to a noise complaint, for which they allegedly never cited Ms. Sause. App. 19a (officers "issued Ms. Sause tickets for . . . not answering her door when the officers first approached").[14]

And, more importantly, even if being "in the midst of a legitimate investigation" could otherwise justify forcing Ms. Sause to stop praying, the Tenth Circuit explained that their "command d[id] nothing to further their investigation." App. 9a. *See also* App. 18a–19a (Tymkovich, C.J., concurring) (officers "demanded that she '[g]et up' and '[s]top praying' only to tell her that she 'need[ed] to move from here,' 'to move back where [she] came from . . . because no one like[d] [her] here.'") (alterations in original).

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565 U.S. 469, 475 (2012) (officers faced "imminent threat to their safety and to the safety of others").

[13] *Cf. Wood v. Moss*, 134 S. Ct. 2056, 2067 (2014) (circumstances required officers "make singularly swift, on the spot, decisions"); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) (officers "forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving"); *Anderson v. Creighton*, 483 U.S. 635, 637 (1987) (discussing "presence of exigent circumstances").

[14] *Cf. Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (preventing evidence destruction may justify otherwise unconstitutional search); *Ker v. California*, 374 U.S. 23, 30–40 (1963) (preventing "destruction of contraband" justified "officers' failure to give notice").

In short, taking Ms. Sause's allegations as true, no reasonable officer would have believed that the situation the officers confronted justified their conduct. *See Hope*, 536 U.S. at 738 (denying qualified immunity and emphasizing "clear lack of an emergency situation" and that any "safety concerns had long since abated").

3. It bears mention that the officers could conceivably offer some justification for their conduct. But no justification is evident from Ms. Sause's complaint. Given the procedural posture of this case, that is dispositive. *See Hernandez*, 137 S. Ct. at 2007–08 (reversing grant of qualified immunity, because circuit court relied on fact not alleged in complaint); *Johnson*, 581 F. App'x at 781 ("Given the procedural posture of Johnson's case . . . the facts surrounding the defendants' justification for their alleged interference with Johnson's religious practices must still be developed."). *See also Tolan*, 134 S. Ct. at 1868 (vacating and remanding "so that the court can determine whether, when [plaintiff's] evidence is properly credited and factual inferences are reasonably drawn in his favor, [defendant's] actions violated clearly established law").

* * *

Any reasonable officer would have known that that forcing a citizen to stop praying in her own home—even if the officer was in the midst of investigating a noise complaint—was unconstitutional absent *some* legitimate law-enforcement purpose. In other words, the officers had "fair notice" that their alleged conduct was unconstitutional and were not entitled to qualified immunity.

Because the Tenth Circuit's decision fundamentally misapprehended this Court's qualified-immunity precedents, the Court should not allow it to stand.

## CONCLUSION

The Court should summarily reverse the judgment of the Court of Appeals. In the alternative, the Court should grant the petition for a writ of certiorari, set the case for full merits briefing, and reverse the judgment below.

Respectfully submitted.

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November 17, 2017

# APPENDIX

# APPENDIX A

## United States Court of Appeals for the Tenth Circuit

No. 16-3231

MARY ANNE SAUSE,

*Plaintiff – Appellant,*

v.

TIMOTHY J. BAUER, Chief of Police; JASON LINDSEY, Police Officer of Louisburg, Kansas; BRENT BALL, Police Officer of Louisburg, Kansas; RON ANDERSON, Former Chief of Police of Louisburg, Kansas; LEE STEVENS, Former Louisburg, Kansas Police Officer; MARTY SOUTHARD, Mayor of City of Louisburg, Kansas; TRAVIS THOMPSON, Former Mayor of City of Louisburg, Kansas,

*Defendants – Appellees.*

## Appeal from United States District Court for the District of Kansas (D.C. No. 2:15-CV-09633-JAR-TJJ)

Bradley G. Hubbard, Gibson, Dunn & Crutcher LLP, Dallas, Texas (James C. Ho, Gibson Dunn & Crutcher LLP, Dallas, Texas, Hiram S. Sasser III, Justin E. Butterfield and Stephanie N. Phillips, First Liberty Institute, Plano, Texas, and Jason Neal, Gibson, Dunn & Crutcher LLP, Washington, D.C., with him on the briefs), for Plaintiff–Appellant.

Christopher B. Nelson, Fisher, Patterson, Sayler & Smith, LLP, Overland Park, Kansas (Michael K. Seck and Amy J. Luck, Fisher, Patterson, Sayler & Smith, LLP, Overland Park, Kansas, on the brief), for Defendants–Appellees.

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Before **TYMKOVICH**, Chief Judge, **LUCERO** and **MORITZ**, Circuit Judges.

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**MORITZ**, Circuit Judge.

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Mary Anne Sause brought this action under 42 U.S.C. § 1983, alleging that Officers Lee Stevens and Jason Lindsey (the defendants) violated her rights under the First Amendment. The district court dismissed Sause's complaint with prejudice for failure to state a claim, *see* Fed. R. Civ. P. 12(b)(6), and Sause appeals.

Because Sause fails to demonstrate that the contours of the right at issue are clearly established, we agree with the district court that the defendants are entitled to qualified immunity. And we likewise agree that allowing Sause leave to amend her complaint would be futile. Accordingly, we affirm the district court's order to the extent that it dismisses with prejudice Sause's claims for money damages. But because we conclude that Sause lacks standing to assert her claims for injunctive relief, we reverse in part and remand with instructions to dismiss those claims without prejudice.

## I

We derive the following facts from Sause's pro se complaint, construing her allegations liberally and in the light most favorable to her. *See Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991) ("A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff."); *id.* at 1110 ("A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers.").

On November 22, 2013, the defendants contacted Sause at her home while investigating a noise complaint. At first, Sause denied the defendants entry "[f]or [her] protection" because she couldn't see through her peephole to determine who was at her door. App. 14. But when the defendants later returned, Sause let them in.

"[A]ppearing angry," the defendants asked Sause why she didn't answer her door the first time. *Id.* at 12. Sause responded by showing them a copy of the Constitution and Bill of Rights that she keeps "on display" by her front door. *Id.* at 13. Lindsey "laugh[ed]" and "mock[ed]" Sause, saying, "[T]hat's nothing, it's just a piece of paper" that "[d]oesn't work here." *Id.* Lindsey also turned on his body camera and told Sause that she was "going to be on" the television show "COPS." *Id.*

At some point, Stevens left Lindsey alone with Sause and her friend Sharon Johnson, who was also present. Lindsey then informed Sause that she "was going to jail," although he "d[idn't] know [why] yet." *Id.* Understandably frightened, Sause asked Lindsey

if she could pray. Lindsey replied, "Yes," and Sause "knelt down on . . . [her] prayer rug." *Id.*

While Sause was still praying, Stevens returned and asked what she was doing. Lindsey laughed and told Stevens "in a mocking tone" that Sause was praying. *Id.* Stevens then ordered Sause to "[g]et up" and "[t]o [s]top praying." *Id.* at 13–14.

Sause's complaint doesn't explicitly state that she complied with Stevens' orders, but it appears she at least stopped praying; when Lindsey told her that she "need[ed] to move back" to Missouri, Sause responded, "Why?" *Id.* at 14. Lindsey then explained to Sause that Sause's apartment manager told him that "no one likes" Sause. *Id.*

Next, the defendants started "looking through [their] booklet" for something to charge Sause with. *Id.* "Lindsey would point" at something in the book, and Stevens "would shake [his] head." *Id.* Eventually, the defendants cited Sause for disorderly conduct and interfering with law enforcement, based at least in part on Sause's failure to answer the door the first time the defendants "came out." *Id.* The defendants then asked to see Sause's tattoos and scars. Sause explained several times that she had previously "had a double mastectomy" and eventually "raised [her] shirt up" and showed the defendants her scars "because they kept asking." *Id.* "That appeared to disgust" the defendants. *Id.* And it "humiliat[ed]" Sause. *Id.*

Two years later, Sause filed suit under § 1983, alleging that the defendants violated her First Amendment rights.[1] The defendants moved to dismiss with prejudice, arguing that Sause's complaint fails to state a claim upon which relief can be granted and that they're entitled to qualified immunity. In response, Sause moved to amend her complaint. Citing a local rule, the district court denied Sause's motion because Sause failed to attach to it a proposed amended complaint. The court explained that it wasn't foreclosing "any future motion to amend that attaches a proposed amended complaint and complies with all applicable [rules]." *Id.* at 62–63.

But when Sause failed to file another motion to amend, the district court granted the defendants' motion to dismiss with prejudice. In doing so, the court reasoned that while Stevens "may have offended" Sause by ordering her to stop praying, he didn't "burden . . . her ability to exercise her religion." *Id.* at 71. Accordingly, the district court concluded that Sause's complaint fails to allege "a plausible First Amendment claim against" Stevens; ruled that Stevens is entitled to qualified immunity; and dismissed Sause's First Amendment claim against him.[2] *Id.* And because the court concluded that granting Sause leave

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[1] Sause also brought other claims and named other defendants. But on appeal, she addresses only her First Amendment claims against Lindsey and Stevens. We therefore confine our analysis to those claims.

[2] The district court didn't separately address whether Lindsey violated Sause's First Amendment rights, apparently because it didn't construe her complaint as asserting such a claim against Lindsey.

to amend would be futile, it dismissed Sause's complaint with prejudice. Sause appeals.

## II

Sause advances three general arguments on appeal. First, she argues that the defendants aren't entitled to qualified immunity because they violated her clearly established rights under the First Amendment. Second, she argues that even assuming the defendants are entitled to qualified immunity because the contours of that right aren't clearly established, the doctrine of qualified immunity doesn't shield them from her claims for injunctive relief. Third, Sause argues that even if dismissal under Rule 12(b)(6) was appropriate, the district court should have dismissed her complaint without prejudice and given her leave to amend.

### A

We review de novo the district court's decision to dismiss Sause's claims on the basis of qualified immunity. *Columbian Fin. Corp. v. Stork*, 811 F.3d 390, 396 (10th Cir. 2016). To defeat the defendants' assertion of qualified immunity at the motion-to-dismiss stage, Sause "must allege sufficient facts that show—when taken as true—the defendant[s] plausibly violated h[er] constitutional rights, which were clearly established at the time of violation." *Schwartz v. Booker*, 702 F.3d 573, 579 (10th Cir. 2012).

We assume that Sause can satisfy the first prong of this inquiry. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (explaining that we have discretion to address second prong first "in light of the circumstances in the particular case at hand"). That is, we assume that the defendants violated Sause's rights under the

First Amendment when, according to Sause, they repeatedly mocked her, ordered her to stop praying so they could harass her, threatened her with arrest and public humiliation, insisted that she show them the scars from her double mastectomy, and then "appeared . . . disgust[ed]" when she complied—"all over" a mere noise complaint. App. 14, 17.

But this assumption doesn't entitle Sause to relief. Instead, Sause must demonstrate that any reasonable officer would have known this behavior violated the First Amendment. *See Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011) (explaining that right isn't clearly established unless every reasonable officer would know that conduct at issue violates that right). Sause argues she can make this showing because it was clearly established that she had a "right to pray in the privacy of [her] home free from governmental interference," at least in the absence of "any legitimate law enforcement interest." Aplt. Br. 15, 47. Alternatively, she asserts, "[t]he right to be free from official retaliation for exercising one's First Amendment rights [was] also clearly established." *Id.* at 48.

We don't disagree with Sause's articulation of these general rights. But the Supreme Court has repeatedly and consistently warned us "not to define clearly established law at [this] high level of generality." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *al–Kidd*, 563 U.S. at 742). Instead, "[t]he dispositive question is 'whether the violative nature of [the defendants'] *particular conduct* is clearly established.'" *Id.* (quoting *al–Kidd*, 563 U.S. at 742). In other words, "the clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson v.*

*Creighton*, 483 U.S. 635, 640 (1987)); *see id.* (suggesting that law isn't clearly established unless court can "identify a case where an officer acting under similar circumstances as [defendant] was held to have violated" relevant constitutional right). Thus, before we may declare the law to be clearly established, we generally require (1) "a Supreme Court or Tenth Circuit decision on point," or (2) a showing that "the clearly established weight of authority from other courts [has] found the law to be as the plaintiff maintains." *Fancher v. Barrientos*, 723 F.3d 1191, 1201 (10th Cir. 2013) (quoting *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007)).

Here, Sause doesn't identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here—i.e., a scenario in which (1) officers involved in a legitimate investigation obtain consent to enter a private residence and (2) while there, ultimately cite an individual for violating the law but (3) in the interim, interrupt their investigation to order the individual to stop engaging in religiously-motivated conduct so that they can (4) briefly harass her before (5) issuing a citation. In other words, "this case presents a unique set of facts and circumstances." *White*, 137 S. Ct. at 552 (quoting *Pauly v. White*, 814 F.3d 1060, 1077 (10th Cir. 2016), *cert. granted and judgment vacated*, 137 S. Ct. 548 (2017)). And "[t]his alone" provides "an important indication . . . that [the defendants'] conduct did not violate a 'clearly established' right." *Id.*

Of course, the Supreme Court has said that "'general statements of the law are not inherently incapable of giving fair and clear warning' to officers." *White*, 137 S. Ct. at 552 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). And we recognize that Sause need not identify "a case *directly* on point" to show that the law is clearly established. *al–Kidd*, 563 U.S. at 741 (emphasis added). "After all, some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015).

But while the conduct alleged in this case may be obviously unprofessional, we can't say that it's "obviously unlawful." *Id.* It certainly wouldn't be obvious to a reasonable officer that, in the midst of a legitimate investigation, the First Amendment would prohibit him or her from ordering the subject of that investigation to stand up and direct his or her attention to the officer—even if the subject of the investigation is involved in religiously-motivated conduct at the time, and even if what the officers say or do immediately after issuing that command does nothing to further their investigation.

In other words, this isn't a case where the defendants' conduct is so "obviously egregious . . . in light of prevailing constitutional principles" that "less specificity is required from prior case law to clearly establish the violation." *Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008) (quoting *Casey*, 509 F.3d at

1284).[3] Instead, Sause can only satisfy the clearly-established prong by citing a case or cases that make clear "the violative nature of [the defendants'] *particular* conduct." *Mullenix*, 136 S. Ct. at 308 (quoting *al–Kidd*, 563 U.S. at 742). And because Sause fails to identify—and our independent research fails to yield—any such authority, we conclude that the law isn't clearly established. Accordingly, we agree with the district court that Stevens is entitled to qualified immunity.[4]

Our conclusion that Stevens is entitled to qualified immunity also resolves Sause's next argument: that the district court erred in construing her complaint to allege a First Amendment claim against Stevens alone, rather than alleging claims against both Stevens and Lindsey. Even if we assume that Sause's complaint alleges a First Amendment claim against Lindsey, the district court's failure to recognize as much was harmless. In the absence of any authority that "place[s] the . . . constitutional question beyond debate," Lindsey is, like Stevens, entitled to qualified immunity. *al–Kidd*, 563 U.S. at 741.

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[3] We have recently questioned *Casey*'s "sliding-scale approach." *Aldaba v. Pickens*, 844 F.3d 870, 874 n.1 (10th Cir. 2016). But we need not address its continuing validity here; even assuming it survives the Court's decision in *Mullenix*, 136 S. Ct. 305, it doesn't help Sause.

[4] The district court didn't reach the clearly-established prong because it found there was no constitutional violation. But we "may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011).

**B**

Alternatively, Sause argues that even if she fails to satisfy the clearly-established prong and the defendants are therefore entitled to qualified immunity, the district court nevertheless erred in dismissing her complaint because it asserts plausible claims for injunctive relief. *See Jones v. City & Cty. of Denver*, 854 F.2d 1206, 1208 n.2 (10th Cir. 1988) (explaining that because doctrine of qualified immunity doesn't protect officials from claims for injunctive relief, "defendants must proceed to trial" on such claims, "even if qualified immunity protects them from suit on the question of liability for money damages").

For purposes of this argument, we again assume that Sause's complaint adequately pleads a constitutional violation. And we agree with Sause that her pro se complaint demonstrates an intent to seek injunctive relief for that violation. Specifically, Sause asserts that "[n]o money" can adequately compensate her for the alleged violation of her constitutional rights. App. 16. Moreover, Sause's complaint indicates that "the wrongs alleged . . . are continuing to occur at the present time." *Id.* Finally, Sause asserts that Lindsey "[t]hreatened [her] again" sometime in March 2015 and "[l]ectured" her that "'[f]reedom of [s]peech' means nothing." *Id.* at 17.

But while these allegations are sufficient to establish that Sause is attempting to assert claims for injunctive relief, they're insufficient to establish that

she has standing to maintain such claims.[5] That's because a plaintiff lacks standing to "maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured in the future." *Barney v. Pulsipher*, 143 F.3d 1299, 1306 n.3 (10th Cir. 1998) (quoting *Facio v. Jones*, 929 F.2d 541, 544 (10th Cir. 1991)); *see City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) ("[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . ." (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495 (1974))).

In *Lyons*, the plaintiff "filed a complaint for damages, injunction, and declaratory relief" based on law enforcement's use, during a routine traffic stop, of a chokehold that left him unconscious and damaged his larynx. 461 U.S. at 97–98. The Supreme Court agreed that these allegations were sufficient to demonstrate that the plaintiff "may have been illegally choked by the police" on a single occasion, and thus "presumably [had] standing to claim damages." *Id.* at 105.

But the Court said that those same allegations "d[id] nothing to establish a real and immediate threat" that the plaintiff would again suffer a similar injury in the near future—i.e., "that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally

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[5] Although the district court didn't address Sause's standing to seek injunctive relief and the defendants don't challenge her standing to do so on appeal, we have an independent obligation to address the issue. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1126 (10th Cir. 2013) ("[W]henever standing is unclear, [this court] must consider it *sua sponte* to ensure there is an Article III case or controversy before [it].").

choke him into unconsciousness without any provocation or resistance on his part." *Id.* And because there was no indication that the plaintiff "faced a real and immediate threat of again being illegally choked," the Court reasoned, the plaintiff "failed to demonstrate a case or controversy . . . that would justify the equitable relief sought." *Id.* at 105, 110. Accordingly, the Court concluded, "the [d]istrict [c]ourt was quite right in dismissing" the plaintiff's claim for injunctive relief. *Id.* at 98, 110.

So too here, where Sause indicates in her complaint only that "the wrongs alleged" there "continu[e] to occur." App. 16. This general allegation is "vague and completely lacking in specificity," *Ledbetter v. City of Topeka*, 318 F.3d 1183, 1188 (10th Cir. 2003) (quoting *Ledbetter v. City of Topeka*, No. 00-1153-DES, 2001 WL 80060, at *2 (D. Kan. Jan. 23, 2001), *aff'd*, 318 F.3d 1183 (10th Cir. 2003)))—especially in light of the numerous and varied "wrongs" Sause alleges in her 14-page complaint, App. 16.

The only specific allegations Sause makes to that effect are her assertions that Lindsey "[t]hreatened [her] again" sometime in March 2015 and "[l]ectured" her that "'[f]reedom of [s]peech' means nothing." App. 15–17. These allegations are insufficient to demonstrate that Sause faces "a good chance of being likewise injured in the future." *Barney*, 143 F.3d at 1306 n.3 (quoting *Facio*, 929 F.2d at 544). That is, Sause fails to establish she "face[s] a real and immediate threat" that (1) the defendants will again enter her home while investigating a crime; (2) she will again kneel and pray; and (3) the defendants will again order her to stand up and stop praying so they can harass her. *Lyons*, 461 U.S. at 105; *see Barney*, 143 F.3d

at 1306 & n.3 (holding that plaintiffs lacked standing to seek injunctive relief because they failed to demonstrate any likelihood that they would "end up" back in jail where alleged constitutional violations occurred).

True, Sause's complaint indicates she continues to "fear[] [t]o [t]his [d]ay" that she will have a similar encounter with the defendants sometime in the future. App. 17. But it's "the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Lyons*, 461 U.S. at 107 n.8. Thus, "[t]he emotional consequences" of the acts Sause alleges in her complaint "simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant[s]." *Id.* Accordingly, Sause's subjective fears, however genuine, are insufficient to establish standing.

In short, we agree with Sause that qualified immunity doesn't shield the defendants against her claims for injunctive relief. But because Sause lacks standing to maintain those claims, the district court was "quite right" to dismiss them. *Lyons*, 461 U.S. at 110. Nevertheless, Sause's lack of standing deprived the district court of subject matter jurisdiction to reach the merits of her claims for injunctive relief. A ccordingly, we remand to the district court with directions to dismiss those claims without prejudice. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006).

**C**

Finally, even assuming dismissal was appropriate, Sause argues that the district court abused its discretion in concluding that it would be futile to grant

Sause leave to amend and in dismissing Sause's claims with prejudice on that basis. *See Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) ("[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 prisoner with a meritorious claim can then submit an adequate complaint." (internal citations omitted)).

In support of this argument, Sause asserts that her "complaint states a plausible claim," Aplt. Br. 53, or at the very least, that her "factual allegations are close to stating" one, *id.* at 53–54 (quoting *Gee*, 627 F.3d at 1195).

We don't necessarily disagree. Indeed, for purposes of resolving this appeal, we assume that the defendants violated Sause's First Amendment rights. But even with the benefit of that assumption, the defendants are nevertheless entitled to qualified immunity because Sause fails to identify a case that "place[s] the . . . constitutional question beyond debate." *al–Kidd*, 563 U.S. at 741. And because Sause makes no effort to explain how she might amend her complaint to overcome this legal hurdle, she fails to demonstrate that the district court abused its discretion in dismissing her claims for monetary relief with prejudice. *Cf. Gee*, 627 F.3d at 1195 (affirming dismissal with prejudice where claims were "barred by preclusion or the statute of limitations" because "amending those claims would be futile").

* * *

To the extent that Sause's complaint seeks monetary relief, we agree that the defendants are entitled

to qualified immunity and that providing Sause an opportunity to amend her complaint would be futile. Accordingly, we affirm the district court's order to the extent that it dismisses with prejudice Sause's claims for money damages. To the extent that Sause's complaint instead seeks injunctive relief, we likewise conclude that the district court properly dismissed her claims. But because we conclude that Sause's lack of standing deprived the district court of subject matter jurisdiction, we remand with directions to dismiss her claims for injunctive relief without prejudice.

**TYMKOVICH**, C.J., concurring.

I fully join in Judge Moritz's opinion and agree that the officers' conduct here did not violate clearly established First Amendment precedent. I write separately to emphasize that Ms. Sause's allegations fit more neatly in the Fourth Amendment context. And, I must add, either the officers here acted with extraordinary contempt of a law abiding citizen and they should be condemned, or, if Ms. Sause's allegations are untrue, she has done the officers a grave injustice by manufacturing such reprehensible conduct.

It is axiomatic that an initially justified police encounter may nonetheless evolve into an unconstitutional seizure if, for example, the encounter is prolonged beyond the time reasonably required to complete the legitimate police objective justifying the encounter, or if the officers' actions are not reasonably related in scope to that legitimate objective.[1] If we believe Ms. Sause's allegations, this sort of devolution is what happened here.

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[1] *See, e.g.*, *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) ("It is [] clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."); *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cty.*, 542 U.S. 177, 185 (2004) ("To ensure that the resulting seizure is constitutionally reasonable, a *Terry* stop must be limited. The officer's action must be 'justified at its inception and reasonably related in scope to the circumstances which justified the interference in the first place.'" (citation omitted; alteration incorporated)). *See also, e.g.*, *United States v. Tubens*, 765 F.3d 1251, 1254 (10th Cir.

The parties agree that Officers Lindsey and Stevens arrived at Ms. Sause's home while investigating a noise complaint. But although the officers' initial motives may have been legitimate, Ms. Sause's complaint indicates the situation quickly devolved. According to the complaint, the officers were more preoccupied with harassing Ms. Sause than with conducting a legitimate police investigation. For example, while the complaint does not allege that the officers questioned Sause about the alleged noise complaint or their attendant investigation, Ms. Sause does allege that the officers:

(1) told her the Constitution and Bill of Rights were "nothing, [] just a piece of paper" that "[d]oesn't work here," App. 13;

(2) threatened that their encounter was "going to be on 'COPs'" (a television show), *id.*;

(3) told her to "get ready" because she was "going to jail," and, although they did not yet know why she would be going to jail, that her bond would be $2,000, *id.*;

(4) demanded that she "[g]et up" and "[s]top praying" only to tell her that she "need[ed] to move from

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2014) ("[E]ven assuming, as the district court did, that the officers' investigation of Tubens escalated from a consensual encounter, . . . the officers' investigation [must be] both 'justified at its inception' and 'reasonably related in scope to the circumstances which justified the interference in the first place.'" (citations omitted)); *United States v. De La Cruz*, 703 F.3d 1193, 1197 (10th Cir. 2013) (acknowledging that there may come a point during a police encounter at which any initial justification has "vanished" and, beyond that point, "[e]ven a very brief extension of the detention without consent or reasonable suspicion violates the Fourth Amendment" (citation omitted)).

here," "to move back where [she] came from . . . because no one like[d] [her] here," *id.* at 14;

(5) flipped through a booklet, seemingly searching for a violation with which to charge Ms. Sause, *see id.*, suggesting they were not going to proceed with charges for any alleged noise violation;

(6) issued Ms. Sause tickets for "Interference with Law Enforcement" and "Disorderly Conduct," allegedly for not answering her door when the officers first approached, *id.*; and

(7) repeatedly (*i.e.*, three or four times) asked Ms. Sause to show them any tattoos or scars she had, including scars on her chest from a double mastectomy, *id.*

If true, Ms. Sause's allegations are inconsistent with any legitimate law enforcement purpose capable of justifying a continuing police intrusion in her home. The officers deny the alleged conduct, although we assume for purposes of a motion to dismiss that the allegations are true. And we do not know whether the district court would find a constitutional violation in these circumstances or, if so, whether any violation would be clearly established.

But Ms. Sause did not make a Fourth Amendment claim on appeal and has only appealed the First Amendment cause of action. I agree First Amendment law is not clearly established for the reasons articulated by Judge Moritz in her well-written opinion.

## APPENDIX B

**In The United States District Court**
**For The District of Kansas**

No. 15-CV-9633-JAR-TJJ

MARY ANNE SAUSE,

*Plaintiff,*

v.

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

*Defendant.*

**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

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

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 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

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[2] Doc. 1 at 7.

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

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[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).

"more than a 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,

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[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).

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 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

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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)).

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 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

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[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).

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

[23] *Id.*

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

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.

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[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).

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 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

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

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 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.

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

### 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 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.

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[33] 42 U.S.C. § 12182(a) (1990).

[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.

#### 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

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

[36] *Id.* at 694.

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 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

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[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).

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 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

## APPENDIX C

**United States Court of Appeals**
**for the Tenth Circuit**

No. 16-3231
(D.C. No. 2:15-CV-9633-JAR-TJJ)
(D. Kan.)

MARY ANNE SAUSE,

*Plaintiff – Appellant,*

v.

TIMOTHY J. BAUER, Chief of Police; JASON LINDSEY, Police Officer of Louisburg, Kansas; BRENT BALL, Police Officer of Louisburg, Kansas; RON ANDERSON, Former Chief of Police of Louisburg, Kansas; LEE STEVENS, Former Louisburg, Kansas Police Officer; MARTY SOUTHARD, Mayor of City of Louisburg, Kansas; TRAVIS THOMPSON, Former Mayor of City of Louisburg, Kansas,

*Defendants – Appellees.*

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**JUDGMENT**

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Before **TYMKOVICH**, Chief Judge, **LUCERO** and **MORITZ**, Circuit Judges.

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This case originated in the United District Court for the District of Kansas and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk