No. 16-3231

In the United States Court of Appeals for the Tenth Circuit

MARY ANNE SAUSE,

Plaintiff – Appellant,

v.

TIMOTHY J. BAUER, ET AL.,

Defendants – Appellees.

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

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Oral Argument Requested

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INTRODUCTION

The officers' argument boils down to this: Construing the facts alleged in the complaint in the light most favorable to *them* and applying an unduly narrow, flatly incorrect reading of the Free Exercise Clause, the district court properly dismissed Ms. Sause's pro se complaint. But the officers are wrong on the facts and wrong on the law.

On the facts, Ms. Sause and the officers tell two very different stories about what occurred the evening of November 11, 2013.

Ms. Sause alleged that Officers Stevans and Lindsey angrily entered her home, told her the Constitution was "just a piece of paper" that "doesn't work here," berated her friend (in a bedroom Ms. Sause was not allowed to enter) for "possibly 30 minutes," and said Ms. Sause "was going to jail" for a yet-to-be-determined offense. App. 12–13. "[E]xtremely frightened," Ms. Sause sought solace in silent prayer. App. 13. Then, the officers mocked her prayer and commanded her to "stop" and "get up." App. 13–14. But they did so not in furtherance of some legitimate law-enforcement objective, but to continue berating and harassing her. App. 13–14. Only later did they issue citations and leave. App. 14.

The officers tell a much different story: Ms. Sause "invited or allowed them in her home," "asked to pray while they investigated," and "was allowed to do so." Officers' Br. 12. They then commanded her to stop praying "simply . . . to complete a noise complaint violation." Officers' Br. 9–10 (officers merely "engaged in a conversation with her, determined whether citations would be issued, and left"). Missing from their sanitized recitation of the evening's events is any mention of their blatant disregard for the Constitution—which "doesn't work here"—or their repeated "mocking" and harassment. App. 13.

Not only is the officers' recitation of the facts flatly inconsistent with the allegations in Ms. Sause's complaint, c*ompare* App. 13–14, but the officers acknowledge as much: "Ms. Sause paints a picture of a woman praying pursuant to the tenants of her religion in her home while being verbally threatened by officers to stop her religious practices." Officers' Br. 30.

Perhaps it will be difficult to reconcile these competing accounts of what happened. Perhaps not. But that is not this Court's task. Rather, this Court must determine whether—"taking all of the complaint's factual allegations as true and drawing all reasonable inferences in [her] favor"—

Ms. Sause has "state[d] a valid claim." *BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co.*, 830 F.3d 1195, 1199 n.2, 1201 (10th Cir. 2016); *see also Abell v. Sothen*, 214 F. App'x 743, 750 (10th Cir. 2007) ("The issue is not whether a plaintiff will ultimately prevail but whether [she] is entitled to offer evidence to support [her] claims."); Sause Br. 17–18 (citing cases).

On the law, the officers repeatedly espouse a distressing, flatly incorrect understanding of the Free Exercise Clause—as protecting only "one's ability to choose his or her religion." Officers' Br. xvii.[1]

Contrary to their contention, it is well established that the Free Exercise Clause protects a person's right not only to choose her religion but also to practice it—prayer is, of course, a quintessential exercise of religion. *See*, *e.g.*, *Korte v. Sebelius*, 735 F.3d 654, 676 (7th Cir. 2013) ("It's well understood that the Free Exercise Clause protects . . . the right to engage in religiously motivated conduct."); *see also* Sause Br. 23–25.

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[1] *See also* Officers' Br. xvii ("[The officers were] not violating Ms. Sause's First Amendment rights in telling her to stop praying. That characterization of the right protected under the First Amendment is too broad."); *id.* at 4 ("Free Exercise Clause Protects One's Right to Choose a Religion"); *id.* ("Ms. Sause . . . blends an individual's right to choose her religion with her right to pray."); *id.* at 8 ("Free Exercise Clause protects an individual's right to choose a religion to practice"); *id.* at 11 ("Free Exercise Clause protects the right of every person to choose his or her religion to practice"); *id.* at 16 ("Officer Stevens'[s] action created no substantial burden on Ms. Sause's right to choose her religion."); *id.* at 17 (officers' actions not "substantially motivated in response to her choice of religion").

Put another way, the Free Exercise Clause prohibits *all* unjustified governmental intrusions that substantially burden religious practice—intrusions that "prevent[] the plaintiff from participating in an activity motivated by a sincerely held religious belief," *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014)—not just those so reprehensible that they "force[]" a person "to change" her "religious practices" or to stop "pray[ing] in her home" altogether. *Compare* Officers' Br. 4–5, *with* *Shakur v. Selsky*, 391 F.3d 106, 120 (2d Cir. 2004) (missing "a single religious feast" constituted a substantial burden); *Ford v. McGinnis*, 352 F.3d 582, 591–94 (2d Cir. 2003) (Sotomayor, J.) ("denial of this one meal" "established a substantial burden").

It surely prohibits a law-enforcement officer from ordering a citizen to stop praying, in the privacy of her own home, so he can mock and harass her. *See* Sause Br. 33–39. No reasonable officer would believe otherwise.

Accordingly, this Court should reverse and remand: Ms. Sause plausibly alleged that the officers violated her clearly established First Amendment right to pray in her home and to be free from retaliation for doing so. At the very least, it should remand with instructions to enter dismissal with leave to amend to remedy any perceived deficiency.

ARGUMENT

I. The Officers' Characterization of the Facts Is Inconsistent with the Complaint and with Rule 12(b)(6).

As the officers recognize, in reviewing *de novo* whether Ms. Sause stated claims for relief, this Court "look[s] to the specific allegations in the complaint." Officers' Br. 2 (quoting *Alvarado v. KOB–TV, L.L.C.*, 493 F.3d 1210, 1215 n.2 (10th Cir. 2007)). And it is beyond question that the Court must "accept the allegations in the complaint as true and construe those allegations and any reasonable inferences therefrom in the light most favorable to [Ms. Sause]." *Tennyson v. Carpenter*, 558 F. App'x 813, 817 (10th Cir. 2014).

Despite giving lip service to these principles, the officers commit two critical errors in their factual recitation:

1. First, the officers doggedly set forth a narrow, sanitized reading of Ms. Sause's pro se complaint, scrutinizing individual allegations without regard for the traumatic encounter described throughout the complaint.

Yet, as this Court has made clear, the Rule 12(b)(6) "inquiry is holistic"—courts must "consider the complaint in its entirety." *In re Zagg, Inc. Sec. Litig.*, 797 F.3d 1194, 1201 (10th Cir. 2015); *see also A.G.*

ex rel. Maddox v. Elsevier, Inc., 732 F.3d 77, 82 (1st Cir. 2013) ("The critical question is whether the claim, viewed holistically, is made plausible by 'the cumulative effect of the factual allegations' contained in the complaint.").

Here, the officers argue that because they "allegedly told her she was 'going to jail' *before* she prayed," Ms. Sause failed to allege any "other 'threat' of arrest." Officers' Br. 12–13 ("Ms. Sause's Complaint cannot be understood to include an allegation that the [officers] threat[en]ed to jail her if she didn't stop praying."); *see id.* at 15 ("[I]n instructing Ms. Sause to stop praying . . . Officer Stevens did not threaten to arrest her, and Ms. Sause has not plead[ed] as much.").

Ms. Sause did allege that Officer Lindsey told her early in the encounter that she "was going to jail" and that he "d[idn't] know yet" why. App. 13. But a cursory examination of the complaint—to say nothing of construing it in the light most favorable to Ms. Sause—makes clear that she interpreted the officers' order to stop praying as any reasonable person would: comply or face arrest. *See* Sause Br. 34–35 (citing cases).

Ms. Sause's interpretation of the officers' command is all the more reasonable when one considers its context: The officers had not only

explicitly threatened her with arbitrary arrest but also told her the Constitution was "just a piece of paper" that "doesn't work here" and that their encounter would "be on 'COPS.'" App. 13.

Accordingly, the officers' suggestion that Ms. Sause failed to allege that the stop praying command was accompanied by a threat of arrest is irreconcilable with a holistic view of the allegations in the complaint. *Cf. Shomo v. New York*, 374 F. App'x 180, 183 (2d Cir. 2010) (courts should "read[] *pro se* complaints with 'special solicitude' and interpret[] them to raise the 'strongest [claims] that they *suggest*'") (last alteration in original).

2. Second, and more importantly, the officers double-down on the district court's error by asserting that the command "to stop praying . . . was simply necessary to complete a noise complaint violation." Officers' Br. 9.

But the only support for that assertion comes from the officers' answer—not Ms. Sause's complaint. *See* Sause Br. 36–37 & n.8. And as this Court has made clear, a 12(b)(6) motion is not a vehicle for resolving disputed fact issues, but a means of testing the legal sufficiency of a plaintiff's allegations. *See Mayfield v. Bethards*, 826 F.3d 1252, 1256 (10th Cir. 2016). Because "it is the [officers'] conduct *as alleged in the*

complaint that is scrutinized," *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014), considering (or treating as true) "the answer's assertion[s]" is reversible error. *Casanova v. Ulibarri*, 595 F.3d 1120, 1124–26 (10th Cir. 2010).

In her complaint, Ms. Sause alleged that Officer Stevans commanded her to "get up" and "stop praying" once Officer Lindsey—"laughing in a mocking tone"—informed him that she was praying. App. 13–14. After she complied with the command, the officers continued berating and harassing her, telling her "to move back from where [she] came from . . . because no one likes [her] here." App. 14. Only *after* that inappropriate, offensive, and entirely unnecessary exchange did the officers even begin "looking through [a] booklet for charges." App. 14.

Simply put, considering only the allegations in Ms. Sause's complaint, and viewing them in the light most favorable to her, there is only one conclusion to be drawn: The officers ordered her to stop praying so they could continue to harass her—not to effect some legitimate law-enforcement objective, like expeditiously issuing a citation and moving on. *See* Sause Br. 30–32.

II. Ms. Sause Stated First Amendment Free Exercise and Retaliation Claims against Both Officers.

A. By Forcing Her to Stop Praying—without a Legitimate Law-Enforcement Purpose—the Officers Violated Ms. Sause's Free Exercise Rights.

The officers argue that Ms. Sause's Free Exercise claim fails for two reasons: First, they contend that Ms. Sause failed to allege her exercise of religion was substantially burdened. Second, they insist that the burden imposed was justified by a compelling government interest. Neither argument withstands scrutiny.

1. The officers' principal argument—that Ms. Sause failed to allege that the officers substantially burdened her religion—relies on a fundamental misunderstanding of the Free Exercise Clause's protections, inapposite precedent, and a definition of substantial burden that finds no precedential support. Officers' Br. 5–6, 10.

First, the officers assert that the command to stop praying "created no substantial burden on Ms. Sause's right *to choose her religion*." Officers' Br. 16 (emphasis added). While that may be true, it is irrelevant.

It is axiomatic that the Free *Exercise* Clause protects the right to *exercise* one's religion. Prayer is indispensable to the exercise of many

religions, which explains why courts—throughout the country and through history—have recognized that the Free Exercise Clause protects one's right to pray free from undue governmental interference. *See* Sause Br. 23–25 (citing cases); *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.").[2]

Officer Stevans substantially burdened Ms. Sause's religious exercise by ordering her to "stop praying" and "get up" from her prayer rug. Sause Br. 34–36 (quoting App. 13–14). That is, Officer Stevans "prevent[ed]" Ms. Sause from praying—"an activity motivated by a sincerely held religious belief"—which this Court has ruled constitutes a substantial burden. *See Yellowbear*, 741 F.3d at 55–56.

Or, to use an articulation that is particularly well-suited to this case: A plaintiff's "exercise of religion is burdened if the challenged action is coercive or compulsory in nature." Officers' Br. 5 (quoting *Bauchman v. W. High Sch.*, 132 F.3d 542, 557 (10th Cir. 1997)); *see also Fields v.*

[2] At the Founding, it was widely understood that the word "exercise" encompassed "Act[s] of divine worship." Samuel Johnson, *A Dictionary of the English Language* 738 (1755) (defining "Exercise"); *see also* John Ash, *The New and Complete Dictionary of the English Language* (1775); Thomas Sheridan, *A Complete Dictionary of the English Language* (1790).

City of Tulsa, 753 F.3d 1000, 1009 (10th Cir. 2014) (same). And Ms. Sause alleged that the order to "stop praying" was "coercive" and "compulsory." Sause Br. 13, 34 (citing App. 43–44).

The officers attempt to distinguish *Fields* on the ground that "[a]n invalid religious objection to an order that does not burden your free exercise of religion does not immunize you from punishment for violation of the order." Officers' Br. 10 (quoting *Fields*, 753 F.3d at 1009). That statement has no application here—Officer Stevans's order *did* burden Ms. Sause's religious exercise, she did *not* violate that order, and her objection was valid.

The *Fields* plaintiff relied on his unreasonable "construction of the [challenged] order." 753 F.3d at 1009. There is no such disconnect here. The order "to stand up and stop praying" was unambiguous. Officers' Br. 11. The officers may dispute (erroneously) whether it was made under clear threat of arrest. *See* Officers' Br. 15. But they do not—and cannot—deny that a reasonable person in Ms. Sause's position would understand that order to be compulsory. Officers' Br. 11; *see also* Sause Br. 34–36 (citing cases).

Second, the officers rely heavily on *Martin v. City of Wichita*, 1999 WL 1000501 (D. Kan. Oct. 27, 1999), to argue the command to stop praying did not impose a substantial burden. *See* Officers' Br. 5–6, 16. *Martin*, however, relies on precedent that this Court has expressly disavowed and is easily distinguishable in any event.

Martin relied on the proposition that the government must substantially burden "the observation of a central religious belief or practice." 1999 WL 1000501, at *4. But this Court has since made clear that the "Tenth Circuit does not follow such a rule." *Kay v. Bemis*, 500 F.3d 1214, 1220 (10th Cir. 2007). Instead, a plaintiff need only show that the government "substantially burdened . . . [a] sincerely-held religious belief[]." *Id.* ("'Sincerely held' is different from 'central,' and courts have rightly shied away from attempting to gauge how central a sincerely held belief is to the believer's religion."). Accordingly, "a substantial burden exists 'when a government . . . prevents participation in conduct motivated by a sincerely held religious belief.'" *McKinley v. Maddox*, 493 F. App'x 928, 933 (10th Cir. 2012) (alteration in original) (quoting *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)). Ms. Sause

plausibly alleged that the "stop praying" command prevented her from continuing to pray.

And, in any event, *Martin* is easily distinguishable. The plaintiff there led outdoor tent revivals. She was repeatedly warned that the services were "too loud" and violated other neutral, generally applicable ordinances. 1999 WL 1000501, at *1–2. Police officers interrupted the revivals and arrested the plaintiff for violating those ordinances. Relying on the since-abrogated "central religious belief" test, *Martin* concluded—in a single paragraph of terse analysis—that the officers' "disruptions or interruptions" did not "place[] a substantial burden on plaintiff's observation of her religion." *Id.* at *4.

Here, by contrast, Ms. Sause's silent prayer in her home did not contravene any neutral, generally applicable ordinance. *See* Sause Br. 38 n.9. More importantly, she does not dispute that law-enforcement officers may execute a legitimate arrest even if the arrestee happens to be engaged in prayer. Instead, she alleges that she was ordered to stop so the officers could further harass her—not so they could accomplish some legitimate law-enforcement objective.

Accordingly, both *Martin* and *Klemka v. Nichols*—an out-of-circuit, district court opinion relied on by the officers—are inapposite. 943 F. Supp. 470, 478 (M.D. Pa. 1996) ("[P]laintiff's presence inside a church when [the officer] came to execute the arrest warrant is not sufficient to establish a prima facie case of religious interference."); *see* Officers' Br. 6–7.[3]

Third, the officers' final substantial-burden argument relies on a definition of "substantial burden" that is wholly unsupported by precedent. The officers argue that Ms. Sause failed to plausibly allege a substantial burden because she did not allege that "her religious practices have been forced to change," that she "no longer prays," or that she has been forced to change her religion. Officers' Br. 4–5, 16.

But, as courts repeatedly have made clear, "[t]he Free Exercise Clause not only forbids regulation of religious beliefs as such but also

[3] The officers take issue with Ms. Sause's citation of *Tompkins v. Cyr*, 995 F. Supp. 664 (N.D. Tex. 1998), and *Schultz v. Medina Valley Independent School District*, 2012 WL 517518 (W.D. Tex. Feb. 9, 2012), on the grounds that *Tompkins* involved "regulations of peaceful picketing activity" and that, in *Schultz*, there was—sensibly—no dispute that the right to peaceful private prayer is fundamental. Officers' Br. 7–8.

But Ms. Sause did not cite those decisions for their application of law to fact. She cited them because they recognize—consistent with countless other authorities, spanning history and the nation—that the fundamental right to private prayer is clearly established. *See* Sause Br. 25–27.

protects religiously motivated expression." *McTernan v. City of York*, 564 F.3d 636, 647 (3d Cir. 2009); *see also* Sause Br. 38–39 (citing cases). This Court should resoundingly decline the officers' invitation to upend decades of established First Amendment jurisprudence by making only the most flagrant religious liberty violations the *sine qua non* of the substantial-burden analysis.

2. The officers also argue that Ms. Sause's Free Exercise claim fails because their actions were supported by a compelling government interest. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("To satisfy the commands of the First Amendment, [government action] restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."). Their argument is without merit for two reasons.

First, the officers fundamentally misconstrue Ms. Sause's argument and erect in its place a straw man. They contend that Ms. Sause argues that she has a "right to pray—without interruption—in any given set of circumstances." Officers' Br. 4, 8 ("She argues . . . [she] has the right to choose the time, place and manner of prayer *without exception*.").

That is a blatant mischaracterization of Ms. Sause's argument—and is not at stake in this case. As her brief makes clear:

> When law enforcement officers interfere with a person's religious liberty, their actions *must be justified by a legitimate law enforcement interest*. Here, Ms. Sause alleged that *the officers lacked a legitimate law enforcement justification* when they forced her to stop praying.

Sause Br. 36 (emphasis added) (internal citations omitted). Put another way, she argues that the officers violated her First Amendment rights when they ordered her—under threat of arrest (or at the very least under the compulsion of an officer's order)—to stop praying in the privacy of her own home without any law-enforcement–related justification. *See* Sause Br. 33, 42 n.12.

The officers contend that "there are reasonable limitations to one's right to practice one's religion." Officers' Br. 9 ("[A]n individual is prohibited from kneeling for prayer in the middle of a busy intersection."). True. But irrelevant.

Ms. Sause was not in a busy intersection—or any public place for that matter. She was in her home, where "First Amendment protections . . . are especially strong." *Pahls v. Thomas*, 718 F.3d 1210, 1234 (10th Cir. 2013) (alteration in original). And, as Ms. Sause alleged, the officers'

command to stop praying furthered not "the welfare of others," but their own disdain for her and her prayer. *Compare* Officers' Br. 9, *with* Sause Br. 36–39.

Second, as explained above, the officers' insistence that the "stop praying" order was "simply necessary to complete a noise complaint violation," Officers' Br. 9, finds support not in Ms. Sause's complaint but in *their answer*. *See supra* Part I.2.

For example, the officers posit that "argu[ing] there was no law enforcement-related justification for instructing Ms. Sause to stop praying ignores that . . . they had responded to a noise complaint." Officers' Br. 15. Ms. Sause does no such thing. She alleged that the officers' violation of her First Amendment rights was unrelated to the noise complaint. And it should go without saying that a noise-complaint investigation does not give law-enforcement officers carte blanche to violate the Constitution.

The officers, of course, do not dispute that, if they ordered Ms. Sause to stop praying in order to continue to harass her, their actions were not supported by a compelling government interest. And that is precisely what she has alleged. *See supra* Part I.2.

Once one cuts through the officers' arguments and construes Ms. Sause's allegations in the light most favorable to her, it is clear that she plausibly alleged that the officers violated her Free Exercise rights. *See Washington v. Gonyea*, 538 F. App'x 23, 26–27 (2d Cir. 2013) (reversing dismissal because plaintiff alleged officers "were motivated by personal prejudice and did not act against him for legitimate penological reasons").

B. By Retaliating against Her for Exercising Her Free Exercise Rights, the Officers Violated Ms. Sause's First Amendment Rights.

The officers' arguments against Ms. Sause's First Amendment–retaliation claim are no more persuasive.

First, they argue Ms. Sause "failed to assert that her prayer, begun in the middle of a noise complaint investigation, was constitutionally protected activity." Officers' Br. 17. No authority requires Ms. Sause to append such "labels and conclusions" to her allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also* Officers' Br. 2. Rather, while this Court may "compar[e] the pleading with the elements of the cause[] of action," Ms. Sause need only provide "sufficient factual allegations" to plausibly state a claim. *Burnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d

1231, 1235–36 (10th Cir. 2013); *see also Khalik v. United Air Lines*, 671 F.3d 1188, 1191–93 (10th Cir. 2012).

Even a cursory examination of Ms. Sause's complaint demonstrates that she plausibly alleged the relevant facts surrounding her prayer and how it related to her claims. *See*, *e.g.*, App. 13–14, 17 ("[Prayer] is between my God and me. That is my First [Amendment] right."). Indeed, at the risk of repetition, it is clearly established that the Free Exercise Clause protects one's right to pray. *See supra* II.A.1; Sause Br. 23–25.

Second, the officers argue that Ms. Sause failed to allege "any injury that would [chill] an ordinary person from practicing one's religion." Officers' Br. 17. As with the direct Free Exercise claim above, they misunderstand the threshold for this claim: Actionable retaliation need not be so severe that it would deter a person from prospectively *practicing her religion altogether*.

Instead, the relevant inquiry in a case like this is whether the officers' compulsory order to stop praying "would chill a person of ordinary firmness from continuing to engage *in that activity*"—not all First Amendment protected religious activity. *Perez v. Ellington*, 421 F.3d 1128, 1131–32 (10th Cir. 2005) (emphasis added).

Ms. Sause's response—stopping her prayer based on her fear of the officers—though "not dispositive," still "provides some evidence of the tendency of that conduct to chill First Amendment activity." *Hartley v. Wilfert*, 918 F. Supp. 2d 45, 54 (D.D.C. 2013) (quoting *Constantine v. Rectors & Visitors of Geo. Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005)).

Moreover, Ms. Sause's "acquiescence is hardly a manifestation of timidity." *Id*. As this Court—and numerous other courts—have recognized, the threat of arrest is sufficient to chill First Amendment activity. *See* Sause Br. 41–43 & n.12; *cf. Esparza v. Bowman*, 523 F. App'x 530, 536 (10th Cir. 2013) (finding it "clear" that "pursuit of an arrest" would "chill a person of ordinary firmness from continuing to engage in protected activity").

Retaliation for engaging in First Amendment activity "offends the Constitution [because] it threatens to inhibit exercise of the protected right." *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (alteration in original). A reasonable person faced with the decision to cease First Amendment activity or be arrested (or otherwise face the consequences of disregarding an officer's command) would likely make the same choice as Ms. Sause.

Third, the officers argue that Ms. Sause failed to allege that the officers' actions were "substantially motivated in response to *her choice of religion*." Officers' Br. 17 (emphasis added). Again, as Ms. Sause repeatedly has explained, the relevant question is whether the officers' actions were motivated by her "exercise of constitutionally protected conduct"—her prayer, not her choice of religion. *Perez*, 421 F.3d at 1132.

"[P]roof of an official's retaliatory intent rarely will be supported by direct evidence of such intent." *MIMICS, Inc. v. Vill. of Angel Fire*, 394 F.3d 836, 848 (10th Cir. 2005) (alteration in original). But this is that rare case. The proof is in the words of the order itself: After observing Ms. Sause praying—and being told by his partner that "she's praying"—Officer Stevans commanded her "to stop praying." The officers' argument that they were motivated by a desire to promptly issue a noise-complaint citation is, as discussed above, directly refuted by Ms. Sause's allegations.

III. Ms. Sause Is Entitled to Damages and Injunctive Relief against Both Officers.

1. The officers are not entitled to qualified immunity. Both Ms. Sause's right to pray privately in her home without undue interference or harassment and her right to be free from retaliation for doing so were clearly established at the time of the officers' wrongful conduct.

Even absent the decades of precedent compiled in Ms. Sause's opening brief, *see* Sause Br. 21–39, the suggestion that an officer can order a citizen to stop praying silently in her own home—so the officer can continue to harass her—is utterly foreign to both our constitutional order and the foundational principles of our civil society.

The officers contend they are entitled to qualified immunity because Ms. Sause did not cite cases involving conduct as beyond-the-pale as what she alleges happened here. Officers' Br. 30–31.

But that is not what is required. Instead, the "clearly established weight of authority" is sufficient, and the operative question is whether "the contours of the right" were "sufficiently clear that a reasonable office[er] would understand that what he is doing violates that right." *Estate of Reat v. Rodriguez*, 824 F.3d 960, 965 (10th Cir. 2016); *see also Kerns v. Bader*, 663 F.3d 1173, 1183 (10th Cir. 2011) ("The court must ask whether 'every reasonable official would have understood that *what he [did]* violate[d] that right.' To satisfy this standard, '[w]e do not require a case directly on point.'") (internal citation omitted) (alterations in original); *cf. Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can

still be on notice that their conduct violates established law even in novel factual circumstances."). Ms. Sause made that showing here.

The officers' primary argument is just a rehash of their no-constitutional-violation argument—it was not clearly established that the First Amendment prohibits interrupting Ms. Sause's prayer to issue a noise-complaint citation. Officers' Br. 27–31. But, for the reasons explained above and in Ms. Sause's opening brief, that is not the relevant inquiry.

The question here is: Would any reasonable officer have believed that he could lawfully order a citizen to stop praying in the privacy of her own home, in order to harass her? That question answers itself. *Cf. McCurry v. Tesch*, 824 F.2d 638, 642 (8th Cir. 1987) ("[A]bsent 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.").

In her opening brief, Ms. Sause cites a plethora of cases denying qualified immunity in similar scenarios—where government actors interfered with a person's religious exercise without legitimate justification. *See*, *e.g.*, *Arroyo Lopez v. Nuttall*, 25 F. Supp. 2d 407, 409–

10 (S.D.N.Y. 1998) ("A reasonable corrections officer . . . would have known that he could not shove an inmate and disrupt his prayer when the inmate was praying quietly."); *see also* Sause Br. 38–39.

It is equally clear that government actors may not retaliate against a person for exercising her First Amendment rights. *See*, *e.g.*, *Washington*, 538 F. App'x at 27 (denying qualified immunity where plaintiff "plausibly alleged that Defendants–Appellees acted with an improper retaliatory motive" because "it can *never* be objectively reasonable for a government official to act with the intent that is prohibited by law") (emphasis added).

Recognizing that the officers' alleged conduct violated clearly established law would neither "unduly inhibit officials in the discharge of their duties" nor undermine any of qualified immunity's other laudable purposes. *Camreta v. Greene*, 563 U.S. 692, 705 (2011). "Qualified immunity was meant to protect officials performing discretionary duties," not those engaging in rank misconduct—it "should not present an insurmountable obstacle to plaintiffs seeking to vindicate their constitutional rights." *Clanton v. Cooper*, 129 F.3d 1147, 1157 (10th Cir. 1997).

2. Ms. Sause plausibly alleged claims against *both* officers. As explained in her opening brief, although Officer Stevans actually gave the command to "get up" and "stop praying," Officer Lindsey is equally culpable based on both his active participation in the violation of Ms. Sause's clearly established constitutional rights and his failure to prevent Officer Stevans from violating those rights. Sause Br. 43–47.

The officers' main response is nitpicking the format of Ms. Sause's pro se complaint. This is contrary to this Court's well established rule that pro se complaints must be "liberally" construed. *Gruenwald v. Maddox*, 274 F. App'x 667, 671 (10th Cir. 2008); *see also* Sause Br. 17–18.

The officers also argue that "the interaction between Ms. Sause and Officer Lindsey regarding her prayer [was] very limited." Officers' Br. 19. But that is beside the point.

Officer Lindsey actively participated in multiple important stages of the encounter, immediately before and after the "stop praying" order: (1) telling her that the Constitution "doesn't work here"; (2) threatening to arrest her, telling her the encounter would be on *COPS*; (3) mockingly informing Officer Stevans that she was praying; and (4) actively participating in the harassment that immediately followed the

unconstitutional command to stop praying. *See* Sause Br. 44. These "important affirmative contribution[s]" to the constitutional violations make Officer Lindsey liable along with Officer Stevans. *Specht v. Jensen*, 832 F.2d 1516, 1524 (10th Cir. 1987).

Likewise, Officer Lindsey was present for and easily capable of intervening against Officer Stevans's unlawful order, which makes him liable under "clearly established" principles. *Hall v. Burke*, 12 F. App'x 856, 861–62 (10th Cir. 2001); *see also* Sause Br. 45–46.

These critical allegations were all included in Ms. Sause's "Statement of Claim," where she was required to "show[]" that she was "entitled to relief." App. 12. And, in the "Relief" section of the complaint, she explained that "[a]ll defendants should compensate" her for the harm she suffered. App. 16.

The officers would have this Court ignore all of that and look only to the narrative section that followed Ms. Sause's request for punitive damages, where she briefly (and unnecessarily) rehashed her previous allegations. Officers' Br. 18–19; *see* App. 16. The officers seize on Ms. Sause's inclusion of a parenthetical—"(R/E Stevans)"—after reasserting her First Amendment right to pray privately. Officers' Br. 18 (citing App.

17). Because Ms. Sause included only Officer Stevans's name there—but mentioned Officer Lindsey elsewhere in the summary—the officers argue that she failed to state a First Amendment claim against Officer Lindsey. Officers' Br. 18–19.

If that constitutes a "liberal construction" of a pro se complaint, then that concept is meaningless. As explained above, facts alleged throughout the complaint demonstrate that Officer Lindsey is liable for actively participating in and failing to prevent the violations of Ms. Sause's First Amendment rights.

Moreover, this Court has ruled that pro se complaints should be "reasonably read . . . to state a valid claim," even where the plaintiff "confus[es] . . . various legal theories." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

It would turn that principle on its head to punish Ms. Sause for a stray parenthetical (the meaning of which is not immediately clear) when she included the factual allegations necessary to plausibly allege a claim against Officer Lindsey. *See Waugh v. Dow*, 617 F. App'x 867, 874–75 & n.8 (10th Cir. 2015) (relying on *Hall* to affirm magistrate judge's decision to "clarif[y] the legal theory under which the alleged facts and asserted

constitutional right should be tested"); *Heard v. Addison*, 728 F.3d 1170, 1186 n.8 (10th Cir. 2013) ("[W]e give pro se petitioners the benefit of the doubt . . . so long as they 'allege the necessary underlying facts to support a claim under a particular legal theory.'").

3. Finally, in addition to damages, Ms. Sause also sought injunctive relief. *See* App. 16–17 (alleging her injury is "continuing to occur" and that she fears "to this day" that the officers will commit further violations). The officers wisely do not contest that qualified immunity is not a defense to equitable claims. *See* Officers' Br. 31–32; *Morse v. Frederick*, 551 U.S. 393, 400 n.1 (2007).

Accordingly, so long as Ms. Sause plausibly alleged that the officers violated her First Amendment rights, her injunctive-relief claims survive—*even if* this Court rules that her rights were not clearly established. *See* Sause Br. 49–51. The officers' counterarguments are meritless:

First, their assertion that "once a motion to dismiss has been granted for failure to state a claim, a plaintiff does not have the right to injunctive relief" is a tautology. Officers' Br. 31–32. The district court's erroneous dismissal is precisely what is at issue in this appeal.

Second, somewhat confusingly, the officers present irrelevant objections regarding both the absence of an "injunctive hearing," and a local rule regarding staying discovery during the pendency of dispositive motions. Officers' Br. 32. Lest there be any confusion: Ms. Sause has not and is not seeking a preliminary injunction. Rather, she asks this Court to reinstate her claims—including those seeking permanent injunctive relief—that were wrongly dismissed. *See*, *e.g.*, *Lane v. Franks*, 134 S. Ct. 2369, 2383 (2014).

IV. At a Minimum, Ms. Sause Should Receive a Fair Opportunity to Amend Her Complaint to Address Any Perceived Deficiencies.

Should this Court disagree with the above arguments—and conclude that Ms. Sause failed to satisfy Rule 12(b)(6)'s plausibility standard—the result mandated by its precedent is clear: It should reverse and remand with instructions to dismiss with leave to amend. As this Court has explained, affirmance would be warranted only if amendment would be utterly futile. *See Staats v. Cobb*, 455 F. App'x 816, 817–18 (10th Cir. 2011) ("[C]ourt 'should dismiss *with leave to amend* . . . if it is at all possible that [pro se plaintiff] can correct the defect in the pleading.'"). The officers do not contend that amendment would be futile—

so they have waived any futility-based argument. *See Brammer–Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1207 (10th Cir. 2007).

1. The officers argue that Ms. Sause should receive neither an "expla[nation] [of] the pleading's deficiencies" nor a chance to "submit an adequate complaint," *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010), because she *previously* filed a motion for leave to amend—which was dismissed not only on *entirely procedural* grounds but also without any indication of a substantive deficiency in her complaint. Officers' Br. 22–23; *see* Sause Br. 15 n.5. Unsurprisingly, the officers cite no authority for that twisted proposition. Nor did the district court rely on that rationale in dismissing her complaint.

The district court denied Ms. Sause's two-page motion for leave, *see* App. 51–52, because she failed to "attach the proposed amended pleading." App. 62 ("[T]he Court cannot review Plaintiff's proposed amended complaint to determine whether Plaintiff should be granted leave to file it.") (citing D. Kan. R. 15.1(a)). Importantly, the court did not indicate that her original complaint was deficient in any way, and rightly so—the sufficiency of that complaint was not at issue. Indeed, the appropriate time for the district court to provide such guidance would

have been when it ruled on the officers' motion to dismiss. Its failure to do so was an abuse of discretion. *Gee*, 627 F.3d at 1195.

The officers' argument that the district court, in ruling on Ms. Sause's motion for leave, gave "clear instructions on how to fix the problem"—but that she nevertheless failed to "follow the roadmap the Court gave her"—is wholly meritless. Officers' Br. 23. The only instruction Ms. Sause received from the district court was about how properly to seek leave to amend.

2. The officers' contention that their motion to dismiss put Ms. Sause "on notice of the alleged flaws in her Complaint" is equally meritless. Officers' Br. 23, 26. A pro se plaintiff is entitled to the guidance of a disinterested, impartial *court*—not forced to rely on the say-so of her adversary. *Cf. Gee*, 627 F.3d at 1186 ("[A] *careful judge will explain* the pleading's deficiencies so that a [pro se plaintiff] with a meritorious claim can then submit an adequate complaint.") (emphasis added). The officers' proposed take-our-word-for-it rule is inconsistent with this Court's repeated admonition that "pro se litigants are to be given reasonable opportunity to remedy the defects in their pleadings." *Hall*, 935 F.2d at 1110 n.3; *see also* Sause Br. 20–21, 51–54.

3. The officers' suggestion that Ms. Sause failed to argue *how* she would amend her complaint misses the mark. *See* Officers' Br. 25. As explained above and in her opening brief, Ms. Sause believes she has stated plausible claims for relief. Should this Court find her allegations wanting, Ms. Sause will amend her complaint to address any identified deficiencies—an opportunity the district court's dismissal with prejudice wrongly deprived her of.

Conclusion

This Court should reverse and remand Ms. Sause's First Amendment claims against Officers Stevans and Lindsey. At the very least, it should remand with instructions to enter dismissal with leave to amend her complaint.

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Respectfully submitted,

<u>/s/ *Bradley G. Hubbard*</u>

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned counsel certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in 14-point New Century Schoolbook, a proportionally spaced typeface, using Microsoft Word 2016. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,483 words, excluding the parts exempted under Fed. R. App. P. 32(f).

/s/ *Bradley G. Hubbard*
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CERTIFICATE OF DIGITAL COMPLIANCE

I hereby certify that (1) all required privacy redactions have been made, *see* 10th Cir. R. 25.5, (2) any required paper copies to be submitted to the Court are exact copies of the electronically submitted version, *see* ECF User's Manual, II.I.b, and (3) the electronic submission was scanned for viruses with Symantec Endpoint Protection, version 12.12.1.15, updated December 15, 2016, and is free of viruses. *See id*. II.I.c.

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CERTIFICATE OF SERVICE

I hereby certify that, on December 15, 2016, a true and correct copy of the foregoing brief was served via the Court's CM/ECF system on all counsel of record.

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