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.

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

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