APPENDIX

APPENDIX A

United States Court of Appeals for the Tenth Circuit

No. 16-3231

MARY ANNE SAUSE,

Plaintiff – Appellant,

v.

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

Defendants – Appellees.

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

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

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

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

MORITZ, Circuit Judge.

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

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

I

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

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

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

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

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

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

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

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

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

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

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

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

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

II

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

A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

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

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

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

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

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

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

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

C

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

Sause leave to amend and in dismissing Sause's claims with prejudice on that basis. *See Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) ("[O]rdinarily the dismissal of a pro se claim under Rule 12(b)(6) should be without prejudice, and a careful judge will explain the pleading's deficiencies so that a prisoner with a meritorious claim can then submit an adequate complaint." (internal citations omitted)).

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

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

* * *

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

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

TYMKOVICH, C.J., concurring.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX B

In The United States District Court
For The District of Kansas

No. 15-CV-9633-JAR-TJJ

MARY ANNE SAUSE,

Plaintiff,

v.

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

Defendant.

Memorandum and Order

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

Specifically, Plaintiff contends that Officer Ball, former Chief Anderson, and Chief Bauer failed to investigate or follow up on alleged assaults by Plaintiff's neighbors and complaints she made about other police

officers. Plaintiff alleges that she was the victim of assaults by several residents of her apartment complex. Plaintiff claims that charges as to these assaults are "missing," and Plaintiff was given no protection after several requests for an internal investigation. Plaintiff further alleges that when Officers Stevans and Lindsey responded to a noise complaint at her apartment, Officer Stevans prohibited her from praying in violation of the First Amendment, and Officer Lindsey prevented her from entering her bedroom in violation of the Fourth Amendment. Plaintiff alleges the officers intimidated her and threatened to charge her with crimes, and Plaintiff claims that she fears for her safety.

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

I. Factual Background

Unless otherwise stated, the following facts are drawn from Plaintiff's Complaint and construed in the light most favorable to Plaintiff.[1] While investigating a noise complaint at Plaintiff's apartment building on November 22, 2013, Officers Lindsey and Stevans arrived at Plaintiff's front door and became angry when Plaintiff did not immediately answer or allow them entry. The officers left and returned, asking Plaintiff why she would not let them in. Plaintiff answered the

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

door and picked up a Constitution booklet and copy of the Bill of Rights, which she keeps near her front door. Officer Lindsey mockingly told Plaintiff, "[T]hat's nothing, it's just a piece of paper. Doesn't work here."[2] Officer Stevans did not stop him from making these comments, and Stevans left the apartment shortly after.

Officer Lindsey then allegedly put on a body camera before he entered Plaintiff's apartment and threatened that Plaintiff would be on the TV show "Cops." Plaintiff's friend was in the apartment with her, and she went to Plaintiff's bedroom to put Plaintiff's dog in its kennel. Officer Lindsey went into the bedroom as well. Officer Lindsey refused to let Plaintiff enter her bedroom, and she heard him talking to her friend in a threatening, angry voice. He told Plaintiff to get ready because she was going to jail. When Plaintiff asked why, Officer Lindsey told her he did not know yet, but the bond would be $2,000.

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

The officers cited Plaintiff for disorderly conduct and interfering with law enforcement for refusing to

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[2] Doc. 1 at 7.

open her door when they first knocked, despite Plaintiff's explanation that she could not see out of the peep hole and she did not answer her door for her protection.

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

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

Plaintiff claims that on September 21, 2015, she met with Chief Bauer at his office to discuss her request for an internal investigation. She allegedly told Chief Bauer that Officer Lindsey's abuse had gone on long enough and she feels unsafe. She alleges that Chief Bauer dismissively responded that he had 4,300 other citizens to deal with. Plaintiff claims that on October 8, 2015, she gave Chief Bauer a notarized letter at a public forum; Chief Bauer allegedly shook Plaintiff's hand and told her he would have an answer to her questions within five days, but he never followed through.

Plaintiff alleges that she has been assaulted by residents of her apartment building but charges are "missing." She claims she wanted to report these assaults to another police officer, but Officer Ball threatened to give her a citation for disorderly conduct to

prevent her from reporting the assaults. Plaintiff allegedly reported this incident but is "missing [a] report and witness statements." Plaintiff states that former Chief Anderson was aware of the incident with Officer Ball. She also claims that Mayor Southard and former Mayor Thompson were aware of her complaints about the police officers. She alleges that the mayors employ or employed the police officer defendants.

II. Discussion

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

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

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

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

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

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

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

A. Qualified Immunity

Defendants argue that Plaintiff's Complaint should be dismissed because Officers Lindsey, Ball,

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

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

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

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

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

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

and Stevans, as well as Chief Bauer and former Chief Anderson, are entitled to qualified immunity. Under the doctrine of qualified immunity, government officials who perform discretionary functions are shielded from individual liability unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known."[13] The doctrine is not just a defense to liability, but rather provides immunity from lawsuits altogether.[14] Accordingly, the qualified immunity defense must be resolved "at the earliest possible stage of litigation."[15] "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'"[16] Because qualified immunity is the "norm" in private actions against public officials, there is a presumption of immunity when the defense is raised.[17] When a defendant claims qualified immunity, the plaintiff bears a heavy burden of showing (1) the defendant's violation of a constitutional or statutory right; and (2) that the "infringed right at issue was clearly established at the time of the allegedly unlawful activity such that a reasonable [official] would have known that his or her

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

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

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

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

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

challenged conduct was illegal."[18] For the court to resolve the issue of qualified immunity at the earliest possible stage of litigation, a plaintiff's complaint must allege enough facts to make clear the grounds on which his or her claims rest.[19]

A government official may be personally liable under § 1983 if a plaintiff shows that the officer, acting under color of state law, deprived the plaintiff of his or her federal rights.[20] To demonstrate that a clearly established right has been infringed, a plaintiff may direct the court "to cases from the Supreme Court, the Tenth Circuit, or the weight of authority from other circuits."[21] At the same time, an action can violate a clearly established right even if there is no specific case addressing that exact action.[22] The unlawfulness of the action at issue must be apparent even if that action has not specifically been held to be unlawful.[23] The question of whether a right is clearly established must be answered "in light of the specific context of the case, not as a broad general proposition."[24] The

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

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

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

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

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

[23] *Id.*

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

plaintiff must be able to "demonstrate that 'every reasonable official would have understood'" that his or her actions violated the law.[25]

1. Claims against Defendants Ball, Anderson, and Bauer

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

2. Claim Against Defendant Stevans

Plaintiff claims that Officer Stevans violated her First Amendment rights by telling her to stop praying.

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

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

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

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

Plaintiff's Complaint does not state a plausible First Amendment claim against Officer Stevans. Officers Stevans and Lindsey were investigating a noise complaint in Plaintiff's building, which led them to her apartment. While Officer Stevans's instruction to Plaintiff to stop praying may have offended her, it does not constitute a burden on her ability to exercise her religion. Plaintiff fails to provide any allegations that would suggest Officer Stevans's actions coerced her into conduct contrary to her religious beliefs, or that he otherwise prevented her from practicing her religion. Rather, he merely instructed her to stop

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

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

[30] *Id.*

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

praying while the officers were in the middle of talking to her about a noise complaint they had received. The Court thus finds that Plaintiff has not made a plausible claim that her First Amendment rights were violated. Because Plaintiff has not established that Officer Stevans violated her clearly established rights, the Court finds that he is entitled to qualified immunity and the claim against him is dismissed.

3. Claims Against Defendant Lindsey

a. Fourth Amendment

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

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

b. ADA Claim

Finally, to the extent Plaintiff alleges that Officer Lindsey discriminated against her because of her disability when he allegedly told her she should move out of her apartment, that claim is also dismissed. The ADA forbids discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[33] Officer Lindsey's comment to Plaintiff does not constitute discrimination. Plaintiff herself made a connection between his comment and her alleged disability by responding to Officer Lindsey that she could not afford to leave her apartment because she is disabled. She does not allege facts to show that the officer had any ability or intention to force her to move from her apartment. He merely made a mean comment that Plaintiff's neighbors did not like her and she should move away. The Complaint does not adequately allege that his comment had anything to do with Plaintiff's disability[34] and does not constitute discrimination within the meaning set forth in the ADA. Plaintiff has therefore failed to allege that Officer Lindsey violated any clearly established rights, and her claim is dismissed.

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[33] 42 U.S.C. § 12182(a) (1990).

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

4. Claims Against Defendants Southard and Thompson

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

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

The Court also finds that Plaintiff's claim against the Louisburg, Kansas Police Department must be

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

[36] *Id.* at 694.

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

C. Leave to Amend

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

As described above, to the extent Plaintiff's factual allegations are discernable, they are far from

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

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

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

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

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

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

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

IT IS SO ORDERED.

Dated: June 17, 2016

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

APPENDIX C

United States Court of Appeals
for the Tenth Circuit

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

MARY ANNE SAUSE,

Plaintiff – Appellant,

v.

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

Defendants – Appellees.

JUDGMENT

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

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

The judgment of that court is affirmed.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk