APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

November 18, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CANDACE AGUILERA,

Plaintiff - Appellant,

v.

CITY OF COLORADO SPRINGS, a municipality; DANIELLE MCCLARIN, in her official and individual capacity; ANGIE NEIVES, in her official and individual capacity; ROGER VARGASON, in his official and individual capacity; BRETT LACEY, in his official and individual capacity; ROBERT MITCHELL, in his official and individual capacity,

Defendants - Appellees.

No. 19-1398
(D.C. No. 1:18-CV-02125-KMT)
(D. Colo.)

ORDER AND JUDGMENT*

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

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Candace Aguilera appeals pro se from the district court's order dismissing her civil-rights complaint and denying her leave to amend. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

In her seventy-page first amended complaint, Aguilera alleges the following. On the morning of July 10, 2017, Colorado Springs Police Officer Roger Vargason and Fire Marshalls Danielle McClarin and Angie Nieves confronted her outside of "GreenFaithMinistry," a "non-denominational spiritual/religious establishment" and retailer of "religious goods." R. at 116, 131. Aguilera is the "Property manager, Volunteer, High Priestess (second minster [sic] in command), member, etc. who leases two rooms at the Establishment." *Id.* at 120.[1]

Fire Marshall McClarin explained they wanted inside to "check the occupancy of the building." *Id.* at 120. Aguilera refused, telling them, "If you want in the building you will have to contact Reverend Baker, I will not let you in." *Id.* Fire Marshall McClarin responded, "If you do not let us in, nobody will be allowed in." *Id.* at 121. While Fire Marshall McClarin attempted to call Reverend Baker, Aguilera apparently went inside and locked the entry door.

A few minutes later, Officer Vargason pulled forcefully on the door, telling the "GreenFaithMinistry members and volunteers [inside] to '[o]pen the door.'" *Id.* at 127.

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[1] Security camera photos included in the amended complaint indicate that GreenFaithMinistry is in a business/strip-mall type location, with other structures located nearby across an alleyway or street. Aguilera does not indicate the purpose for which she leases the rooms inside GreenFaithMinistry.

When Aguilera came to the door, Officer Vargason warned her that "[i]f [she] d[id] not open th[e] door, [she] w[ould] be in trouble." *Id.* at 128. He again tried to pull open the door. Aguilera said, "this is private property do you have a warrant?" *Id.* Officer Vargason replied, "Oh now I am talking to Rob Corry (Marijuana lawyer out of Denver)." *Id.* at 128. Officer Vargason continued pulling, stating, "[W]e know you have an illegal grow in there." *Id.* Officer Vargason's final "order to . . . Aguilera was to 'Praise the Lord.'" *Id.* at 129.

The officers remained at GreenFaithMinistry for forty-five minutes. During that time, several other GreenFaithMinistry members arrived. Fire Marshall Nieves asked one such member "[i]f marijuana [wa]s being consumed inside the building." *Id.* at 134. Those members felt "intimidated," so they "turn[ed] around and le[ft]." *Id.* at 126. Before the officers finally left, Officer Vargason used a cell phone to take "pictures of Members[']license plates, including the vehicle that . . . Aguil[e]r[a] drives." *Id.* at 133.

Aguilera filed this 42 U.S.C. § 1983 pro se lawsuit in August 2018.[2] She alleges in confusing fashion that the defendants violated her "absolute natural rights and the constitutions which expressively mandates [sic] its compliance and restricts any opposition by any government and anything below it without contest via absolute natural rights, Art. 6, Clause 2 Supremacy Clause, Constitutions, Free Exercise Clause, etc." *Id.*

[2] In addition to suing the City of Colorado Springs and the officers who confronted her on July 10, 2017, Aguilera also sued two individuals not present that day—Brett Lacey and Robert Mitchell. They allegedly "worked in concert" as the "Head Fire Marshall" and El Paso County Sheriff's Lieutenant, respectively, to violate Aguilera's rights. *Id.* at 117-18; *see also id.* at 256.

at 158. Further, she alleges that the defendants' actions caused her and "four other church members/volunteers[ ] [to] vacate their place of worship," *id.* at 123-24, and that the City of Colorado Springs "targeted non-denominational GreenFaithMinistry to insure [that] monetary contributions for police and the fire dep[ar]t[ment] services continue from neighboring [Christian] religious establishments." *Id.* at 115-16. She seeks declaratory, injunctive, and monetary relief.

The defendants moved to dismiss, asserting qualified immunity. The district court granted the motions and dismissed all of Aguilera's claims. Doing so, it construed Aguilera's complaint as advancing claims under (1) the First Amendment for violations of the Establishment and Free Exercise Clauses, and (2) the Fourth Amendment for unlawful search and seizure.[3]

To the extent Aguilera asserted her claims on behalf of GreenFaithMinistry and other members, the district court concluded she lacked standing. As for her Establishment Clause claim, the district court determined it failed the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Her Free Exercise claim failed, the district court said, because she did not allege that any defendant burdened her ability to exercise a religious belief. Regarding her search-and-seizure claim, the district court determined there were no allegations the defendants actually conducted a search, and there was no seizure of property because the defendants did not meaningfully interfere

[3] We conclude that the district court accurately distilled the nature of Aguilera's first amended complaint.

with her possessory interests.[4] Finally, the district court denied Aguilera's motion for leave to amend the complaint because she failed to comply with the meet-and-confer requirements of the local rules.

DISCUSSION

I. Standards of Review

We review de novo the district court's grant of a motion to dismiss on the grounds of standing, *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 447 (10th Cir. 1996), and qualified immunity, *Weise v. Casper*, 593 F.3d 1163, 1166 (10th Cir. 2010).

"In resolving a motion to dismiss based on qualified immunity, the court considers (1) whether the facts that a plaintiff has alleged make out a violation of a constitutional right, and (2) whether the right at issue was clearly established at the time of defendant's alleged misconduct." *Keith v. Koerner*, 707 F.3d 1185, 1188 (10th Cir. 2013) (internal quotation marks omitted). "If the plaintiff fails to satisfy either part of the inquiry, the court must grant qualified immunity." *Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1208 (10th Cir. 2017).

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[4] Although the district court did not discuss Aguilera's claims against the City of Colorado Springs and the officers in their official capacities, its dismissal order covers those claims. "[A]n official-capacity suit brought under § 1983 generally represents only another way of pleading an action against an entity of which an officer is an agent." *Moss v. Kopp*, 559 F.3d 1155, 1168 n.13 (10th Cir. 2009) (brackets and internal quotation marks omitted). And without "a constitutional violation by the individual . . . officers whose conduct directly caused plaintiffs' injuries, there can be no municipal liability." *Trigalet v. City of Tulsa*, 239 F.3d 1150, 1156 (10th Cir. 2001).

In deciding whether the complaint should be dismissed, we evaluate the complaint to see if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Wittner v. Banner Health*, 720 F.3d 770, 774-75 (10th Cir. 2013) (internal quotation marks omitted). But "we are not bound to accept as true a legal conclusion couched as a factual allegation," and "we consider only the facts alleged in [Aguilera's] [a]mended [c]omplaint." *Id.* We do "not consider allegations or theories [asserted in her appellate briefs] that are inconsistent with those pleaded in the complaint." *Hayes v. Whitman*, 264 F.3d 1017, 1025 (10th Cir. 2001).

Although we construe Aguilera's filings liberally, we do not serve as her advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

II. Standing

"The doctrine of standing . . . requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant [her] invocation of federal-court jurisdiction." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (internal quotation marks omitted). Thus, "[o]rdinarily, a party must assert h[er] own legal rights and cannot rest h[er] claim to relief on the legal rights of third parties." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (ellipsis and internal quotation marks omitted).

Aguilera acknowledges in her opening brief that she is not suing to vindicate the rights of GreenFaithMinistry and its other members. *See* Aplt. Opening Br. at 37.[5] Thus,

[5] At the same time, she maintains that "Appellees are incorrect when they say you cannot sue for others." Reply Br. at 1. We do not reach this dispute. Article III

the district court did not err in dismissing Aguilera's claims without prejudice "to the extent [she] assert[ed] [them] on behalf of others." R. at 576.

III. Establishment Clause

Aguilera argues that Officer Vargason violated the Establishment Clause by ordering her to "Praise the Lord."[6] Aplt. Opening Br. at 41. The Establishment Clause prohibits "law[s] respecting an establishment of religion." U.S. Const. amend. I. In particular, it "mandate[s] governmental neutrality between religion and religion, and between religion and nonreligion." *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1223 (10th Cir. 2005) (internal quotation marks omitted).

"To assess an Establishment Clause challenge, we follow the tripartite test from *Lemon v. Kurtzman*," which provides that "government action does not violate the Clause

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of the Constitution limits our power to hear cases or controversies. *See* U.S. Const. art. III, § 2, cl. 1. It does not confer jurisdiction over disputes that are purely academic. *See Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 240-41 (1937) (observing that there "must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts"). Given Aguilera's representation that she "include[d] GreenFaithMinistry and Members to show" only that "[her] rights were clearly violated," Aplt. Opening Br. at 37, her dispute with Defendants-Appellees concerning third-party standing is purely academic.

[6] "[T]he requirements for standing to challenge state action under the Establishment Clause . . . do not include proof that particular religious freedoms are infringed." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963). Rather, the plaintiff can show standing by asserting a "direct[ ] affect[ ]" from the "practice[ ] against which [her] complaint[ ] [is] directed." *Id.*; *see also Montesa v. Schwartz*, 836 F.3d 176, 197 (2d Cir. 2016) (stating that "direct exposure standing" can occur where "a plaintiff is personally confronted with a government-sponsored religious expression that directly touches the plaintiff's religious or non-religious sensibilities"). We conclude that Aguilera's allegation of being ordered to "Praise

if (1) it has a secular purpose; (2) its principal or primary effect is one that neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion." *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1230 (10th Cir. 2017) (internal quotation marks omitted).[7] The purpose and effect prongs "look[ ] through the eyes of an objective observer, aware of the purpose, context, and history of the government action in question." *Id.* at 1230-31 (internal quotation marks omitted).

In order to survive a motion to dismiss, a plaintiff asserting an Establishment Clause violation "must allege facts which, accepted as true, suggest a violation of any part of th[e] [*Lemon*] analysis." *Bauchman for Bauchman v. W. High Sch.*, 132 F.3d 542, 552-53 (10th Cir. 1997). "We will not infer an impermissible purpose or effect in the absence of any supporting factual allegations." *Id.* at 553.

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the Lord" confers standing to assert an Establishment Clause violation under a direct-exposure theory.

[7] The Supreme Court has recently cast doubt on the viability of the *Lemon* test, stating that it "presents particularly daunting problems in cases . . . that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations." *Am. Legion v. Am. Humanist Assoc.*, 139 S. Ct. 2067, 2081 (2019) (plurality opinion). *American Legion* does not, however, offer a replacement test. Rather, it encourages the "application of a presumption of constitutionality for longstanding monuments, symbols, and practices." *Id.* at 2081-82. In any event, Aguilera's allegation that she was ordered to "Praise the Lord" appears to fall outside of *American Legion*'s repudiation of *Lemon* in religious-display cases.

A. Secular Purpose

Aguilera's amended complaint does not allege facts indicating that an objective observer would view Officer Vargason's purpose in saying "Praise the Lord" as an official endorsement of religion. Specifically, the phrase "Praise the Lord" can be uttered solely as a personal affirmation of religious or even non-religious gratitude, and not "with the ostensible and predominant purpose of advancing religion," *McCreary County v. Am. Civ. Liberties Union*, 545 U.S. 844, 860 (2005). Aguilera fails to identify any allegation supporting her assertion that Officer Vargason intended the phrase as a directive for her to worship a deity. Further, the phrase was uttered in the midst of a secular investigation concerning the building's occupancy and suspected use as an illegal marijuana establishment. "We will not lightly attribute unconstitutional motives to the government, particularly where we can discern a plausible secular purpose." *Medina*, 877 F.3d at 1230 (internal quotation marks omitted).

B. Effect

Similarly, the amended complaint is devoid of allegations showing that Officer Vargason's mere utterance of "Praise the Lord" would have the principal or primary effect of advancing or inhibiting religion. In particular, no facts are alleged under which an objective observer, aware of the officers' secular investigational purpose, would conclude that the phrase "convey[ed] a message that religion or a particular religious belief is favored or preferred." *Medina*, 877 F.3d at 1231 (internal quotation marks omitted). The effect prong "does not forbid all mention of religion," and it does not take

into account "whether particular individuals might be offended by the content" of a government actor's message "or consider [that message] to endorse religion." *Bauchman*, 132 F.3d at 555.

C. Entanglement

Nor does Aguilera allege that Officer Vargason's utterance of "Praise the Lord," "foster[ed] an excessive government entanglement with religion." *Id.* at 1233. This prong of the *Lemon* test ensures that religious organizations retain "independence from secular control or manipulation" in "matters of church government as well as those of faith and doctrine." *Id.* at 1234 (internal quotation marks omitted). Without an allegation that Officer Vargason's use of "Praise the Lord" somehow constituted "state involvement with recognized religious activity," the entanglement prong is not met. *See Bauchman*, 132 F.3d at 556.

D. Conclusion

We conclude that the district court did not err in dismissing Aguilera's Establishment Clause claim, as she has not plausibly alleged a constitutional violation under any prong of the *Lemon* test. *Cf., e.g.*, *Wood v. Arnold*, 915 F.3d 308, 315 (4th Cir.) ("[I]f courts were to find an Establishment Clause violation every time that a student or parent thought that a single statement by a teacher either advanced or disapproved of a religion, instruction in our public schools would be reduced to the lowest common denominator." (internal quotation marks omitted)), *cert. denied*, 140 S. Ct. 399 (2019).

IV. Free Exercise Clause

Aguilera argues that Fire Marshall McClarin violated the Free Exercise Clause by "threaten[ing] [her]" outside GreenFaithMinistry when he said, "If you do not let us in, nobody will be allowed in." R. at 120-21. According to Aguilera, that threat "made . . . [her] and four other church members/volunteers[ ] vacate their place of worship." *Id.* at 123-24; *see* Aplt. Opening Br. at 44.

"To establish a free-exercise claim, [Aguilera] must show that the government has placed a burden on the exercise of h[er] religious beliefs or practices." *Fields v. City of Tulsa*, 753 F.3d 1000, 1009 (10th Cir. 2014). "A plaintiff states a claim that h[er] exercise of religion is burdened if the challenged action is coercive or compulsory in nature." *Id.* (alteration and internal quotation marks omitted).

Aguilera's own allegations belie the coercive or compulsory nature of Fire Marshall McClarin's threat. She alleges that immediately after Fire Marshall McClarin made the threat, she went inside GreenFaithMinistry and locked the entry door behind her. Indeed, she remained inside with the door locked, refused to open it even as Officer Vargason pulled on it and told her to open it, and she declared, "this is private property do you have a warrant?" R. at 128. It is unclear when she finally exited GreenFaithMinistry. Given these allegations, Aguilera has failed to assert a connection between Fire Marshall McClarin's threat (even when viewed together with Officer Vargason's actions) and her decision to vacate GreenFaithMinistry. Significantly, Aguilera has not alleged that Fire Marshall McClarin (or any other officer) ever ordered her to vacate the building.

Nevertheless, Aguilera argues the constitutional violation is clear in light of *Sause v. Bauer*, 138 S. Ct. 2561 (2018). There, the Supreme Court explained that the Free Exercise Clause may have been violated by a police officer's order to the plaintiff, while he was inside her apartment investigating a noise complaint, to stop praying. *Id.* at 2562-63. The Court said it was "impossible to analyze [the plaintiff's] free exercise claim" without knowing whether officers were lawfully inside her apartment and "what, if anything, the officers wanted her to do at the time when she was allegedly told to stop praying." *Id.* at 2563. Thus, the Court reversed and remanded for further proceedings.

But *Sause* has no apparent application here. Aguilera does not assert in her complaint that she was ordered to stop praying or worshipping in any manner. Nor does she allege that she was engaged in prayer or worship inside GreenFaithMinistry at any time during the officers' presence outside the building. Further, as discussed below, the officers were lawfully present on the porch outside GreenFaithMinistry when they communicated with Aguilera.

In short, Aguilera has failed to allege that any defendant burdened her exercise of religious beliefs or practices. Thus, the district court did not err in dismissing her Free Exercise claim.

V. Fourth Amendment

The Fourth Amendment prohibits unreasonable searches and seizures. *New York v. Burger*, 482 U.S. 691, 699 (1987). A plaintiff asserting a Fourth Amendment violation must either have "a legitimate expectation of privacy in the place searched or the item seized," *United States v. Angevine*, 281 F.3d 1130, 1134 (10th Cir. 2002) (internal

quotation marks omitted), or identify an "unprivileged trespass on property expressly protected by the Fourth Amendment—persons, houses, papers, and effects—for the purpose of conducting a search or seizure," *United States v. Carloss*, 818 F.3d 988, 992 n.2 (10th Cir. 2016) (internal quotation marks omitted).

A. Search

Aguilera contends that Officer Vargason engaged in an unlawful Fourth Amendment search by photographing her vehicle and its license plate. At the time Officer Vargason took the photos, he was standing on GreenFaithMinistry's porch, with Aguilera's vehicle parked only a few feet away, off of what appears to be an alleyway or street, with other buildings/businesses nearby. Aguilera has not pled a plausible Fourth Amendment violation for the following reasons.

First, she has no expectation of privacy in the appearance of her vehicle or its license plate, with her car parked in public view off of a street or alleyway. *See New York v. Class*, 475 U.S. 106, 114 (1986) ("The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a 'search.'"); *United States v. Walraven*, 892 F.2d 972, 974 (10th Cir. 1989) ("[B]ecause they are in plain view, no privacy interest exists in license plates.").

Second, although Officer Vargason took the photos from GreenFaithMinistry's porch, his vantage point did not convert his photo-taking into a search. The amended complaint is not entirely clear as to whether he and the fire marshalls were at GreenFaithMinistry to check compliance with administrative occupancy standards, to investigate illegal marijuana sales, or both. In any event, the Fourth Amendment is not

implicated where officers are on private property and perform a so-called "knock and talk." *See United States v. Shuck*, 713 F.3d 563, 568 (10th Cir. 2013) (holding that "officers did not violate the Fourth Amendment when they approached [a] trailer's back door with an intent to speak to its occupants regarding the reported odor of marijuana" and saw in plain view a PVC pipe that smelled of marijuana). "Observations made from such vantage points are not covered by the Fourth Amendment." *Id.* at 567 (brackets and internal quotation marks omitted); *see also Carloss*, 818 F.3d at 993 ("The mere purpose of discovering information in the course of engaging in [a knock and talk] does not cause it to violate the Fourth Amendment."). Thus, Officer Vargason did not need a warrant to photograph Aguilera's license plate while on GreenFaithMinistry porch.[8]

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[8] Aguilera's reliance on *Collins v. Virginia*, 138 S. Ct. 1663 (2018), is misplaced. In that case, the Supreme Court held that a warrant is required to search a vehicle that is within the curtilage of a home, notwithstanding the automobile exception to the warrant requirement. *Id.* at 1670-71. The Court rested its decision on "the core Fourth Amendment protection afforded to the home and its curtilage." *Id.* at 1671. Here, Aguilera's vehicle was not parked within the curtilage of a home. *See Oliver v. United States*, 466 U.S. 170, 180 (1984) (explaining that the curtilage "is the area to which extends the intimate activity associated with the sanctity of a [person's] home and the privacies of life, and therefore has been considered part of the home itself for Fourth Amendment purposes" (internal quotation marks omitted)). Rather, her vehicle was parked off of an alleyway or street, in a non-residential area, and next to GreenFaithMinistry, a "non-denominational spiritual/religious establishment" and retailer of "religious goods." R. at 116, 131.

Also, Aguilera argues on appeal that Officer Vargason's photo-taking constituted a search because he used "his police issued phone," which "can run apps / programs" that provide "access to [a] [d]atabase that [is] not accessible by the public." Aplt. Opening Br. at 48. Because these allegations are not in the amended complaint, we do not consider them. *See Hayes*, 264 F.3d at 1025. We likewise do not consider Aguilera's allegation that the photo-taking unlawfully disclosed her "association in a non[]profit." Aplt. Opening Br. at 48.

B. Seizure

Aguilera contends that Fire Marshall McClarin's threat, "If you do not let us in, nobody will be allowed in," "illegally seize[d] [GreenFaithMinistry] in violation of the 4th [A]mendment." Aplt. Opening Br. at 44. We conclude that Aguilera has standing to advance this claim to the extent it is based on her leasing of two rooms in the building. But she fails to allege that any defendant meaningfully interfered with her possessory interests in the building. *See United States v. Shrum*, 908 F.3d 1219, 1229 (10th Cir. 2018) (observing that "a Fourth Amendment 'seizure' occurs when there is some meaningful government interference with an individual's possessory interests in property" (alterations and internal quotation marks omitted)). As we have already observed, following Fire Marshall McClarin's alleged threat, Aguilera entered the building, locked the door, excluded the officers, and then later exited the building without being asked to leave. Thus, no Fourth Amendment seizure occurred.

C. Conclusion

The district court did not err in dismissing Aguilera's Fourth Amendment claims for illegal search and seizure.

VI. Motion to Amend

"We review for abuse of discretion the district court's denial of [Aguilera's] motion to file an amended complaint." *Cohen v. Longshore*, 621 F.3d 1311, 1313 (10th Cir. 2010). The district court denied the motion because she failed to confer with opposing counsel before filing the motion, as required by District of Colorado Local Civil Rule 7.1(a), which states that "[b]efore filing a motion, counsel for the moving party or

an unrepresented party shall confer or make reasonable good faith efforts to confer with any opposing counsel or unrepresented party to resolve any disputed matter."

Although Aguilera states in her opening appellate brief that she would like to amend her complaint, she does not address the district court's rationale for denying her leave to amend. She therefore waived any challenge to that decision. *See Sylvia v. Wisler*, 875 F.3d 1307, 1332 (10th Cir. 2017) ("An issue or argument insufficiently raised in the opening brief is deemed waived." (internal quotation marks omitted)).

CONCLUSION

Because Aguilera's amended complaint fails to plausibly allege a constitutional violation against any of the individual defendants, the district court properly applied qualified immunity and dismissed the complaint. We therefore affirm the district court's judgment.

We deny as moot Aguilera's motion to file an appendix, given that all the documents she seeks to include are already included in the record on appeal. We grant attorney Peter A. Lichtman's motion to withdraw as counsel of record for Defendant-Appellee Mitchell.

Entered for the Court

Nancy L. Moritz
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK

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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

November 18, 2020

Mrs. Candace Aguilera
1850 North Academy
Colorado Springs, CO 80909

RE: 19-1398, Aguilera v. City of Colorado Springs, et al
Dist/Ag docket: 1:18-CV-02125-KMT

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of the Court

cc: Peter A. Lichtman
Bryan E. Schmid
Anne Turner

CMW/jjh

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Kathleen M. Tafoya

Civil Action No. 18–cv–02125–KMT

CANDACE AGUILERA,

Plaintiff,

v.

CITY OF COLORADO SPRINGS, a municipality,
DANIELLE MCCLARIN, in her official and individual capacity,
ANGIE NEIVES, in her official and individual capacity,
ROGER VARGASON, in his official and individual capacity,
BRETT LACEY, in his official and individual capacity,
ROBERT MITCHELL, in his official and individual capacity,

Defendants.

ORDER

This matter is before the court on "Defendant Mitchell's Motion to Dismiss Plaintiff's Amended Complaint (Doc. 17) Pursuant to Fed. R. Civ. P. 12(b)(1) and (6)." (Doc. No. 22 [Mitchell Mot.], filed September 28, 2018.) Plaintiff filed her response on March 23, 2019 (Doc. No. 39 [Resp. Mitchell Mot.]), and Defendant Mitchell filed his reply on April 3, 2019 (Doc. No. 41 [Mitchell Reply]).

Also before the court is the "City Defendants' Motion to Dismiss Amended Complaint."[1] (Doc. No. 23 [City Mot., filed October 2, 2018.) Plaintiff filed her response on March 23, 2018

[1] The City Defendants include the City of Colorado Springs, Danielle McCalarin, Angie Nieves, Roger Vargason, and Brett Lacey. (*See* City Mot. at 1.)

(Doc. No. 38 [Resp. City Mot.]), and the City Defendants filed their reply on April 8, 2019 (Doc. No. 42 [City Reply]).

Also before the court is Plaintiff's "Motion for Leave to File a Second Amended Complaint" (Doc. No. 26 [Mot. Amend], filed October 16, 2018). Defendants filed a joint response on October 24, 2018 (Doc. No. 30 [Resp. Mot. Amend]), and Plaintiff filed her reply on November 7, 2018 (Doc. No. 34 [Reply Mot. Amend]).

STATEMENT OF THE CASE

Plaintiff, proceeding *pro se*, filed her Amended Complaint on September 24, 2018. (Doc. No. 17 [Am. Compl.].) Plaintiff alleges Defendant City of Colorado Springs "has utilized its resources of the police and fire dept. in a pattern that illegally threatens and persecuted [Plaintiff's] absolute natural right to [her] sole beliefs and practices, GreenFaithMinistry, [her] spirituality/religion under the First Amend. Free Exercise Clause." (*Id.* at 3.)

Plaintiff states she is the "Property manager, Volunteer, High Priestess (second minster [sic] in command), member, etc. [of GreenFaithMinistry] who leases two rooms [to GreenFaithMinistry]." (*Id.* at 8, ¶ 18.) Plaintiff alleges on July 10, 2017, Plaintiff alleges that two City Fire Department Marshals (Defendants McClarin and Nieves) and a City Police Officer (Defendant Vargason) attempted to conduct an occupancy check of the building in which GreenFaithMinistry is located. (*Id.*, ¶¶ 11–13, 18–19.) Plaintiff states she refused to let the defendants in the building and, instead, told them they would have to contact Reverend Baker. (*Id.*, ¶ 19.) Plaintiff alleged Defendant McClarin told her, "If you do not let us in, nobody will be allowed in." (*Id.* at 11, ¶ 24.)

While Defendants McClarin, Nieves, and Vargason contacted Reverend Baker by telephone from the front porch of the building, other GreenFaithMinistry members approached the building. (*Id.*, ¶¶ 21, 27, 34, 35.) Defendant Nieves allegedly questioned one of the individuals, asking "[i]f marijuana is being consumed inside the building." (*Id.*, ¶ 34.) The various members who approached the building left the premises. (*Id.*, ¶¶ 27, 34, 35.)

Plaintiff alleges Defendant Vargason pulled forcefully on the doors to GreenFaithMinistry in an "attempt to gain illegal entry." (*Id.* at 16–17, ¶ 28.) Plaintiff came to the door, and the following exchange allegedly took place between her and Defendant Vargason:

> "Open this door. If you do not open this door, you will be in trouble" Defend[ant] Roger Vargason then uses all his weight and leans noticeably back in attempt to pull the secured entrance door. Plaintiff [ ] responds "this is private property do you have a warrant? This angers Defendant Officer Roger Vargason who reply's [sic] "Oh now I am talking to Rob Corry" (Marijuana lawyer out of Denver)[.] Defendant Officer Roger Vargason continues to attempt to unlawfully, lawlessly, arbitrary, forcefully open secured doors in violation of Art. 6, Clause 2 Supremacy Clause, Constitutions, Fourth Amend.

(*Id.*, ¶¶ 28, 30.) Plaintiff also alleged Defendant Vargason threatened Plaintiff and made "the false, unjustified accusation and persecuted statement 'we know you have an illegal grow in there.' " (*Id.*, ¶ 28.) Plaintiff alleges that, after questioning another member of GreenFaithMinistry and taking pictures of the some of the members' license plates, Defendants Vargason, McClarin and Nieves left the premises after approximately 45 minutes, apparently without gaining access to the property. (*Id.* at 21–23, ¶¶ 33–36.)

Plaintiff alleges the defendants' actions deprived her, GreenFaithMinistry, and its members of their right to freely exercise their religion. (*Id.*) Plaintiff alleges she and four other church members/volunteers were required to vacate their place of worship, which caused

Plaintiff to believe she, GreenFaithMinistry, and the other members were "persecuted via Guilt by Association." (*Id.* at 11–12, ¶ 24.)

Plaintiff asserts claims for the defendants' violations of her "Absolute Natural Rights, Art. 6, Clause 2 Supremacy Clause, Constitutions [sic], First Amend. Violations of the Establishment Clause," (*id.* at 37); the "Free Exercise Clause-Business, Beliefs, Practice, Association, Viewpoint, Idea, Expression, Activities, Conscience, ETC." (*id.* at 45), the "Fourth Amend. Clauses and 42 U.S. Code § 1985 – Conspiracy to Interfere with civil rights. (3) Attempts to enter without a warrant violation of the Fourth Amendment. Attempted Warrantless Search" (*id.* at 52), and

> U.S. of A. Constitution Art. 1 Section 9 Clause 3 No Bill of Attainder or ex post facto Law shall be passed, Section 10 Clause 1 Shall not pass any Bill of Attainder, ex post facto Law, or Law impairing The Obligation of Contracts, or grant any Title of Nobility., Amend. 5 Due Process, Amend. 9, Amend. 10 All Reserved Powers of the people and Also Entangled with the Colorado Constitution Article II Section 1: Vestment of Political Power, Section 3: Inalienable Rights, Section 11: Ex Post Facto Laws nor immunities, Section 25: Due Process of Law, Section 28: Rights Reserved Not Disparaged

(*id.* at 61).

STANDARDS OF REVIEW

A. Pro Se *Plaintiff*

Plaintiff is proceeding pro se. The court, therefore, "review[s] h[er] pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted). *See also Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (holding allegations of a *pro se* complaint "to less stringent standards than formal pleadings drafted by lawyers"). *Pro se* plaintiffs must "follow the same rules of procedure that govern other litigants" and "must still allege the

necessary underlying facts to support a claim under a particular legal theory." *Thundathil v. Sessions*, 709 F. App'x 880, 884 (10th Cir. 2017) (citations and internal quotation mark omitted). "[A] *pro se* plaintiff requires no special legal training to recount the facts surrounding [her] alleged injury, and [s]he must provide such facts if the court is to determine whether [s]he makes out a claim on which relief can be granted." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). A *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Id.*

Courts "cannot take on the responsibility of serving as the litigant's attorney in constructing arguments" or the "role of advocate" for a *pro se* plaintiff. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). A court may not assume that a plaintiff can prove facts that have not been alleged, or that a defendant has violated laws in ways that a plaintiff has not alleged. *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). *See also Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997) (court may not "supply additional factual allegations to round out a plaintiff's complaint"); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir.1991) (the court may not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues"). The plaintiff's *pro se* status does not entitle her to application of different rules. *See Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

B. Lack of Subject Matter Jurisdiction

Federal Rule of Civil Procedure Rule 12(b)(1) empowers a court to dismiss a complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case. Rather, it calls for a determination that the

court lacks authority to adjudicate the matter, attacking the existence of jurisdiction rather than the allegations of the complaint. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). A court lacking jurisdiction "must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *See Basso*, 495 F.2d at 909. The dismissal is without prejudice. *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006); *see also Frederiksen v. City of Lockport*, 384 F.3d 437, 438 (7th Cir. 2004) (noting that dismissals for lack of jurisdiction should be without prejudice because a dismissal with prejudice is a disposition on the merits which a court lacking jurisdiction may not render).

A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere conclusionary allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). When considering a Rule 12(b)(1) motion, however, the Court may consider matters outside the pleadings without transforming the motion into one for summary judgment. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Where a party challenges the facts upon which subject matter jurisdiction depends, a district court may not presume the truthfulness of the complaint's "factual allegations . . . [and] has wide discretion to allow affidavits, other documents, and [may even hold] a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id.*

C. Failure to State a Claim upon Which Relief Can Be Granted

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (quotation marks omitted).

"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." *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The *Iqbal* evaluation requires two prongs of analysis. First, the court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusion, bare assertions, or merely conclusory. *Id.* at 679–81. Second, the Court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id.* at 679.

Notwithstanding, the court need not accept conclusory allegations without supporting factual averments. *S. Disposal, Inc., v. Texas Waste*, 161 F.3d 1259, 1262 (10th Cir. 1998).

"[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S at 678. Moreover, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does the complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (citation omitted).

In evaluating a Rule 12(b)(6) motion to dismiss, the court may consider documents incorporated by reference, documents referred to in the complaint that are central to the claims, and matters of which a court may take judicial notice. *Tellabs, Inc*, 551 U.S. at 322; *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). Publicly filed court records, including court transcripts, are subject to judicial notice. *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979); *United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007); *Trusdale v. Bell*, 85 F. App'x 691, 693 (10th Cir. 2003).

D. Amend Complaint

Pursuant to Federal Rule of Civil Procedure 15(a), the court is to freely allow amendment of the pleadings "when justice so requires." Fed. R. Civ. P. 15(a). The grant or denial of an opportunity to amend is within the discretion of the court, but "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis*, 371 U.S. 178, 182 (1962). "Refusing leave to amend is generally only justified upon a showing

of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993).

ANALYSIS

A. Standing

The City Defendants move to dismiss Plaintiff's claims for lack of standing. (City Mot. at 4–5.) Specifically, the City Defendants argue that Plaintiff's claims are based on the defendants' alleged violations of rights other than Plaintiff's. (*Id.*)

Standing is a threshold requirement, and without it, the Court lacks jurisdiction. *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009). A federal court's jurisdiction . . . can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (internal citations and quotation marks omitted). Even when the plaintiff has alleged injury sufficient to meet Article III's 'case or controversy' requirement, "the plaintiff generally must assert [her] own legal rights and interests, and cannot rest [her] claim to relief on the legal rights or interests of third parties." *Id.*

Plaintiff asserts claims against the defendants based on their purported violations of others' rights—namely, GreenFaithMinistry and its members. Plaintiff complains that Defendants McCalarin, Nieves, and Vargason deterred others from entering the building. (Am. Compl., ¶¶ 27, 34, 35.) She alleges that Defendant Vargason attempted a warrantless entry of the GreenFaithMinistry building. (*id.*, ¶ 28.) She avers that Defendant Vargason left Reverend Baker a voicemail message falsely accusing GreenFaithMinistry of being a retail marijuana

establishment. (*Id.*, ¶ 32.) She contends that the City of Colorado Springs is entangled financially with many Christian organizations and targeted GreenFaithMinistry. (*Id.*, ¶ 4.) Plaintiff fails to allege how this conduct, directed to other individuals and to the GreenFaithMinistry entity, harmed her.

In her response, Plaintiff does not dispute that she is suing to vindicate the rights of others; rather, she argues, citing *Truax v. Raich*, 239 U.S. 33 (1915), *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925), and *Barrows v. Jackson*, 346 U.S. 249 (1953), that "you can sue for others['] rights.") (Resp. City Mot. at 2.) However, in *Truax*, the non-citizen plaintiff did not assert claims on behalf of others but rather sued on his own behalf to challenge the constitutionality of a law that required employers to maintain a workforce of at least eighty percent qualified electors or native-born citizens. 239 U.S. at 39. In *Pierce*, two private-school-plaintiffs asserted claims on their own behalf to enjoin enforcement of a law that required parents and guardians to send their children to public schools. 268 U.S. at 531–34.

Finally, in *Barrows*, the Court held that a woman who was sued for selling her real property to an African American, in violation of a restrictive covenant applicable to her property, could defend the action, which sought $11,600 in damages, by arguing that the covenant violated the constitutional rights of others. 346 U.S. at 254–55. The court noted that "a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation" but that in this case "a judgment against [the plaintiff] would constitute a direct, pocketbook injury to her." *Id.* at 255–56.

In this case, Plaintiff has not alleged that she, personally, was injured by the defendants' alleged conduct directed to GreenFaithMinistry or its members. Plaintiff does not have standing

to vindicate the rights of others in her own name. *Warth*, 422 U.S. at 499. Accordingly, to the extent Plaintiff asserts claims on behalf of others, including GreenFaithMinistry and its members, the claims are dismissed without prejudice.

Upon a thorough review of Plaintiff's 70-page Amended Complaint, the only allegations concerning actions taken by the defendants against Plaintiff directly are that Defendant Vargason ordered Plaintiff "to 'Praise the lord' " (Am. Compl., ¶ 5); that Defendant McClarin threatened Plaintiff that he would not allow anyone else into the building unless she let the defendants in to conduct the occupancy search (*id*, ¶ 19); and that Defendant Vargason took a picture of Plaintiff's license plate and vehicle (*id.*, ¶ 33). The court addresses these allegations *infra*.

B. Establishment Clause

The Tenth Circuit follows the three-part test from *Lemon v. Kurtzman*, 403 U.S. 602, 91 (1971), to determine whether a government defendant has violated the Establishment Clause. The Tenth Circuit has explained that

> government action does not violate the Clause if (1) it has a secular purpose; (2) its principal or primary effect is one that neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion. We interpret the first and second prongs of the *Lemon* test in light of Justice O'Connor's endorsement test. That is, we ask whether government's actual purpose is to endorse or disapprove of religion, and whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. We evaluate the government's actions from the perspective of a reasonable observer who is aware of the history, purpose, and context of the act in question.

Medina v. Catholic Health Initiatives, 877 F.3d 1213, 1230 (10th Cir. 2017) (quoting *Fields v. City of Tulsa*, 753 F.3d 1000, 1010 (10th Cir. 2014)). A governmental action violates the Establishment Clause if it fails to satisfy any of three prongs of the *Lemon* test. *See Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1259 (10th Cir. 2005) ("Thus, to succeed,

Plaintiffs must allege facts which suggest a violation of any part of the [*Lemon*] analysis."); *Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) (noting that governmental action does not run afoul of the Establishment Clause "so long as" it satisfies all three prongs of the *Lemon* test).

1. Secular Purpose

"The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). "Establishment Clause questions are heavily dependent on the specific context and content of the display." *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222 (10th Cir. 2005) (citing *Van Orden v. Perry*, 545 U.S. 677 (2005) (Breyer, J., concurring in the judgment). The inquiry is "fact-intensive." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment). "In deciding whether the government's purpose was improper, a court must view the conduct through the eyes of an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." Medina, 877 F.3d at 1230 (citing *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030 (10th Cir. 2008) (quotations omitted)). The Tenth Circuit "will not lightly attribute unconstitutional motives to the government, particularly where [it] can discern a plausible secular purpose." 877 F.3d at 1230.

Defendants argue, and the court agrees, that an objective observer would not view Defendant Vargason's alleged statement to Plaintiff, "Praise the lord," to be motivated by an intent to endorse religion. According to Plaintiff's own allegations, Defendant Vargason was on

the premises to conduct an occupancy check of the building because he suspected GreenFaithMinistry of operating an illegal marijuana grow and retail store. (Am. Compl., ¶¶ 19, 28.) Under the facts alleged by Plaintiff, and considering the "history, purpose, and context of" the events in question, *Medina*, 877 F.3d at 1230, the court find it implausible that a reasonable observer would conclude that Defendant Vargason made the statement with the purpose of endorsing religion. *Iqbal*, 556 U.S. at 678. Moreover, Plaintiff has alleged no facts to support her conclusions that Defendant McClarin's alleged threats to prevent anyone from entering the building or Defendant Vargason's taking pictures of Plaintiff license plate and vehicle were motivated by an intent to endorse or disapprove of any religion. *Medina*, 877 F.3d at 1230. Accordingly, these "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Hall*, 935 F.2d at 1110.

2. Primary Effect

Under the second prong of the *Lemon* test, the court considers whether the government action has the principal or primary effect of advancing or inhibiting religion. *Lemon*, 403 U.S. at 612. Plaintiff contends that Defendant Vargason threatened her while making "the false, unjustified accusation and persecuted statement 'we know you have an illegal grow in there' " and " 'what you're doing is illegal.' " (Am. Compl., ¶ 28.) Plaintiff then infers that "the real reason" the defendants were at GreenFaithMinistry was to violate the Supremacy Clause. (*Id.*) However, again, given the "history, purpose, and context of" the events, *Medina*, 877 F.3d at 1230, the court finds a it is implausible that an objective observer would conclude that Defendant Vargason's statement, Defendant McClarin's alleged threat, or Defendant Vargason's picture-taking conveyed a message that any religion or particular religious belief is favored or preferred.

3. Excessive Entanglement

" '[T]o assess entanglement, [courts] have looked to the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.' " *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, 612 F. Supp. 2d 1163, 1181 (D. Colo. 2009) (quoting *Agostini v. Felton*, 521 U.S. 203, 232–233 (1997). Excessive entanglement consists of "interfering in the internal organization of a religious institution." *Medina*, 877 F.3d at 1234. It is conduct that infringes on religious organizations' "independence from secular control or manipulation—[their] power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.' " *Id.* (citation omitted). "Not all entanglements, of course, have the effect of advancing or inhibiting religion." *Agostini*, 521 U.S. at 233. "Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Id.*

Plaintiff fails to allege how any government entity was benefited by Defendant Vargason's statement, Defendant McClarin's alleged threat, or Defendant Vargason's picture taking. Moreover, Plaintiff fails to allege any interference in the internal organization of a religious institution. Finally, these three allegations cannot be considered "excessive."

The court finds that Plaintiff's Establishment Clause claim must be dismissed.

C. Free Exercise Clause

To state a claim for relief under the Free Exercise Clause, Plaintiff must allege facts demonstrating the challenged action created a burden on the exercise of her religion. *United States v. Lee*, 455 U.S. 252, 256–57 A plaintiff states a claim her exercise of religion is burdened

if the challenged action is coercive or compulsory in nature. *See Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 448–51 (1988).

Plaintiff's Amended Complaint is devoid of any factual allegation that she was burdened in her ability to freely exercise her religious beliefs. She does not allege that any defendant prevented her from worshiping or otherwise freely practicing her religion, nor does she allege that any defendant required her to affirm a belief that is contrary to her faith. Though Plaintiff claims that Defendant Vargason's statement, "Praise the lord" was an order, she fails to allege any facts to support that assertion.

Plaintiff's Amended Complaint fails to state a Free Exercise claim.

D. Fourth Amendment

Plaintiff asserts that Fire Marshal McClarin's statement, "If you do not let us in, nobody will be allowed in," seized the building in violation of the Fourth Amendment and "made [her] and four other church members/volunteers/ vacate their place of worship."[2] (Am. Compl., ¶¶ 19, 24.) Plaintiff also complains of the "unconstitutional documenting of Plaintiff['s and others'] vehicles and license plates." (*Id.*, ¶ 51.)

"A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The Fourth Amendment protects "people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). However, "any determination of just what protection is to be given requires, in

[2] The court already determined *supra* that Plaintiff does not have standing to vindicate the rights of others in her own name. *Warth*, 422 U.S. at 499.

a given case, some reference to a place." *United States v. Ruckman*, 806 F.2d 1471, 1473 (10th Cir. 1986).

Plaintiff's factual allegations belie her claim that she was required to vacate the property. Plaintiff fails to allege that any defendant prevented her from entering the building or forced her from it. To the contrary, Plaintiff alleges that she entered the building and locked the door while the defendants were on scene, after Defendant McClarin allegedly made the statement. (Am. Compl., ¶¶ 18, 19, 28.) Plaintiff further alleges that the defendants left the premises after just 45 minutes, without ever having stepped foot in the building and without ever ensuring that it was vacant. (*Id.*, ¶¶ 18, 36.)

Moreover, "law enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made." *Kentucky v. King*, 563 U.S. 452, 463 (2011) (citing *Horton v. California*, 496 U.S. 128, 136–140 (1990). Plaintiff does not allege that the defendants violated the Fourth Amendment by their arrival at the property. Nor does Plaintiff allege any "meaningful interference" with her vehicle by photographing it. *Jacobsen*, 466 U.S. at 113.

Finally, Plaintiff also asserts a claim for "Attempted Warrantless Search," based upon Officer Vargason's attempt to open the locked building door without a warrant. (Am. Compl., ¶ 28.) It is well settled that "no claim premised on an 'attempted' Fourth Amendment violation can result when no search occurs." *Doe v. McAfee*, 13–CV–01287–MSK–MJW, 2014 WL 4852274, at *4 (D. Colo. Sept. 29, 2014) (dismissing claim for "attempted unreasonable search of her person" as not cognizable). In this case, Plaintiff does not allege that the defendants ever entered or searched the building.

Plaintiff's Fourth Amendment claims fail and are dismissed.

E. Qualified Immunity

Qualified immunity is an affirmative defense against 42 U.S.C. § 1983 damage claims available to public officials sued in their individual capacities. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The doctrine protects officials from civil liability for conduct that does not violate clearly established rights of which a reasonable person would have known. *Id.* As government officials at the time the alleged wrongful acts occurred, being sued in their individual capacities, the defendants are entitled to invoke a qualified immunity defense to Plaintiff's claims. *See id.* at 231; *Johnson v. Jones*, 515 U.S. 304, 307 (1995) (noting that police officers were "government officials entitled to assert a qualified immunity defense"). "In resolving a motion to dismiss based on qualified immunity, a court must consider whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right, and whether the right at issue was clearly established at the time of defendant's alleged misconduct." *Leverington v. City of Colo. Springs*, 643 F.3d 719, 732 (10th Cir. 2011) (quoting *Pearson*, 555 U.S. at 232) (internal quotations omitted). Once a defendant invokes qualified immunity, the burden to prove both parts of this test rests with the plaintiff, and the court must grant the defendant qualified immunity if the plaintiff fails to satisfy either part. *Dodd v. Richardson*, 614 F.3d 1185, 1191 (10th Cir. 2010). Where no constitutional right has been violated "no further inquiry is necessary and the defendant is entitled to qualified immunity." *Hesse v. Town of Jackson, Wyo.*, 541 F.3d 1240, 1244 (10th Cir. 2008) (quotations omitted).

As the court has determined Plaintiff has failed to state any claim, the defendants are entitled to qualified immunity.[3]

F. Motion to Amend

Plaintiff seeks to amend her complaint to "(1) add additional evidence to bolster the fact that Defendants malicious intent in their violation of Candace Aguileras (sic) Ancient Absolute Nature Rights, Reserved Rights and Reserved Powers. (2) to clarify existing claims in the complaint." (Mot. Amend at 1–2.)

The Local Rules of this District require parties to meet and confer prior to filing any motion, except those motions filed in a case of an unrepresented prisoner, motions to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure, motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and motions to withdraw by counsel pursuant to D.C.COLO.LAttyR 5(b). D.C.COLO.LCivR 7.1(a).

Local Rule 7.1(a) specifically directs the moving party to "confer or make reasonable good faith efforts to confer with any opposing counsel or unrepresented party to resolve any disputed matter." *Id.* A violation of Local Rule 7.1(a) is an independent basis for denial of a motion. *See Predator Int'l, Inc. v. Gamo Outdoor USA, Inc.*, No. 09–cv–00970–PAB–KMT, 2014 WL 4056578, at *2 (D. Colo. Aug. 14, 2014).

In her motion to amend the complaint, Plaintiff provides a certification of conferral in which she avers she conferred with opposing counsel before filing her motion, in accordance

[3] The court need not address the other arguments made by the defendants in their motions, including arguments that any of the individual defendants did not participate in the alleged constitutional violations. Moreover, the court does not construe any of Plaintiff's claims as state tort claims, and Plaintiff confirms in her response to Defendant Mitchell's Motion to Dismiss that she does not assert any state tort claims. (*See* Resp. Mitchell Mot. at 2.)

with this Court's Local Rule of Practice 7.1(a). *See* D.C.COLO.LCivR 7.1(a). However, Plaintiff's attempt at conferral was to send defense counsel an email stating, "I am conferring with you to see you are opposed to a motion of leave to file a 2nd Amended complaint. Please answer via email." (Resp. Mot. Amend, Ex. A.) Defense counsel Hodges responded, requesting a redlined proposed complaint. (*See id.*) On October 16, 2018, at 9:10 p.m., Plaintiff emailed proposed amendments to Mr. Hodges without copying other counsel. (*Id.*, Ex. B.) Also, on October 16, 2018, at 9:42 p.m., the parties were notified by the electronic filing system that Plaintiff had filed her Motion for Leave to File a Second Amended Complaint.

To satisfy the requirements of Local Rule 7.1(a), "the parties must hold a conference, possibly through the exchange of correspondence but preferably through person-to-person telephone calls or face-to-face meetings, and must compare views and attempt to reach an agreement." *Hoelzel v. First Select Corp.*, 214 F.R.D. 634, 636 (D. Colo. 2003). The rule is not satisfied by one party sending an email merely indicating an intention to file a motion without suggesting any negotiation or compromise. *Id.* Noncompliance with procedures required by a local rule is a proper basis for denying Plaintiff's motion. *See Shrader v. Biddinger*, 633 F.3d 1235, 1249 (10th Cir. 2011) (denying a motion to amend a complaint for failure to comply with a local rule) (citations omitted); *Farris v. Broaddus*, Case No. 08–CV–00986–CMA–BNB, 2008 WL 5225885, at *1 (D. Colo. Dec. 12, 2008) (denying a motion, in part, based upon a party's failure to comply with Local Rule 7.1(a)).

G. City Defendants' Motion for Attorney Fees

Finally, the State Defendants request an award of their attorney's fees pursuant to 42 U.S.C. § 1988. (City Mot. at 14–15.) The court has discretion to grant "the prevailing party . . .

a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). "A prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983); *see Edgerly v. City and Cnty. of San Francisco*, 599 F.3d 946, 962 (9th Cir.2010). However, the City Defendants have not provided support for any particular fee requested. *See* D.C.COLO.LCivR 54.3 (requiring that, "[u]nless otherwise ordered by the court, a motion for attorney fees shall be supported by affidavit," and "shall include the following for each person for whom fees are claimed: (1) a summary of relevant qualifications and experience; and (2) a detailed description of the services rendered, the amount of time spent, the hourly rate charged, and the total amount claimed."). Accordingly, the City Defendants' request for attorney's fees is denied.

WHEREFORE, it is

ORDERED that "Defendant Mitchell's Motion to Dismiss Plaintiff's Amended Complaint (Doc. 17) Pursuant to Fed. R. Civ. P. 12(b)(1) and (6)" and "City Defendants' Motion to Dismiss Amended Complaint." (Doc. No. 23) are **GRANTED** as follows:

1. To the extent Plaintiff asserts claims on behalf of others, including GreenFaithMinistry and its members, the claims are dismissed without prejudice for lack of standing;
2. Plaintiff's remaining claims are dismissed with prejudice for failure to state a claim upon which relief can be granted; and
3. The defendants are granted qualified immunity as to the claims asserted against them in their individual capacities. It is further

ORDERED that the City Defendants' request for attorney's fees is **DENIED**. It is further

ORDERED that Plaintiff's "Motion for Leave to File a Second Amended Complaint (Doc. No. 26) is **DENIED**. It is further

ORDERED that any other pending motions are **DENIED** as moot. It is further

ORDERED that judgment shall enter in favor of the defendants and against the plaintiff on all claims for relief and causes of action asserted in this case. It is further

ORDERED that the defendants are awarded their costs to be taxed by the Clerk of Court in the time and manner prescribed by Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1. It is further

ORDERED that this case is **CLOSED**.

Dated this 23rd day of July, 2019.

BY THE COURT:

Kathleen M. Tafoya
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18–cv–02125–KMT

CANDACE AGUILERA,

Plaintiff,

v.

CITY OF COLORADO SPRINGS, a municipality,
DANIELLE MCCLARIN, in her official and individual capacity,
ANGIE NEIVES, in her official and individual capacity,
ROGER VARGASON, in his official and individual capacity,
BRETT LACEY, in his official and individual capacity,
ROBERT MITCHELL, in his official and individual capacity,

Defendants.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order (Doc. No. 45) of Magistrate Judge Kathleen M. Tafoya entered on July 23, 2019, it is

ORDERED that the "Motion to Dismiss Plaintiffs Amended Complaint from Defendants Robert Mitchell, Robert Mitchell (I)", (Doc. No. 22), and the "Motion to Dismiss Amended Complaint by Defendants City of Colorado Springs, Colorado, Brett Lacey, Brett (I) Lacey, Danielle McClarin, Danielle (I) McClarin, Angie Neives, Angie (I) Nieves, Roger Vargason, Roger (I) Vargason, (Doc. No. 23), are **GRANTED**. It is further

ORDERED that the City Defendants' request for attorney's fees is **DENIED**. It is further

ORDERED that Plaintiff's Motion for Leave to File a Second Amended Complaint (Doc. No. 26) is **DENIED**. It is further

ORDERED that any other pending motions are **DENIED** as moot. It is further

ORDERED that judgment shall enter in favor of the Defendants and against the Plaintiff on all claims for relief and causes of action asserted in this case. It is further

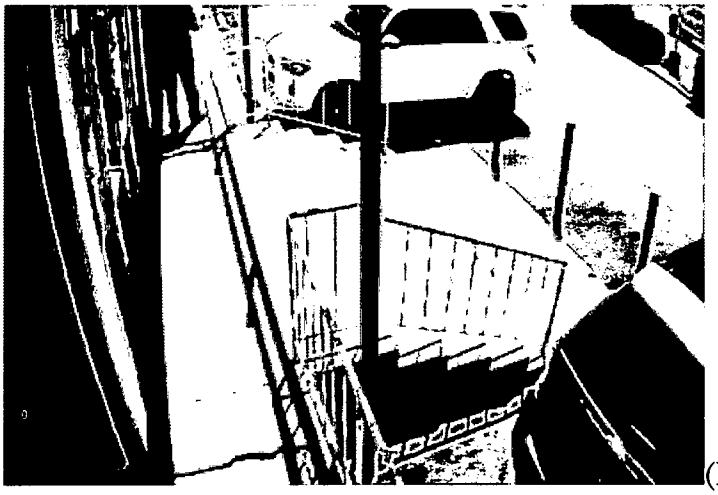
ORDERED that the Defendants are awarded their costs to be taxed by the Clerk of Court in the time and manner prescribed by Fed. R. Civ. P. 54(d)(1) and D.C.Colo.LCivR 54.1. It is further

ORDERED that this case is **CLOSED**.

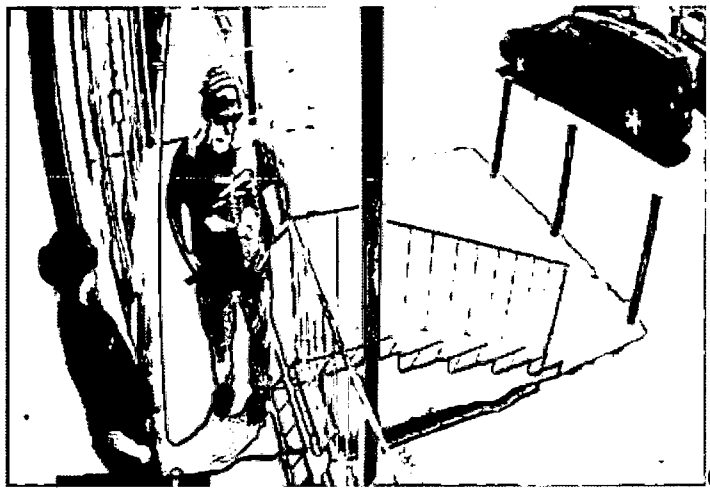
Dated this 23rd day of July, 2019.

BY THE COURT:
JEFFREY P. COLWELL, CLERK

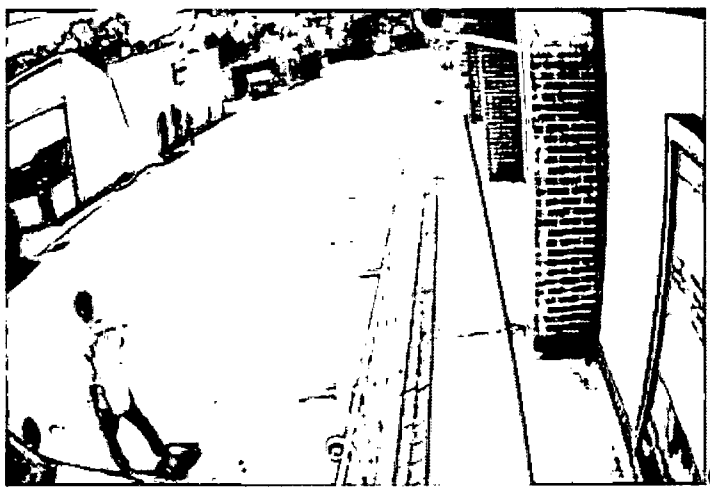
By: s/ K.Senamontry
Deputy Clerk


(Exhibit 14)


(Exhibit 15)



(Exhibit 16)



(Exhibit 17)