IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-01951-CNS-MDB

JACQUELINE ARMENDARIZ and CHINOOK CENTER,

Plaintiffs,

v.

CITY OF COLORADO SPRINGS,
DANIEL SUMMEY, a detective with the Colorado Springs Police Department, in his individual capacity,
B.K. STECKLER, a detective with the Colorado Springs Police Department, in his individual capacity,
JASON S. OTERO, a sergeant with the Colorado Springs Police Department, in his individual capacity,
ROY A. DITZLER, a police officer with the Colorado Springs Police Department, in his individual capacity, and
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

MOTION TO STAY DISCOVERY BY DEFENDANTS DANIEL SUMMEY AND THE FEDERAL BUREAU OF INVESTIGATION

Defendants Daniel Summey and the Federal Bureau of Investigation ("FBI") respectfully move for a stay of discovery—including the Rule 26(f) conference, tendering of a proposed scheduling order, and scheduling conference—until the Court renders a decision on Summey's entitlement to qualified immunity, which he intends to raise by motion when his response to the First Amended Complaint is due on November 20, 2023. Supreme Court and the Tenth Circuit precedent dictates that discovery should not proceed—on any claims or against any defendants—before the district court rules on the qualified immunity defense, where the defense does not depend on disputed facts. Even when the Court considers qualified immunity in conjunction

with other factors bearing on the traditional stay analysis, the balance of factors favors a temporary stay.

STATEMENT ON CONFERRAL

Pursuant to D.C.COLO.LCivR 7.1(a), undersigned counsel certifies that he conferred with Plaintiffs' counsel regarding the relief sought in this motion via email on October 6, 2023, and October 10, 2023, and Plaintiffs oppose this motion. Additionally, the parties discussed the relief sought in this motion during the pre-scheduling conference with the Court on September 13, 2023, and Plaintiffs represented their opposition to this motion, prompting the Court to set a briefing schedule for this motion. *See* ECF No. 21 at 2.

ARGUMENT

I. The Court should resolve qualified immunity issues before permitting discovery.

A. Supreme Court and Tenth Circuit precedent dictates a stay when a defendant raises qualified immunity based on the allegations in the complaint.

Qualified immunity shields public officials from needing to defend against liability in their individual capacities so long as their conduct does not violate clearly established rights of which every reasonable official would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is "an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Jiron v. City of Lakewood*, 392 F.3d 410, 414 (10th Cir. 2004) (same). Accordingly, the Supreme Court directs district courts to resolve the issue "at the earliest possible stage in litigation," *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam), and "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Harlow*, 457 U.S. at 818; *see also Siegert v. Gilley*, 500 U.S. 226, 231 (1991)

("Once a defendant pleads a defense of qualified immunity," "discovery should not be allowed" until the "threshold immunity question is resolved") (quoting *Harlow*, 457 U.S. at 818).

Participation in discovery is one of the chief burdens against which qualified immunity is designed to protect. Qualified immunity gives "government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such *pretrial* matters as discovery ..., as [i]nquiries of this kind can be particularly disruptive of effective government.'" *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (quoting *Mitchell*, 472 U.S. at 526) (emphasis and alterations in *Behrens*). The "'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims against government officials [will] be resolved prior to discovery." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'"). These discovery burdens include, among other things, preparing a discovery plan under Rule 26(f). *See Howe v. City of Enterprise*, 861 F.3d 1300, 1302 (11th Cir. 2017). "Discovery should not be allowed until the court resolves the threshold question whether the law was clearly established at the time the allegedly unlawful action occurred." *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992).

When a public official raises qualified immunity at the pleading stage, "the district court should resolve that threshold question *before permitting discovery*." *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (emphasis added). To resolve the qualified immunity issue on the pleadings, courts "determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law." *Id.* Discovery is neither necessary nor

appropriate to make that purely legal determination. *See Workman*, 958 F.2d at 336 (describing the qualified immunity inquiry at the pleading stage as "purely legal" and stating that the question should be resolved "before discovery").

The Supreme Court's decision in *Anderson v. Creighton* illustrates the point. There, the plaintiffs alleged that an FBI agent conducted a warrantless search and sued for money damages under the Fourth Amendment, among other things. *Anderson*, 483 U.S. at 637. Although the plaintiffs argued that they were entitled to discovery, the Supreme Court concluded that the question of whether the plaintiffs had alleged a violation of a clearly established right should be decided *before* any discovery could be taken: "Thus, on remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is *entitled to dismissal prior to discovery*." *Id.* at 646 n.6 (emphasis added).

Supreme Court and Tenth Circuit precedent dictates a stay here. Summey intends to raise a qualified immunity defense based on the allegations in the First Amended Complaint. He intends to assert this defense at the earliest possible stage of this litigation: his responsive pleading deadline. The doctrine of qualified immunity requires the threshold immunity inquiry to be decided before discovery is permitted.[1] *See, e.g.*, *Anderson*, 483 U.S. at 646 n.6;

[1] Because this motion to stay discovery is due before any motion to dismiss, the federal defendants are still evaluating additional grounds for dismissal of the claims. Presently, Summey intends to argue that because he was acting in his capacity as a federal Task Force Officer, the Section 1983 claim against him should be construed as a *Bivens* claim, that no *Bivens* remedy exists in this context, and that special factors counsel hesitation in creating one. The question of whether a *Bivens* remedy exists is a purely legal inquiry "antecedent" to the qualified immunity question. *Hernandez v. Mesa*, 582 U.S. 548, 553 (2017). Courts have stayed discovery to decide this threshold legal issue alone. *See* Order, *Wimberly v. United States*, No. 22-cv-20166, at *3-*4 (S.D. Fla. Sept. Sept. 29, 2022), ECF No. 42 (staying discovery to resolve

Crawford-El, 523 U.S. at 598; *Workman*, 958 F.2d at 336. A temporary stay of discovery, to allow the Court to review immunity issues and other potentially dispositive legal arguments, appropriately balances "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231; *see also Martin v. Cnty. of Santa Fe*, 626 F. App'x 736, 740 (10th Cir. 2015) ("there is a strong policy justification for staying discovery and for refusing requests for additional discovery once a defendant invokes qualified immunity as a defense").

B. The stay of discovery should apply to all claims and parties.

The FBI also is entitled to a stay of discovery based on Summey's qualified immunity defense. In *Iqbal*, the Supreme Court made clear that discovery must be stayed when a qualified immunity defense is raised, even if there are separate claims or defendants that are not entitled to the immunity defense:

> It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

Iqbal, 556 U.S. at 685-86. There is "no justification for ignoring the clear language in *Iqbal*, and the Supreme Court precedent predating it, which directs that discovery should *not* proceed until

---

a dispositive motion arguing that no *Bivens* remedy exists); *cf. Elmore v. Artisan & Truckers Cas. Co.*, No. 20-cv-01994-PAB-KMT, 2020 WL 4571095, at *2 (D. Colo. Aug. 7, 2020) (staying discovery to resolve a dispositive legal issue, noting that "Defendant could be prejudiced by engaging in discovery at this time"). Separate from the qualified immunity issue, the Court should not permit discovery into non-cognizable claims against the federal defendants.

threshold immunity questions are resolved even if not every claim or defendant raises an immunity defense." *Lucero v. City of Aurora*, No. 23-cv-00851-GPG-SBP, 2023 WL 5957126, at *5 (D. Colo. Sept. 13, 2023); *see also Estate of Waterhouse v. City of Lakewood*, No. 21-cv-00982-KLM, 2022 WL 20275683, at *2 (D. Colo. Jan. 6, 2022) (staying discovery as to all defendants, including the defendant municipality, noting that "the United States Supreme Court has discouraged partial stays of discovery in situations like the one presented here"); *Paulsen v. Anderson*, No. 15-cv-00800-PAB-KMT, 2015 WL 5818244, at *1 (D. Colo. Oct. 6, 2015) ("discovery should be avoided if possible" even for "defendants in the case not asserting qualified immunity").

The *Lucero* case is instructive. There, the plaintiff brought Fourth Amendment and Enhance Law Enforcement Integrity Act claims arising out of her arrest "in connection with protest activities." *Lucero*, 2023 WL 5957126, at *1. She sued both a police officer in his individual capacity and his employing municipality, approximately two years after the facts giving rise to the suit, *id.*, as plaintiffs have done here. The court analyzed Supreme Court and Tenth Circuit case law on qualified immunity and concluded that a stay must be entered, both based on qualified immunity grounds alone and after considering the "*String Cheese Incident*" factors. *Id.* at *3-*10 (referring to *String Cheese Incident, LLC v. Stylus Shows, Inc.*, No. 02-cv-01934-LTB-PA, 2006 WL 894955 (D. Colo. March 30, 2006)). The court observed that, particularly after *Iqbal*, "the law is clear that discovery should be stayed upon assertion of qualified immunity, even for those defendants not asserting the defense." *Id.* at *6 (quoting *Tenorio v. Pitzer*, No. 12-cv-1295, 2013 WL 12178001, at *3 (D.N.M. July 27, 2013)). The court also observed that *String Cheese Incident* was decided before *Iqbal*, "in which the Supreme

Court recognized that the intertwined positions of multiple defendants can jeopardize the right to avoid discovery of an individual defendant who asserts qualified immunity."[2] *Lucero*, 2023 WL 5957126, at *6. For the same reasons, the FBI is entitled to a stay of discovery based on Summey's qualified immunity defense.

C. Although narrow discovery into a qualified immunity defense may be allowed in limited circumstances, merits discovery should not proceed before the Court rules on the immunity defense on a motion to dismiss.

While it is true that the prohibition on discovery in the face of a qualified immunity defense is not absolute, discovery should not commence before resolving a motion to dismiss on immunity grounds. In cases in which qualified immunity *cannot be resolved on a motion to dismiss*, limited discovery may be necessary before a court decides a summary judgment motion on qualified immunity grounds. *See Crawford-El*, 523 U.S. at 593 n.14 (explaining that the assertion of qualified immunity may not render a defendant immune "from *all* discovery" because "limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity"). However, even where discovery is permitted as an exception to the general rule, the right to discovery is "narrow" and "limited to the issue of qualified immunity." *Cole v. Ruidoso Mun. Schs.*, 43 F.3d 1373, 1387 (10th Cir. 1994) ("any such discovery must be tailored specifically to the immunity question") (quoting *Workman*, 958 F.2d at 336); *see also Crawford-El*, 523 U.S. at 593 n.14; *Stonecipher v. Valles*, 759 F.3d 1134, 1149 (10th Cir. 2014) ("If . . . the district court determines it cannot rule on the

[2] In reaching its decision, the *Lucero* court considered but rejected non-binding district court decisions to the contrary, including *Rome v. Romero*, 225 F.R.D. 640 (D. Colo. 2004), and *Kaufman v. University of Colorado*, No. 15-cv-00406-LTB-NYW, 2015 WL 4748987 (D. Colo. Aug. 12, 2015), as they failed to properly apply "Supreme Court precedent on the immunity/discovery question." *Id.* at *5-*6.

immunity defense without clarifying the relevant facts, the court 'may issue a discovery order *narrowly tailored to uncover only* those facts needed to rule on the immunity claim.'") (quoting *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012)). To qualify for such exceptional discovery, the plaintiff bears the burden of demonstrating how any discovery taken "will raise a genuine fact issue as to the defendants' qualified immunity claim." *Martin*, 626 F. App'x at 740 (quoting *Cole*, 43 F.3d at 1387). Discovery that is not "narrowly tailored to uncover only those facts needed to rule on the immunity claim" constitutes the very "burdensome pretrial discovery that qualified immunity protects against." *Hansen v. PT Bank Negara Indonesia (Persero), TBK*, 601 F.3d 1059, 1064 (10th Cir. 2010). Thus, Supreme Court and Tenth Circuit precedent does not permit full merits discovery before immunity issues can be resolved, even when immunity questions are resolved on summary judgment.

If a district court permits discovery that is "designed to flesh out the merits of a plaintiff's claim before a ruling on the immunity defense," or where discovery "exceeds that narrowly tailored to the question of qualified immunity," the district court effectively denies qualified immunity to the defendant and "appellate jurisdiction is invoked." *Garrett v. Stratman*, 254 F.3d 946, 953 (10th Cir. 2001) (quoting *Maxey ex rel. Maxey v. Fulton*, 890 F.2d 279, 282 (10th Cir. 1989), and *Lewis v. City of Fort Collins*, 903 F.2d 752, 754 (10th Cir. 1990)). Because no discovery is needed to resolve whether Summey is entitled to qualified immunity based on the allegations in the First Amended Complaint, the Court should implement a temporary stay of discovery. A denial of a stay would be a denial of qualified immunity.

II. The *String Cheese Incident* factors also support a stay.

Staying discovery under these circumstances is also a proper exercise of the Court's

discretion. *See, e.g., Rodriguez v. IBP, Inc.*, 243 F.3d 1221, 1230 (10th Cir. 2001) (control over discovery lies within the "sound discretion" of the court) (citing *Martinez v. Schock Transfer & Warehouse Co.*, 789 F.2d 848, 850 (10th Cir. 1986)); *see also Clinton v. Jones*, 520 U.S. 681, 706 (1997) (court has "broad discretion to stay proceedings as an incident to its power to control its own docket"). In exercising this discretion, courts in this District often consider the "*String Cheese Incident* factors" when analyzing a motion to stay discovery.[3] *See String Cheese Incident*, 2006 WL 894955, at *2. These factors include: "(1) plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest." *See id*.

When qualified immunity is at stake, "the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense." *Crawford-El*, 523 U.S. at 597. As the court in *Lucero* observed, the *String Cheese Incident* factors need not be considered when immunity is the basis for a stay. *See Lucero*, 2023 WL 5957126, at *6. Here, however, the *String Cheese Incident* factors also favor a stay.

Plaintiffs' interests. Plaintiffs have an interest in proceeding expeditiously with this case. However, it is also true that Plaintiffs waited to file this suit until approximately two years after the events described in the First Amended Complaint. *See, e.g.*, ECF No. 1 ¶¶ 33, 57, 89, 95, 116 (claims arising out of a protest on July 31, 2021, and search warrants obtained in August 2021); *id.* at 1 (complaint filed August 1, 2023). Defendants' proposal to stay discovery only

[3] *String Cheese Incident* was not a qualified immunity case, and the Tenth Circuit has never cited the case or reviewed its factors.

incrementally more until the Court can resolve qualified immunity or dispositive legal issues does not unduly delay the resolution of this case or prejudice Plaintiffs. And because permitting full merits discovery before resolving qualified immunity issues invokes appellate jurisdiction, *see Garrett*, 254 F.3d at 953, it is entirely possible that this matter could reach a final resolution faster *with* a temporary stay than without one, as the parties and the Court would avoid any potential interlocutory appeal on qualified immunity issues. Finally, Plaintiffs do not have a legitimate interest in conducting merits discovery if they fail to allege a clearly established violation of the U.S. Constitution or a claim cognizable under *Bivens* against a federal agent. It follows that the Court should determine those threshold issues, including whether Plaintiffs have stated any claim for relief, before permitting discovery. At most, this factor weighs slightly against a stay. *See Lucero*, 2023 WL 5957126, at *8-*9 (finding the plaintiff's interests outweighed by the burden on defendants, in light of the qualified immunity defense).

Burden on Defendants. Even if the Court declines to hold that qualified immunity, on its own, does not warrant a stay without considering the other *String Cheese Incident* factors, Summey's claimed entitlement to qualified immunity tips the second factor strongly in favor of a stay. *See Cook v. Whyde*, No. 20-cv-02912-PAB-STV, 2021 WL 981308, at *3 (D. Colo. Mar. 15, 2021) (finding no error in the magistrate judge's ruling that the second factor "weighed strongly in favor of a stay," where one defendant had raised a qualified immunity defense); *see also Hibbs v. Mercer*, No. 21-cv-00166-RM-KMT, 2021 WL 1662723, at *2 (D. Colo. Apr. 28, 2021) (finding the second factor favored a stay, even where qualified immunity was applicable only to some of the claims); *Neilsen v. McElderry*, No. 18-cv-01538-CMA-NRN, 2018 WL 10808581, at *2 (D. Colo. Sept. 19, 2018) (granting a stay of discovery, stating "[m]ost

significantly, the Court finds that the interest of Mr. Neilsen to proceed expeditiously is outweighed by the burden on Ms. McElderry of having to participate in discovery while a motion to dismiss arguing she is immune to suit is pending"); *Johnson v. Little*, No. 17-cv-02993-RBJ-NRN, 2018 WL 10215859, at *2 (D. Colo. Oct. 2, 2018) (same).

The Supreme Court and Tenth Circuit have repeatedly acknowledged the burdens of ordinary discovery on defendants seeking qualified immunity protection. *See, e.g.*, *Iqbal*, 556 U.S. at 672 (qualified immunity is an "entitlement not to stand trial or face the other burdens of litigation"); *Behrens*, 516 U.S. at 308 (pretrial discovery "can be particularly disruptive of effective government"); *Stonecipher*, 759 F.3d at 1148 (acknowledging the "burdens of discovery" on a party that has filed a dispositive motion based on qualified immunity).

Additionally, both federal defendants intend to present other dispositive legal arguments demonstrating that Plaintiffs have not asserted a cognizable claim against them. Allowing full merits discovery under these circumstances would burden the federal defendants, because they would not otherwise need to defend this lawsuit. This second factor weighs strongly in favor of a stay. *See, e.g.*, *Neilsen*, 2018 WL 10808581, at *2.

Convenience to the Court. "[I]t is certainly more convenient for the Court to stay discovery in the matter until it is clear which claims, if any, will proceed against which Defendant." *Lucero*, 2023 WL 5957126, at *9; *see also Harbinger Cap. Partners LLC v. Ergen*, No. 14-cv-01907-WJM-KMT, 2015 WL 1133503, at *2 (D. Colo. Mar. 10, 2015) ("it is certainly more convenient for the Court to stay discovery"); *Estate of George ex rel. George v. City of Rifle*, No. 20-cv-00522-CMA-GPG, 2020 WL 13825346, at *3 (D. Colo. Nov. 6, 2020) ("judicial economy is preserved by pausing discovery until it is determined which claims, if any,

have survived Defendants' motion to dismiss"). Judicial economy will be advanced by avoiding a "struggle over the substance of the suit when, as here, a dispositive motion is pending." *Harris v. United States*, No. 09-cv-02658-PAB-KLM, 2010 WL 1687915, at *1 (D. Colo. Apr. 27, 2010) (internal quotation marks and citation omitted). The anticipated motions to dismiss will seek to dismiss all claims in this action, meaning that discovery may never be necessary in this matter at all.

Additionally, because this case arises out of a law enforcement investigation, it is reasonable for the Court to expect that difficult discovery disputes could arise over, for example, law enforcement privilege or other sensitive law enforcement issues. *See In re M & L Bus. Mach. Co., Inc.*, 161 B.R. 689, 693 (D. Colo. 1993) (discussing the law enforcement privilege). It would be more convenient for the Court to dedicate its resources to other important matters, rather than discovery disputes that could be avoided in their entirety if the immunity and other dispositive issues eliminate the claims. This factor weighs in favor of a stay.

Interests of non-parties and the public interest. "[W]hile the public has an interest in the speedy resolution of legal disputes, 'there is also a strong public policy behind the qualified immunity doctrine. Among other things, this includes avoiding unnecessary expenditures of public and private resources on litigation.'" *Carey v. Buitrago*, No. 19-cv-02073-RM-STV, 2019 WL 6215443, at *2 (D. Colo. Nov. 21, 2019) (citation omitted); *see also Martin*, 626 F. App'x at 740 ("there is a strong policy justification for staying discovery"). The public also has an interest in minimizing disruption to federal agents and their duties, at least until threshold legal issues are resolved. The efficient operations of government could be affected if federal agents are named as individual-capacity defendants in suits and bogged down in time-consuming

discovery only for a court to later determine that the agents were entitled to immunity or that no claim for relief had been pleaded. The public has a strong interest in eliminating distractions of litigation for public servants unless and until a court determines that applicable legal defenses are unavailable. *See, e.g.*, *Behrens*, 516 U.S. at 308 (pretrial discovery can be "peculiarly disruptive of effective government"). Staying discovery also "promotes the efficient and just resolution of this matter, serves the ends of justice, and appropriately recognizes '[t]he *probability* that judicial resources . . . and attorney resources will be conserved by clarifying and resolving [the] disputed legal issue[s]" before discovery. *Lucero*, 2023 WL 5957126, at *10. "Overall, the public's interest in the efficient and just handling of legal disputes favors imposition of a stay in these circumstances." *Id.* (quoting *Estate of Thakuri ex rel. Thakuri v. City of Westminster*, No. 19-cv-02412-DDD-KLM, 2019 WL 6828306, at *3 (D. Colo. Dec. 12, 2019)). These two factors weigh in favor of a stay.

In sum, the *String Cheese Incident* factors favor a stay of discovery pending adjudication of qualified immunity or other threshold legal issues. *See, e.g., Cook*, 2021 WL 981308, at *1 ("the magistrate judge noted that nearly all of the recent cases on this issue have held that discovery should be stayed for all defendants when the defense of qualified immunity has been pled, even if the defense is only available to some defendants, as here").

CONCLUSION

Defendants respectfully request that the Court enter a stay of discovery pending adjudication of the anticipated motions to dismiss.

Submitted on October 11, 2023.

COLE FINEGAN
United States Attorney

s/ Thomas A. Isler
Thomas A. Isler
Assistant United States Attorney
1801 California Street, Ste. 1600
Denver, Colorado 80202
Tel. (303) 454-0336
Fax (303) 454-0411
thomas.isler@usdoj.gov
Counsel for Defendants Daniel Summey and the Federal Bureau of Investigation

CERTIFICATE OF SERVICE

I certify that October 11, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve all parties and counsel of record:

s/ Thomas A. Isler
Thomas A. Isler
Assistant United States Attorney