IN THE UNITED STATES DISTRICT COURT
DISTRICT COURT OF COLORADO

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

JAQUELINE 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.

PLAINTIFFS' COMBINED RESPONSE TO DEFENDANTS' MOTIONS TO STAY DISCOVERY

INTRODUCTION

This lawsuit stems from the Colorado Springs Police Department ("CSPD") and the Federal Bureau of Investigation ("FBI")'s unconstitutional attempt to squelch Plaintiffs' peaceful exercise of free speech by invading their privacy rights. To raise awareness for the lack of affordable housing and the associated housing crisis in Colorado Springs, Plaintiff Chinook Center ("Chinook") and several other groups arranged a constitutionally protected housing march in which Plaintiff Jacqueline Armendariz ("Armendariz") and other activists participated. These local activists had become a target for CSPD and FBI surveillance because of their association with earlier racial justice protests in the area. Having conducted extensive surveillance on the activists—using social media and undercover officers—the CSPD and FBI knew about the planned housing march and used it as an opportunity to arrest community leaders and gather unrelated information on their political leanings and planned activities.

CSPD obtained broad warrants that permitted unconstrained searches of Plaintiff Armendariz's electronic devices and drives and all of Chinook's private chats on Facebook Messenger. These dragnet warrants lacked any probable cause, appropriate limitation, or plausible connection to any alleged crimes under investigation. They embodied the very dangers with general warrants that the U.S. and Colorado constitutions sought to prevent. The searches were an unconstitutional effort to chill political speech and violated Plaintiffs' rights to privacy.

Having rummaged through Plaintiffs' personal information, Defendants now seek to delay inspection of their own files. They ask this Court to stay any discovery into these events while they argue they are legally immune and should be dismissed from the lawsuit. This Court should reject Defendants' motions for at least two reasons. First, contrary to Defendants' arguments, an assertion of qualified immunity does not require discovery to be stayed. Indeed,

discovery stays are generally disfavored in this district, especially when, as here, even a successful qualified immunity defense cannot dispose of all claims or defendants. Second, each of the factors the Court considers in determining whether to stay discovery militates against a stay in this case. Plaintiffs therefore respectfully request that the Court deny Defendants' motions.

LEGAL STANDARD

The Federal Rules of Civil Procedure do not provide for a stay of discovery; the power to stay lies in the Court's discretion. *String Cheese Incident, LLC v. Stylus Shows, Inc.*, No. 05-cv-01934-LTB-PAC, 2006 WL 894955, at *2 (D. Colo. Mar. 30, 2006). In this district, discovery stays while a motion to dismiss is pending are generally disfavored. *Bustos v. United States*, 257 F.R.D. 617, 623 (D. Colo. 2009); *Rocha v. CCCF Admin.*, No. 09-cv-01432-CMA-MEH, 2010 WL 291966 at *1 (D. Colo. Jan. 20, 2010); *Love v. Grashorn*, No. 21-cv-02502-RM-NRN, 2022 WL 1642496, at *2 (D. Colo. May 24, 2022). Moreover, contrary to Defendants' arguments, discovery stays are not required every time a defendant asserts qualified immunity. Whether the court, in its discretion, deems a stay appropriate in a given case generally depends on the following factors: (1) the 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 of proceeding with discovery; (3) the convenience to the Court; (4) the interests of nonparties; and (5) the public interest. *String Cheese Incident, LLC*, 2006 WL 894955, at *2.

ARGUMENT

I. Defendants' Mere Assertion of Qualified Immunity Does Not Justify a Stay.

Defendants' mere assertion of qualified immunity does not warrant a stay of discovery in this case. *See Estate of Ronquillo v. City & Cnty. of Denver*, No. 16-cv-01664-CMA-NYW, 2016

WL 10842586, at *3-4 (D. Colo. Nov. 14, 2016) (citing *Rome v. Romero*, 225 F.R.D. 640, 643 (D. Colo. 2004)) (recognizing stays are not automatic every time a defendant asserts qualified immunity); *McGinn v. El Paso Cnty.*, 640 F. Supp. 3d 1070, 1075 (D. Colo. 2022) (balancing the *String Cheese Incident* factors, as well as other relevant factors, including whether a successful qualified immunity defense would be "dispositive of *all claims* in the proceeding"). Here, a motion to dismiss based on qualified immunity will not resolve all claims against all defendants, because only individuals can assert a qualified immunity defense and because qualified immunity is no defense to claims for injunctive relief. *See Love*, 2022 WL 1642496, at *3 (discovery should proceed in "cases alleging official-capacity claims, requests for injunctive (as opposed to monetary), relief, and claims against entities, not individuals"); *see also Estate of Saenz v. Bitterman*, No. 20-cv-00848-NRN, 2020 WL 6870565, at *2 (D. Colo. May 15, 2020); *Owen v. Independence*, 445 U.S. 622, 657 (1980). Regardless of whether the individual defendants succeed on their qualified immunity defense, Plaintiffs' claims against the City and FBI will remain defendants in the case, as will Plaintiffs' claims under the Stored Communications Act and Colorado Constitution. In such circumstances, as courts in this district have held, efficiency and fairness dictate that discovery proceed.

In *Estate of Saenz*, for example, the court denied the defendants' request for a stay of discovery pending the resolution of a motion to dismiss. *Estate of Saenz*, 2020 WL 6870565, at *3. The individual officer asserted a qualified immunity defense; the municipality police department could not. *Id.* at *2. The court noted that a stay could apply only to the individual officer. *Id.* But the court rejected any discovery stay, including as to the individual defendant, because (i) the claims potentially subject to qualified immunity were based on the same facts as the claims not subject to qualified immunity, (ii) government entities are not entitled to a stay

simply because their co-defendants asserted claims of qualified immunity, and (iii) judicial economy would be undermined by piecemeal discovery on those claims. *See id.* Similarly, in *Hulse v. Adams County*, this Court declined to stay discovery for claims against a municipality because "the doctrine of qualified immunity is not applicable to Plaintiffs' municipal liability . . . claims . . ." No. 14-cv-02531-RM-NYW, 2015 WL 1740399, at *1 (D. Colo. Apr. 14, 2015); *see also Love*, 2022 WL 1642496, at *5 (holding that "discovery will proceed against the City, for whom the defense of qualified [immunity] is not available.").

The same reasoning applies here. Neither the City nor the FBI can claim qualified immunity, so they are not entitled to a stay irrespective of the individual defendants' qualified immunity defense. Similarly, qualified immunity does not protect the individuals against Plaintiffs' Stored Communications Act or Colorado Constitution claims. As Defendants acknowledge, these claims (against the City and FBI, and arising under laws other than § 1983) stem from the identical facts and circumstances as the § 1983 claims against the individuals. In other words, discovery related to the City, the FBI, and these other claims will necessitate the same discovery from and about the individuals regardless of their success in asserting qualified immunity against the § 1983 claims. Staying discovery as to those individuals thus has no practical effect and only serves to delay the inevitable. As in *Estate of Saenz*, the Court should reject this inefficient approach and not permit the individual defendants' mere assertion of qualified immunity to derail the entire trajectory of the case.

II. The *String Cheese Incident* Factors Weigh Against a Stay.

In analyzing whether to exercise its discretion to grant a stay—including where defendants assert qualified immunity—this Court weighs five factors. *McGinn*, 640 F. Supp. 3d at 1076-1077 Each here weighs against a stay and in favor of proceeding with discovery.

A. Plaintiffs' Interest in Proceeding Expeditiously and the Potential Prejudice to Plaintiffs of a Delay Weighs Against a Stay.

Plaintiffs are entitled to timely protection of the law when they suffer an injury. *Id*. at 1076. Delay caused by a discovery stay "diminish[es] Plaintiff[s'] ability to proceed and may impact [their] ability to obtain a speedy resolution of [their] claims." *Lester v. Gene Express, Inc.*, No. 09-cv-02648-REB-KLM, 2010 WL 743555, at *1 (D. Colo. Mar. 2, 2010); *see also Estate of Bailey v. City of Colorado Springs*, No. 20-cv-1600-WJM-KMT, 2020 WL 6743789, at *2 (D. Colo. Nov. 17, 2020) (Discovery delays impede plaintiffs' ability to prosecute their claims because "the memories of the parties and other witnesses may fade with the passage of time, witnesses may relocate or become unavailable, or documents may become lost or inadvertently destroyed."). For these reasons, a plaintiff's interest in proceeding expeditiously and the potential prejudice to a plaintiff from a delay weigh against the imposition of a stay. *Wells v. Dish Network, LLC*, No. 11-cv-00269-CMA-KLM, 2011 WL 2516390, at *1 (D. Colo June 22, 2011); *Duca v. Falcon Sch. Dist. 49*, No. 22-cv-00880-CMA-MDB, 2022WL 4131435, at *2 (D. Colo. Sept. 12, 2022).

In particular, staying discovery pending resolution of a motion to dismiss "could substantially delay the ultimate resolution of the matter, with injurious consequences." *Chavez v. Young Am. Ins. Co.*, No. 06-cv-02419-PSF-BNB, 2007 WL 683973, at *2 (D. Colo. Mar. 2, 2007). Motions to dismiss can take "several months" or longer to resolve, severely impacting a plaintiff's interests. *Four Winds Interactive LLC v. 22 Miles, Inc.*, No. 16-cv-00704-MSK-STV, 2017 WL 121624, at *2 (D. Colo. Jan. 11, 2017). These types of stays "cause [the wheels of justice] to nearly grind to a halt, further delaying the process of answering whether the Defendants' actions in this case were consistent with the Constitution." *Love*, 2022 WL 1642496, at *5.

Here, Plaintiffs seek relief for violations of their constitutional rights, so a multi-month to year-long stay would have grave consequences. Among other things, Armendariz is seeking an injunction against the Defendants to return or delete copies of her devices and files that were unlawfully obtained and kept. This case must proceed expeditiously to end the ongoing violation of Armendariz's constitutional rights. More broadly, this matter fundamentally involves a dispute over whether law enforcements' actions here violated the U.S. and Colorado Constitutions or are permissible police practice. For Plaintiffs, resolving that disagreement quickly is of the essence as they continue to engage in activism in Colorado Springs that subjects them to risk of police engagement.

The FBI and Summey argue that any delay caused by the stay would not burden Plaintiffs because issues of qualified immunity would be resolved prior to discovery, which they claim would save Plaintiffs time from a future interlocutory appeal, and because Plaintiffs already waited almost two years to file the complaint. (Mot. to Stay Disc. by Defs. Daniel Summey and the Federal Bureau of Investigations. 9-10.) Neither of these arguments is persuasive. As to the first, it assumes that Defendants' qualified immunity defenses will be successful on a motion to dismiss. That is not a valid assumption, particularly when only some of the Defendants can assert qualified immunity defenses at all and only for some of the claims. Further, "motions to dismiss are denied far more often than they result in the termination of a case." *Peterson v. City & Cnty. Of Denver*, No. 1:21-cv-01804-RMR-SKC, 2022 WL 1239327 at *3 (D. Colo. Apr. 27, 2022) (citations omitted). Defendants may also file an interlocutory appeal in the event their motion to dismiss is denied on qualified immunity grounds, which would further delay the case. Second, Plaintiffs timely filed their complaint within the two-year statute of limitations, so Defendants' claim that Plaintiffs "waited" too long lacks any merit.

In short, because a discovery stay will unduly delay the case, adversely affect the discovery process, and prejudice Plaintiffs, this factor weighs against this Court granting a stay.

B. Allowing Discovery to Proceed Does Not Unfairly Burden Defendants.

Defendants contend that allowing discovery to proceed would unfairly burden them. But the burden Defendants assert is not the type of "extraordinary or unique burden" that would justify a stay. *Wells*, 2011 WL 2516390, at *2. "The ordinary burdens associated with litigating a case do not constitute undue burden." *Collins v. Ace Mortg. Funding, LLC*, No. 08-cv-01709-REB-KLM, 2008 WL 4457850, at *1 (D. Colo. Oct. 1, 2008); *Webb v. Brandon Express, Inc.*, No. 09-cv-00792-WYD-BNB, 2009 WL 4061827, at *2 (D. Colo. Nov. 20, 2009) ("Parties always are burdened by discovery and the other requirements for the preparation of a case. That is a consequence of our judicial system and the rules of civil procedure."); *Barrington v. United Airlines*, 565 F. Supp. 3d 1213, 1218 (D. Colo. 2021) ("[M]eeting and conferring with counsel over written discovery and filing motions related to the same; taking and defending depositions; and engaging an expert witness" is not out of the ordinary.)

The City Defendants also argue that certain parties could potentially be dismissed from the case if one of the warrants is upheld, and thus, Defendants would be burdened by unnecessarily participating in the case. Again, Defendants do not provide any support for their belief that their motion to dismiss will be successful. Another judge in this District was unpersuaded that "Defendants will suffer prejudice beyond ordinary burdens of litigation in the absence of stay merely because they believe in the success of their Motion to Dismiss." *Genscape, Inc. v. Live Power Intelligence Co. NA, LLC*, No. 18-cv-02525-WYD-NYW, 2019 WL 78933, at *2 (D. Colo. Jan. 2, 2019). Moreover, since "[t]he purpose of the discovery rules is not only to elicit unknown facts, but also to narrow and define the issues . . .," *Cook v. Rockwell*

Int'l Corp., 161 F.R.D. 103, 105 (D. Colo. 1995), proceeding with discovery now will help both sides narrow the claims and issues.

Finally, as previously discussed, the City and the FBI cannot assert a qualified immunity defense, and thus, they are not entitled to a stay. Therefore, "[e]ven if a stay were granted as to Plaintiff[s'] § 1983 claim against [individual Defendants], [all] Defendants would still be subject to discovery on Plaintiff[s'] remaining [Stored Communications Act and Colorado Constitution] claims." *Estate of Saenz*, 2020 WL 6870565, at *2. Given that the "claims are all based on the same event," it is likely that discovery will be substantially the same. *Id.* Therefore, "subjecting the [individual Defendants] to discovery on the § 1983 claim would not impose . . . any additional burden . . ." *Id.* Moreover, like the defendants in *Love*, the individual Defendants here "would likely be deposed anyway as witnesses regarding Plaintiffs' [claims against the City of Colorado Springs and the FBI], so any additional burden associated with also being asked questions as to individual liability claims would be minimal." *Love*, 2022 WL 1642496, at *5.[1] "It makes no sense to have the individual Defendants be deposed as witnesses now, only to be re-deposed as parties later in the event their qualified immunity defenses are unsuccessful." *Estate of McClain v. City of Aurora*, No. 20-cv-02389-DDD-NRN, 2021 WL 307505, at *3 (D. Colo Jan. 29, 2021).

Ultimately, Defendants' argument that the burden imposed on them outweighs the

[1] Defendants briefly argue that the Court should stay discovery because Summey intends to argue that the Section 1983 claim against him should be construed as a *Bivens* claim because he was acting in his capacity as a federal Task Force Officer. (Mot. to Stay Disc. by Defs. Daniel Summey and the Federal Bureau of Investigations. 4 n.1, 10.) That argument is unconvincing: Summey's warrant application and affidavit listed Colorado Springs Police Department as his employer and agency name, was initialed by his Colorado Springs Police Department supervisor, and was submitted to a state court. (Am. Compl., Doc. 12, ¶¶ 111, 115.) But in any event, like qualified immunity, even a successful *Bivens* defense could not bar Plaintiffs' injunctive or government entity claims and thus does not justify a stay of discovery here.

Plaintiffs' interest in proceeding expeditiously with the case is unavailing. "Defendants always are burdened when they are sued, whether the case ultimately is dismissed; summary judgment is granted; the case is settled; or a trial occurs." *Chavez*, 2007 WL 683973, at *2. Any delay in waiting for the resolution of the motions to dismiss would cause undue burden to Plaintiffs, not Defendants.

C. The Court Will Be Inconvenienced by the Stay.

Defendants argue that judicial resources would be wasted if discovery is permitted because their motions to dismiss could dispose of the case in its entirety. On the contrary, this District's policy "not to stay discovery pending a ruling on a motion to dismiss . . . recognizes the burdens to the court and to the public in delaying, potentially for months, those cases where a motion to dismiss is filed." *Sutton v. Everest Nat'l Ins. Co.*, No. 07-cv-00425-WYD-BNB, 2007 WL 1395309, at *2 (D. Colo. May 9, 2007). Further, a stay inconveniences courts because it "makes the Court's docket less predictable and, hence, less manageable," especially when, as here, "the stay is tied to a resolution of a motion for which ultimate success is not guaranteed." *Elliott v. Essex Motors, LLC*, No. 12-cv-01078-REB-KLM, 2012 WL 4049844, at *2 (D. Colo. Sept. 13, 2012). "Having cases sit in limbo, without any progress, while a dispositive motion takes months (or potentially a year) to be decided, is not in the Court's interest." *Love*, 2022 WL 1642496, at *5. That is particularly true because "motions to dismiss are denied far more often than they result in the termination of a case." *Peterson*, 2022 WL 1239327 at *3.

All of these concerns apply here. Because a stay would only introduce delay into a case that can proceed while motions to dismiss are pending, this factor weighs against a stay.

D. The Interests of Third Parties and The Public Interest Will be Best Served by Allowing Discovery to Proceed.

Defendants argue that the public has an interest in the speedy resolution of legal disputes

and avoiding judicial waste. Additionally, the FBI and Summey also argue that the public has an interest in eliminating the distractions of litigation for public servants. None of these arguments justifies delaying discovery in this case.

There is a "strong interest held by the public in general regarding the prompt and efficient handling of all litigation." *Lester*, 2010 WL 743555, at *2. The public's interest is especially important when it comes to litigation involving "allegations against public officials." *A.A. v. Martinez*, No. 12-cv-00732-WYD-KMT, 2012 WL 2872045, at *5 (D. Colo. July 12, 2012). "It is not in the interest of the public or in the interest of justice to 'put on the back burner' discovery in a case that raises significant questions about the conduct of . . . law enforcement officers." *Peterson*, 202 WL 1239327, at *3 (quoting *McKnight v. Brown*, No. 20-cv-03678-PAB-SKC, 2021 WL 3510809, at *2 (D. Colo. Aug. 10, 2021)).

Here, the public's interest in resolving legal disputes involving serious allegations against CSPD and the FBI weighs against a stay. This case implicates matters of public importance because it involves governmental entities and its officers abusing their authority and violating constitutional rights to privacy and freedom of speech. As alleged, CSPD is engaged in a concerted campaign against activists in the region, abusing its powers to target them through infiltration, surveillance, and dragnet warrants to search and seize personal devices and digital data without justification. These unlawful searches have the effect of chilling First Amendment activities by sending a message to community members that activists will be targeted, arrested, and their privacy will be invaded through highly intrusive, unlawful searches. The public has an interest in ensuring that its community members can freely exercise their First Amendment right to association and free speech, and their Fourth Amendment right to privacy. Plaintiffs' relief should not be delayed because of a procedural process.

Moreover, the FBI and Summey's assertion that the public has an interest in preventing civil servants from being distracted by litigation is not sufficient to warrant a stay. While it is true that discovery has the potential to distract individuals from their "core professional responsibilities," all parties that are part of litigation suffer from some kind of distraction. *Estate of Ronquillo*, 2016 WL 10842586, at *4 ("While this court understands that discovery may burden the Individual Defendants involved in this action and distract from their core professional responsibilities, such is always the case for witnesses in civil litigation."). Defendants fail to show how the government would be unfairly affected if public servants were required to participate in litigation. Further, the fact that public servants work for the government cannot excuse them from being held accountable for abusing their government positions to harm Plaintiffs.

With respect to the interests of nonparties, the City Defendants, without much context, list several individuals who they claim may be involved in the discovery process. Courts in this district, however, have held that "vague, unspecified allegations of potential inconvenience do not tip the scales one way or the other." *Love*, WL 1642496, at *6. Here, the City Defendants neither show the extent to which the nonparties' interests will be affected by discovery nor provide support that these nonparties' interest in litigation weigh in favor of a stay. *Id.* Defendants' broad assertion that there are several individuals who may participate in the discovery process is not sufficient to warrant a stay. Therefore, this factor does not support an imposition of a stay.

CONCLUSION

For the foregoing reasons, a stay of discovery is not warranted and Defendants' Motions to Stay Discovery should be denied.

Respectfully submitted this 25th day of October, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on October 25th, 2023, a copy of the foregoing was filed electronically with the Court. In accordance with Fed. R. Civ. P. 5, notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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