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.

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

Defendants Daniel Summey and the Federal Bureau of Investigation ("FBI") reply to "Plaintiffs' Combined Response to Defendants' Motions to Stay Discovery" (ECF. No. 36, filed 10/25/23) and in support of their Motion to Stay Discovery (ECF No. 30, filed 10/11/23).

I. The Court must assess whether the First Amended Complaint overcomes the Defendants' qualified immunity defense before permitting discovery.

Plaintiffs' response brief fails to acknowledge or distinguish the last four decades of Supreme Court and Tenth Circuit precedent on qualified immunity. That precedent instructs, without deviation, that discovery should not be allowed, at the motion to dismiss stage, until the district court determines whether, on the pleadings, the individual defendants are entitled to

qualified immunity. *See Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) ("if the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery"); *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"); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until this threshold immunity question is resolved, discovery should not be allowed."); *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992) ("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."); *see also* ECF No. 30 at 2-5. Case law further instructs that, even on summary judgment, the plaintiff bears the burden to establish that discovery is needed to raise a genuine dispute of fact material to the immunity defense, and any discovery must be narrowly tailored to the disputed factual issue. *See Crawford-El*, 523 U.S. at 593 n.14 ("limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on 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"); *Stonecipher v. Valles*, 759 F.3d 1134, 1149 (10th Cir. 2014) ("If . . . the district court determines it cannot rule on the 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.'").

Plaintiffs offer no explanation why the Court should ignore these unambiguous instructions from the Supreme Court and Tenth Circuit.

Plaintiffs' brief cites only one Supreme Court case, *Owen v. City of Independence*, 445 U.S. 622 (1980), which stands for the uncontroversial point that municipalities are not entitled to

qualified immunity as a defense to liability. *See* ECF No. 36 at 4.[1] The FBI does not contend otherwise. Rather, the federal defendants' motion explains that the failure to stay discovery for all parties would effectively deny Summey the protections of qualified immunity. *See* ECF No. 30 at 5-7; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 685-86 (2009).

The failure to heed the Supreme Court's guidance on discovery in the qualified immunity context is reversible error. One of the cases that Plaintiffs cite, *A.A. ex rel. Archuletta v. Martinez*, No. 12-cv-00732-WYD-KMT, 2012 WL 2872045 (D. Colo. July 12, 2012), *objection sustained*, 2012 WL 5974170, at *2 (D. Colo. Oct. 9, 2012), illustrates this point. *See* ECF No. 36 at 11. In that case, the magistrate judge granted a motion to stay discovery by a defendant who had asserted a qualified immunity defense in a motion to dismiss but denied the stay to a party who did not, reasoning that discovery into the facts was inevitable, and "it is simply a question of when." *A.A.*, 2012 WL 2872045, at *1 & n.1, *4-*5. Upon objection, the district court judge held that the magistrate judge's ruling was "clearly erroneous or contrary to law." *A.A. ex rel. Archuletta v. Martinez*, No. 12-cv-00732-WYD-KMT, 2012 WL 5974170, at *2 (D. Colo. Oct. 9, 2012). The court said that *Iqbal* "indicate[s] very clearly that the Supreme Court believes discovery should be stayed in the case as a whole even when only one defendant is asserting qualified immunity." *Id.* The district judge noted that the magistrate judge had so ruled in another case, *Eggert ex rel. Eggert v. Chaffee County*, No. 10-cv-01320-CMA-KMT, 2010 WL 3359613, at *3 (D. Colo. Aug. 25, 2010). *Id.* The district court ordered "all proceedings . . . stayed until resolution of [the defendant's] Motion to Dismiss asserting the defense of qualified immunity." *Id.* This Court should reach the same conclusion.

[1] Defendants refer to pages in Plaintiffs' response by ECF page numbers.

Plaintiffs also cite two opinions authored by Magistrate Judge Neureiter to support their argument that a stay of discovery should not be entered, because the qualified immunity defense could not resolve all claims in this action. *See* ECF No. 36 at 4-5 (citing *Love v. Grashorn*, No. 21-cv-02502-RM-NRN, 2022 WL 1642496 (D. Colo. May 24, 2022), and *Estate of Saenz*, No. 20-cv-00848-NRN, 2020 WL 6870565 (D. Colo. May 15, 2020)).[2] But a more recent opinion by Magistrate Judge Neureiter reaches the opposite conclusion, consistent with controlling case law.

In *Griffith v. El Paso County*, No. 21-cv-00387-CMA-NRN, 2022 WL 20286303, at *1-*2 (D. Colo. Nov. 2, 2022), the court considered a motion to stay discovery, where individual defendants raised qualified immunity but the county could not. The complaint alleged that the plaintiff suffered repeated sexual harassment, assault, and discrimination "as a result of El Paso County's policy of refusing to house transgender inmates based on their gender identity." Third Am. Compl. ¶ 1, *Griffith v. El Paso Cnty.*, No. 21-cv-00387-CMA-NRN (D. Colo. June 7, 2022), ECF No. 124. The plaintiff asserted multiple claims, including those under the Fourth Amendment against unreasonable searches and Article II of the Colorado Constitution, seeking both money damages and injunctive relief. *Id.* ¶¶ 156-64, 180-90 & p. 56 (prayer for relief). The defendants moved to dismiss all claims in the complaint. *Griffith*, 2022 WL 20286303, at

[2] *Saenz* is distinguishable because in that case, all defendants answered the complaint and moved to dismiss only one of the five claims in the complaint. 2020 WL 6870565, at *1. *Love* also is distinguishable because the court determined that undeveloped fact issues weighed against a stay. 2022 WL 1642496, at *7. Here, Summey's immunity defense should not require factual development. Claim 1 likely can be resolved based on the warrants themselves, because the inquiry turns on whether the warrants were sufficiently particular and tailored and whether they exceeded the scope of probable cause established in the affidavit. *See* ECF No. 12 ¶ 154. And even if the complaint stated a claim for a constitutional violation, no discovery is needed to determine whether every reasonable official in Summey's position would have understood that what he was doing violated the constitution. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

*2. The magistrate judge observed that the "motion to dismiss could fully dispose of Ms. Griffith's claims without further engaging in the discovery process" and concluded that the plaintiff's interest "to proceed expeditiously is outweighed by the burden on Defendants of having to participate in discovery while a motion that argues they are immune to suit is pending." *Id.* The magistrate judge noted that the court "typically discourages stays of discovery" but acknowledged "the efficiency and fairness of delaying the proceedings pending resolution of a dispositive motion that could resolve this matter in its entirety." *Id.* The court considered whether discovery should proceed against the county, but concluded it should not:

> [A] stay of all discovery, including discovery related to Defendant El Paso County, is warranted. Proceeding with discovery on Plaintiff's municipal liability claim would likely mean the individual Defendants would have to sit for depositions or answer written discovery. This would both effectively deprive them the benefit of immunity and result in a risk of piecemeal discovery. The Court agrees [that] it would be more efficient and convenient to stay all discovery.

Id. The magistrate judge later recommended dismissing the complaint, underscoring the prudence of staying discovery until the motion to dismiss could be adjudicated. *See Griffith v. El Paso Cnty.*, No. 21-cv-00387-CMA-NRN, 2023 WL 2242503 (D. Colo. Feb. 27, 2023), *recommendation adopted,* 2023 WL 3099625 (D. Colo. Mar. 27, 2023).

Here, like in *Griffith*, all defendants intend to move to dismiss all claims based on the pleadings, and the individual defendants will raise qualified immunity at the earliest stage of litigation. Although government entities cannot avoid liability based on qualified immunity, their dispositive motions, coupled with those of the individual defendants, could resolve this matter in its entirety. Plaintiffs argue that because discovery into the claims against the government entities would overlap with that sought from the individual defendants, discovery should be permitted. ECF No. 36 at 5. But that premise warrants the opposite conclusion, as

stated in *Griffith*: if discovery cannot be had in a manner that preserves the protections of qualified immunity for the individual defendants, all discovery should be stayed unless and until the Court determines that Plaintiffs have sufficiently pleaded claims for relief. 2022 WL 20286303, at *2 ("This would both effectively deprive them the benefit of immunity and result in a risk of piecemeal discovery."); *cf. Crawford-El*, 523 U.S. at 597 ("the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense"). The Court should stay discovery until it adjudicates the qualified immunity defense.

If the Court followed Plaintiffs' proposal to proceed with full merits discovery, individual defendants *never* could invoke the protections of qualified immunity in cases with claims for injunctive relief against government entities arising from common facts. And because Plaintiffs argue that a dispositive motion based on non-immunity grounds should not be a reason to stay discovery either, *see* ECF No. 36 at 5-6, 9 & n.1, even meritless claims for injunctive relief would entitle a plaintiff to begin full merits discovery from the outset of a case, notwithstanding an individual's assertion of qualified immunity or other arguments such as lack of jurisdiction or lack of a cause of action. None of the Supreme Court or Tenth Circuit precedent suggests that such an approach is permissible. *See, e.g.*, *Iqbal*, 556 U.S. at 685 (rejecting the argument that discovery should proceed as to parties not entitled to qualified immunity).

The Court should stay discovery unless and until it determines that the individual defendants are not entitled to qualified immunity. To rule otherwise would amount to a denial of qualified immunity for Summey. *See Garrett v. Stratman*, 254 F.3d 946, 953 (10th Cir. 2001) (an order permitting merits discovery before ruling on the immunity defense is a denial of qualified immunity that invokes appellate jurisdiction).

II. Even the discretionary *String Cheese Incident* factors warrant a temporary stay.

Although the district court need not apply the *String Cheese Incident* factors in the qualified immunity context, those factors warrant a stay. *See Lucero v. City of Aurora*, No. 23-cv-00851-GPG-SBP, 2023 WL 5957126, at *6 (D. Colo. Sept. 13, 2023) (stating that the court's analysis in the qualified immunity context could end before considering *String Cheese* factors).

Plaintiffs' interests. Plaintiffs misapprehend the federal defendants' arguments on this factor. *See* ECF No. 36 at 7. First, the defendants' argument that this case may be resolved faster with a stay of discovery than without one does *not* depend on the ultimate success of a motion to dismiss. Because an order permitting full merits discovery itself implicates appellate jurisdiction, *see Garrett*, 254 F.3d at 953, an order denying a stay of discovery is subject to interlocutory appeal. So even assuming that the Tenth Circuit *agreed* with Plaintiffs that a stay of discovery should not issue, an interlocutory appeal on the order denying the stay could delay this action much longer than if the district court stayed discovery until it adjudicated the qualified immunity defense in the normal course. In that way, a temporary stay could better vindicate Plaintiffs' stated interests, *see* ECF No. 36 at 6-7, than an order denying a stay.

Second, the federal defendants do not contend that Plaintiffs "'waited' too long" to file this action by filing two years after the underlying events. *Id.* at 7. But the fact that Plaintiffs waited so long to sue undermines their argument that there would be "grave consequences" to any additional delay or that time is "of the essence." *Id.*; *see Lucero*, 2023 WL 5957126, at *8 (noting that the plaintiff waited two years to initiate the lawsuit and stating that "nothing in this timeline . . . suggests a stay pending resolution of the motions to dismiss would interfere in any significant way with Ms. Lucero's ability to expeditiously pursue her rights in this case"). Any

incremental pause in discovery until immunity is adjudicated would not unduly burden Plaintiffs, given how much time Plaintiffs allowed to elapse before suing.

Defendants' burden. Plaintiffs argue that this factor does not weigh in favor of a stay, because "ordinary burdens associated with a case do not constitute undue burden." ECF No. 36 at 8. For this point, Plaintiffs rely on five cases—*Collins*, *Webb*, *Barrington*, *Genscape*, and *Chavez*—none of which involved qualified immunity.[3] *Id.* at 8, 10. Qualified immunity, however, protects against the "ordinary" burdens of litigation. *Workman*, 958 F.2d at 335 ("qualified immunity, if successful, protects the official both from liability as well as from the *ordinary burdens of litigation*, including far-ranging discovery") (emphasis added); *see also Wilson v. Layne*, 526 U.S. 603, 609 (1999) (qualified immunity is designed to spare a defendant "unwarranted demands *customarily imposed* upon those defending a long drawn out lawsuit") (emphasis added). Even the burden of ordinary discovery weighs in favor of a stay.

Some district court opinions suggest that qualified immunity only protects against a subcategory of "broad-reaching discovery," citing language from *Harlow*, 457 U.S. at 818, or *Crawford-El*, 523 U.S. at 588—*see, e.g.*, *Rome v. Romero*, 225 F.R.D. 640, 643 (D. Colo. 2004)—without investigating the meaning of that phrase. Controlling case law clarifies that ordinary merits discovery, not limited only to those disputed facts needed to adjudicate a qualified immunity defense, constitutes impermissibly broad discovery. *See, e.g.*, *Garrett*, 254 F.3d at 953 ("Discovery designed to flesh out the merits of a plaintiff's claim before a ruling on

[3] *Collins* even acknowledged that qualified immunity defenses "typically warrant[] the imposition of a stay" due to concerns that "defendants are unnecessarily subject to litigation." *Collins v. Ace Mortg. Funding, LLC*, No. 08-cv-01709-REB-KLM, 2008 WL 4457850, at *1 (D. Colo. Oct. 1, 2008).

the immunity defense . . . would certainly fall within this category" of "avoidable or overly broad" discovery); *Cole*, 43 F.3d at 1387 (citing *Workman* for the proposition that qualified immunity protects against "ordinary burdens of litigation," which "*includ*[*es*] far-ranging discovery"); *see also Martin v. County of Sante Fe*, 626 F. App'x 736, 740 (10th Cir. 2015) ("discovery generally should be avoided once qualified immunity is raised" unless the plaintiff can demonstrate "how [such] discovery will raise a genuine fact issue as to defendants' qualified immunity claim"). Any discovery other than "limited discovery" necessary to "resolve a motion for summary judgment based on qualified immunity" should be avoided. *Crawford-El*, 523 U.S. at 593 n.14. Where, as here, the qualified immunity defense is made on the pleadings, no discovery is needed at all. Thus, ordinary burdens of litigation weigh strongly in favor of a stay.

Additionally, Claim 4 is properly asserted against the United States—not Summey—because the claim alleges a wrongful act by an individual within the scope of his federal office or employment. *See* Motion to Substitute United States, ECF No. 39; 28 U.S.C. § 2679(b)(1), (d)(1). As a claim against the United States, Claim 4 suffers from jurisdictional defects, as the United States intends to explain upon substitution. This jurisdictional defense is another reason for the Court to adjudicate dispositive motions before allowing merits discovery.

Finally, Plaintiffs argue that discovery could *lessen* the burden on defendants because discovery can help "narrow" the issues in a suit. ECF No. 36 at 8-9. But jumping into discovery before the Court adjudicates immunity, jurisdictional, or other dispositive defenses on the face of the pleadings does not relieve the defendants of any burden.

Remaining factors. Plaintiffs' remaining arguments do not warrant a stay. The public interest argument should be rejected because *all* qualified immunity cases, by definition, involve

allegations of misconduct by government officials. Merely asserting that the constitution has been violated, *see* ECF No. 36 at 11 ("This case implicates matters of public importance . . . ."), cannot be enough to tip the *String Cheese Incident* scales against discovery in the qualified immunity context. If that were sufficient, the *String Cheese Incident* analysis, by its very structure, would eviscerate the protections of qualified immunity, which already embodies the balance of interests that the Supreme Court has struck. *See Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (referring to "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties").

Finally, the federal defendants do not seek to "excuse" public employees "from being held accountable." ECF No. 36 at 12. Rather, the federal defendants argue that the only prudent exercise of the Court's discretion at this juncture is to stay discovery unless it has determined that the defenses available to all government employees do not apply based on the facts alleged.

Even assuming that the Court were to credit the interests raised by Plaintiffs related to *String Cheese Incident* factors three through five, ECF No. 36 at 10-12, the most the Court could conclude is that they cancel out the contrary factors identified by the defendants in the motions to dismiss, *see, e.g.*, ECF No. 30 at 11-13; ECF No. 29 at 12-14, and thus those factors are neutral. The analysis then turns on the fact that the burden of discovery on defendants, who claim immunity from suit—not just liability—outweighs Plaintiffs' generic interests in pursuing their claims that they waited two years to assert. Thus, the *String Cheese Incident* factors favor a stay.

CONCLUSION

Defendants respectfully request that the Court enter a stay of discovery.

Submitted on November 3, 2023.

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CERTIFICATE OF SERVICE

I certify that November 3, 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:

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