IN THE UNITED STATES DISTRICT COURT
DISTRICT COURT 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.

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE CITY OF COLORADO SPRINGS' MOTION TO DISMISS

Table of Contents

Plaintiffs Armendariz and Chinook Center respond to "City of Colorado Springs' Motion to Dismiss" (ECF No. 52, filed 11/20/23).

INTRODUCTION

On July 31, 2021, Plaintiff Chinook and several other groups arranged a constitutionally protected and legal housing march to address the lack of affordable housing and the associated housing crisis in Colorado Springs. Plaintiff Jacqueline Armendariz and other activists participated in the march. In response to the housing march, the City of Colorado Springs ("City") and its officers obtained unconstitutional warrants to search and seize Plaintiffs' devices and digital data in violation of their constitutional rights. These dragnet warrants were drafted, approved, and executed in accordance with City custom, practice, and policy, including seeking and executing overbroad warrants that violate the particularity requirement and fail to limit the search to evidence of the alleged crime. The City has a history of using these warrants to send a message to protestors and organizations that unwelcome political expression in Colorado Springs will be met with intimidation. These warrants give the City unfettered access to the private lives and information of its citizens.

The City's custom, policy, and practice of unconstitutional invasion into the private lives and information of protestors and organizations has had the effect of chilling and suppressing protected speech, assembly, and association. In addition to the warrants underlying this case, Plaintiffs' Amended Complaint details several other instances where the City has issued dragnet warrants in response to a protest or demonstration. Following a demonstration to commemorate De'Von Bailey, who was killed by the City's officers, the City obtained and executed several warrants to search and seize records and data of organizations or people who were involved in

the demonstration—and even people who were merely associated with people who were involved in the demonstration. These warrants authorized incredibly broad searches for information about protesters' communications and associations without establishing a nexus between the evidence to be seized and any particular crime. These examples are more than sufficient to require denial of the City's motion to dismiss Plaintiffs' *Monell* claim, which was pled without the benefit of any discovery.

Furthermore, the City violated the Stored Communications Act by requiring the disclosure of Plaintiff Chinook Center's Facebook data without following proper procedures. And the City continues to violate Armendariz's federal and state constitutional rights by retaining copies of her digital data without justification. For at least these reasons, the City's Motion to Dismiss should be denied in its entirety.

LEGAL STANDARD

"There is a strong presumption against the dismissal of claims under [Fed. R. Civ. P. 12(b)(6)]." *Trujillo v. City of Colo. Springs,* No. 07-cv-00753-MSK-BNB, 2008 WL 511890, at *1 (D. Colo. Feb. 22, 2008) (citing *Cottrell, Ltd. v. Biotrol Intern., Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999)). If a complaint contains "enough facts to state a claim to relief that is plausible on its face," it cannot be dismissed. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible when the complaint includes "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In reviewing a 12(b)(6) motion, a court must accept as true "all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Kerber v. Quest Group Life Ins. Plan*, 647 F.3d 950, 959 (10th Cir. 2011)

(citation omitted). At the dismissal phase, Rule 12(b)(6) motions "are not designed to weigh evidence or consider the truth or falsity of an adequately pled complaint." *Tal v. Hogan*, 453 F.3d 1244, 1265–66 (10th Cir. 2006). Granting a motion to dismiss "is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleadings but also to protect the interests of justice." *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (quoting *Twombly*, 550 U.S. at 556). Therefore, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.*

Moreover, courts have rejected a heightened pleading standard for § 1983 claims for municipal liability because "a plaintiff, as an outsider to municipal government, is not expected to have information about a city's official policies, practices, or training programs at the pleading stage." *Walker v. Zepeda*, No. 1:11-cv-01242-DME-CBS, 2012 WL 13285403, at *5 (D. Colo. May 29, 2012) (citation omitted). "There is a balance demanded in pleading municipal liability which requires more than boilerplate allegations but not demanding specific facts that prove the existence of a policy." *Torre v. L.A. Plata Cnty.*, No. 21-cv-01422-CMA-NRN, 2022 WL 1193471, at *3 (D. Colo. Feb. 11, 2022) (citation and quotations omitted). "To require more could foreclose legitimate § 1983 claims that, after appropriate discovery, turn out to have evidentiary support." *Walker*, 2012 WL 13285403, at *5.

ARGUMENT

I. The City Is Liable Under Section 1983.

A municipality can be liable for constitutional violations when officers act pursuant to a city's custom, policy, or practice, when the city has ratified the acts of officers who violated

plaintiff's constitutional rights, and when the city has failed to train its officers. To establish municipal liability, a plaintiff must prove (1) that a municipal employee committed a constitutional violation, and (2) that a municipal custom, policy, or practice was the moving force behind the constitutional deprivation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-94 (1978); *Myers v. Oklahoma Cnty. Bd. of Cnty. Commr's*, 151 F.3d 1313, 1316 (10th Cir. 1998); *Gonzalez v. Brunnemer*, No. 21-cv-02851-RMR-NRN, 2023 WL 3005749, at * 10 (D. Colo. Apr. 19, 2023); *Vigil v. Laurence*, 524 F. Supp. 3d 1120, 1129 (D. Colo 2021) (Plaintiff "must establish that [defendant] maintains a particular custom, policy, or practice, and demonstrate a causal link between such policy and a violation of his constitutional rights."). A municipal policy, practice, or custom includes "an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law." *Bryson v. City of Oklahoma City*, 627 F.3d 784, 788 (10th Cir. 2010) (citation and quotations omitted).

Plaintiffs alleged sufficient facts to show that the City has a custom, policy, or practice that led to the constitutional violations, including by weaponizing warrants to instill fear in protestors and organizations and chill their speech and association.

A. The City's Officers Violated Plaintiffs' Constitutional Rights.

Although the City argues that Plaintiffs have failed to allege a plausible Fourth Amendment claim against its officers, Plaintiffs have sufficiently alleged that officers employed by the City drafted and executed unconstitutional warrants in violation of Plaintiffs' Fourth Amendment Rights. (First Amended Complaint, Doc. 12 ("FAC"), ¶¶ 153, 154, 155, 156, 159, 160, 163, 164, 173, 174, 175, 176, 177, 178, 181; *see also* Plaintiffs' Response in Opposition to

Motion to Dismiss by the Federal Defendants and Ditzler's Motion to Dismiss and Joinder; Plaintiffs' Response in Opposition to Steckler's and Otero's Motion to Dismiss.)

Moreover, the cases cited by the City are distinguishable. In both *Hernandez v. Correct Care Sols., LLC*, No. 18-CV-02522-DDD-GPG, 2019 WL 4200929, at *3 (D. Colo. Sept. 5, 2019) and *Ellis ex rel. Est. of Ellis v. Ogden City*, 589 F.3d 1099, 1104 (10th Cir. 2009), the individual defendants were previously dismissed from the lawsuit. "Therefore, once the claims against the officers were properly dismissed, the claims against the municipality were also properly dismissed since liability for the municipality could not attach." *Ellis ex rel. Est. of Ellis*, 589 F.3d at 1105. Here, the individual officers are still Defendants in the lawsuit, and Plaintiffs have properly alleged that the officers committed constitutional violations pursuant to the custom, policy, and practice of the City.

B. The City Has a Custom, Policy, or Practice That Led to the Constitutional Violations.

Plaintiffs have alleged facts plausibly demonstrating that the officers acted pursuant to City customs, policies, and practices, including drafting, obtaining, and executing overbroad and insufficiently particular warrants to rummage through the personal and political communications of protesters, associates of protesters, and organizers. "With informal, unwritten policies, customs, or practices, the plaintiff can plead . . . a pattern of multiple similar instances of misconduct – no set number is required, and the more unique the misconduct is, and the more similar the incidents are to one another, the smaller the required number will be to render the alleged policy plausible." *Gonzalez v. Brunnemer*, No. 21-cv-02851-RMR-NRN, 2023 WL 3005749, at * 10 (D. Colo. Apr. 19, 2023) (citing *Abila v. Funk*, No. CV 14-1002 JB/SMV, 1727372016 WL 9021834, at *17 (D.N.M. Dec. 14, 2016)).

Plaintiffs' complaint describes several instances of the City obtaining unconstitutional warrants to search protest participants' and organizations' private information, including but not limited to their digital devices and social media accounts.

CSPD obtained a warrant to search and seize all of Armendariz's digital media storage devices and electronic data, including a work computer, all private personal photos, videos, text messages, and emails for more than a two-month period unlimited by subject or topic. The affidavit in support of the warrant pointed to Armendariz's political expression and social ties—unrelated to any crime—as the sole motivation to search her data. There is nothing in the facts alleged – or the City's motion to dismiss – that suggest the officers were doing anything other than following official custom, policy, practice, and training of the City's police department.

Additionally, CSPD obtained a warrant to search all of Chinook's private Facebook messenger chats, posts, and events from a weeklong period as well as all subscriber information tied to the Chinook Center's Facebook profile. Despite the warrant's broad scope and intrusion on an unidentified number of innocent people's private communications, the affidavit made no attempt to establish probable cause to believe evidence of a particular crime would be found in any of the data. Here again, the facts alleged demonstrate that the officers who obtained the constitutionally deficient Facebook warrant were not rogue officers deviating from the City's standard operating procedure —the City's custom, policy, and practice condoned obtaining overbroad, insufficiently particular search warrants.

Plaintiffs' Amended Complaint also identified several other warrants that CSPD obtained in retaliation for individuals' and organizations' participation in a public demonstration. In 2020, activists held a demonstration to commemorate the one-year anniversary of CSPD's killing of

De'Von Bailey in the neighborhood of the officer who was accused of shooting him. (FAC, ¶ 136.) After the demonstration, CSPD asserted the protest had become a "riot" and began an investigation. (*Id.* ¶¶ 138–39.) Nearly six months after the demonstration, CSPD determined that an individual, M.A., had participated in the demonstration and had stood in front of blocked vehicles with a gun. (*Id.* ¶ 140.) CSPD obtained a warrant to seize not only M.A.'s phone, but also the phone of M.A.'s partner, E.B., without any evidence that E.B. had even attended the demonstration. (*Id.* ¶¶ 140–41.) The warrant to search E.B.'s phone authorized a search for all emails, internet searches, voicemail, text messages, logs of incoming and outgoing calls, photos, videos, contact and phone book information—all on the basis that, because E.B. was in a romantic relationship with M.A., her phone would contain material evidence. (*Id.* ¶ 141.)

CSPD also obtained a warrant to search the Empowerment Solidarity Network's Facebook records for a six-week period, including a listing of Facebook friends of the organization and all private messages—all on the basis that, because the group had announced the demonstration, and one of the group's leaders intended to plan similar events in the future, the group's records would provide evidence of criminal activity. (*Id.* ¶¶ 143–44.)

Additionally, CSPD obtained a warrant to search a zippered notebook that included organizational information, rosters, contact information, and personal identification of members of two political groups, described as "far-left political group[s] that organize[] predominantly among working-class people." (*Id.* ¶ 145). While the zippered notebook is not a digital device or social media account, the notebook warrant serves as an additional example of the City's practice of obtaining overbroad search warrants to uncover political associations, gain unfettered access to individuals' and associations' private information, and chill and suppress protected speech,

assembly, and association.

Although the City claims—without support—that each of these warrants was used to identify and prosecute individuals who engaged in criminal conduct, the warrants themselves suggest otherwise, and the fact remains that the scope of the warrants and their lack of particularity mirrors the procedure used with respect to Armendariz and Chinook. Each of the warrants discussed in Plaintiffs' Amended Complaint authorized the City to search through vast amounts of private information without probable cause to believe that doing so would turn up evidence of a particular crime.

The Supreme Court has long recognized that "unrestricted power of search and seizure could . . . be an instrument for stifling liberty of expression." *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978). As the examples above demonstrate, the City is using this instrument consistently to send a message to activists that, if they choose to exercise their First Amendment rights in ways that the City disfavors, the City will choose to rummage through their private information and scrutinize their political views and associations. Plaintiffs have alleged more than sufficient facts showing that the City retaliates against expressive activities with overbroad and general warrants. *ee Sexton v. City of Colorado Springs*, 530 F.Supp 3d 1044, 1067 (D. Colo. 2021) (close temporal proximity and lack of probable cause are factors that show a retaliatory motive).

The City argues that "Plaintiffs must show that similarly situated individuals were mistreated by the municipality in a similar way," citing *Carney v. City & Cty. of Denver* to support its argument 534 F.3d 1269, 1274 (10th Cir. 2008). *Carney*, however, does not require that showing. Instead, it merely observes that "[i]n attempting to prove the existence of such a

'continuing, persistent and widespread' custom, plaintiffs *most commonly* offer evidence suggesting that similarly situated individuals were mistreated by the municipality in a similar way." *Id.* The similarly situated standard is only one way of showing that a custom, policy, or practice exists, but it is neither the only way nor a requirement for a Section 1983 claim against a municipality. To show a custom, policy, or practice exists, Plaintiffs can plead "a pattern of multiple similar instances of misconduct." *Gonzalez*, 685822023 WL 3005749, at *10. For example, in *Orlin*, plaintiff provided examples of prior incidents where Aurora officers were using "unnecessary, disproportionate, and excessive force against civilians." *Orlin v. City & Cnty. of Denver*, No. 22-CV-00242-WPJ, 2022 WL 17820900, at *8 (D. Colo. Dec. 20, 2022). The court found that plaintiff's allegations were "sufficient to plausibly allege a municipal custom of excessive force." *Id.*

Similarly, Plaintiffs here alleged numerous instances where the City issued overbroad warrants to intrude upon the protected expression and association of protestors, in violation of their Fourth Amendment rights. These allegations are sufficient to show that the City has a custom, policy, or practice of engaging in "precisely the kind of rummaging through a person's belongings, in search of evidence of even previously unsuspected crimes or of no crime at all, that the fourth amendment proscribes." *Cassady v. Goering*, 567 F. 3d 628, 635 (10th Cir. 2009) (citing *Voss v. Bergsgaard*, 774 F.2d 402, 405 (10th Cir. 2009)).

The City also argues that because neutral judges approved the warrants drafted by the City's officers, they necessarily met constitutional requirements. That is not the law. Instead, the "uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Cassady*, 567 F. 3d

at 636. Therefore, the City's attempt to "separate the authorization of the search from the execution of the search is a red herring – a violation of the warrant requirement is itself a violation of the Fourth Amendment." *Id.* at 637. Moreover, where, as here, a warrant implicates First Amendment-protected activities, Fourth Amendment requirements must be applied with "scrupulous exactitude." *See Stanford v. Texas*, 379 U.S. 476, 485 (1965). The City has a custom, policy, or practice of drafting and executing warrants that, like the warrant in *Cassady*, "d[o] not confine the scope of the search to any particular crime," and violate bedrock constitutional principles. *Cassady*, 567 F.3d at 635.

C. There Is a Direct Causal Link Between the City's Actions and the Constitutional Violations Suffered.

Plaintiffs sufficiently plead facts to indicate that the warrants issued by the City through its officers directly caused the harm alleged in the complaint. To establish the causation element for a municipal liability claim, "the challenged policy or practice must be 'closely related to the violation of the plaintiff's federally protected right.'" *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 770 (10th Cir. 2013) (citation omitted). Similar to *Orlin v. City & Cnty. of Denver*, where plaintiffs specifically identified the officers who caused constitutional harm and linked the officers' conduct to the policies, practices, and customs of the City of Aurora, Plaintiffs here identified Detective Summey, Detective Steckler, Sergeant Otero, and Officer Ditzler of the City's Police Department as the individuals responsible for the violation of Plaintiffs' Fourth Amendment rights. No. 22-cv-00242-WPJ, 2288692022 WL 17820900, at *9 (D. Colo. Dec. 20, 2022). Plaintiffs allege that Defendant Steckler drafted the unconstitutional warrant to search the Chinook Center's Facebook account, and Defendant Otero, in his role as Steckler's City-trained supervisor following City protocol, reviewed and approved the warrant.

Plaintiffs also allege that Defendant Summey drafted and submitted the applications to search and seize Armendariz's digital devices and data, and Defendant Ditzler, in his role as Summey's City-trained supervisor following City protocol, reviewed and approved the unconstitutional search warrants. All of these actions were in accordance with City custom, policy, and practice. The warrants resulted in the unlawful search and seizure of a vast amount of Plaintiffs' private data in direct violation of their Fourth Amendment rights.

While the City contends that Plaintiffs need to show how the incident would have been different with better training or supervision, such showing is unnecessary given the facts alleged, but also the answer is that the City would not have sought or obtained unconstitutional dragnet warrants with proper training and supervision.

II. The City Violated the Stored Communications Act

The City argues that Plaintiffs failed to allege a violation of the Stored Communications Act ("SCA") because the government can require the disclosure of the contents of an electronic communication so long as it is done pursuant to a warrant. Although the government can require the disclosure of electronic communications in electronic storage under 18 U.S.C. § 2703(a) without providing notice, the disclosure of information must be made pursuant to a ***valid*** warrant. As Plaintiffs plead, the warrant to search the Chinook Center's Facebook account was invalid because it was not issued pursuant to State warrant procedures—the warrant failed to limit the search to evidence of a particular crime, violated the particularity requirement, failed to sufficiently limit the scope of the search, and was not based on any assertion of probable cause.

Alternatively, to the extent the warrant against Chinook is considered a court order, it fails to meet the requirements of 18 U.S.C. § 2703(b)(1)(B) and § 2703(d). Under Section

2703(d), a court order for disclosure "shall issue only if the government entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." Here, the order requiring the disclosure of Chinook's Facebook records failed to comply with Section 2703(d) because the affidavit failed to identify a specific crime for which the evidence is sought, it did not show that evidence of crime would be found in the records sought, and the search was not limited only to the alleged criminal conduct. Facebook disclosed Chinook's records, information, and electronic files, including private confidential communications. Moreover, the warrant was not supported by an affidavit establishing probable cause. Additionally, Chinook did not receive prior notice from the City of the disclosure of its Facebook account information, including the content of its and its members' wire or electronic communications, as required by 18 U.S.C. § 2703(b)(1)(B).

The City argues that it cannot be held liable for violating the SCA because it relied on the warrant in "good faith." But the good-faith defense is a fact-based affirmative defense, which the Officers bear the burden of proving. *United States v. Councilman*, 418 F.3d 67, 83 (1st Cir. 2005) ("We may neither expand the good faith defense's scope, nor convert it from a fact-based affirmative defense to a basis for dismissing an indictment on legal grounds."). Defendants have failed to meet that burden here.

The good-faith defense requires "objectively reasonable reliance on a warrant." *Thompson v. Platt*, 815 Fed. Appx. 227, 233 (10th Cir. 2020) (citing *Davis v. Gracey*, 111 F.3d 1472, 1484 (10th Cir. App. 1997)). The objective test "asks whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.*

(citation omitted). "[A] warrant may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *Groh v. Ramirez*, 540 U.S. 551, 565 (2004) (citation omitted). The deficiencies of the affidavit and application for search warrant, and the warrant that issued, would have been apparent to any reasonably well-trained officer. That Chinook organized a legal housing march could not possibly provide a basis for the broad sweeping search the unconstitutional warrant authorized. The warrant authorized the seizure of *all* Facebook Messenger chats "tied to" the Chinook Center's Facebook profile without any attempt to limit the search to evidence of specific criminal conduct, which is a clear violation of the protections afforded under the Fourth Amendment. *Cassady*, 567 F. 3d at 635.

Finally, the City contends that Plaintiffs have not alleged that it violated the SCA knowingly or intentionally because to be liable, "a person must know he or she is accessing . . . subscriber records or stored communications . . . without an appropriate form of legal process." (City's Mot. at 9.) But Plaintiff alleged that City officers acted intentionally and knowingly in accordance with the City's custom, practice, and policy of issuing unconstitutional warrants when they issued and executed a warrant that fails to comport with the requirements of 18 U.S.C. § 2703(d) and lacked probable cause. The City violated the SCA's statutory requirements, and Plaintiffs' claim must survive.

III. The City Continues to Violate Armendariz's Constitutional Rights By Retaining Her Data.

Plaintiffs' Amended Complaint includes a request for "[a]n injunction ordering the City of Colorado Springs . . . to return or delete the electronic copies of Armendariz's digital devices and the files extracted from them." (FAC, at 51.) The City has not moved to dismiss Plaintiffs'

claim that CSPD's continued retention of Armendariz's data violates her rights under the Fourth Amendment and Article II, section 7 of the Colorado Constitution. Plaintiffs acknowledge that the headings of their state constitutional and injunctive relief claims erroneously did not identify the City. But the Amended Complaint makes clear throughout that Plaintiffs have stated a claim for injunctive relief against the City for the wrongful retention of Armendariz's files. (FAC, at 51 & ¶¶ 129, 167–69, 203–04.).

For the reasons articulated in Section IV of Plaintiffs' Response in Opposition to Motion to Dismiss by the Federal Defendants and Ditzler's Motions to Dismiss and Joinder, Plaintiffs have plausibly stated a claim for injunctive relief ordering the City to return or delete the electronic copies of Armendariz's digital devices and the files extracted from them.

CONCLUSION

Plaintiffs' complaint more than sufficiently pleads claims against the City, including factual allegations sufficient to show *Monell* liability, liability under the SCA, and liability for unconstitutionally retaining Armendariz's digital data. The City's motion should be denied and the case should proceed to discovery.

Dated: December 18, 2023

s/ Theresa W. Benz

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 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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