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 STECKLER'S AND OTERO'S MOTION TO DISMISS

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Defendants B.K. Steckler and Jason S. Otero (collectively, the "Officers") reply to Plaintiffs' Response (Doc. 59) to their motion to dismiss (Doc. 51).

Argument

I. Fourth Amendment Search and Seizure

A. Search Warrant Validity

1. Particularity and Overbreadth

Plaintiffs' challenge to the Facebook Warrant is more one of overbreadth than particularity. As discussed in the Motion (*see* Doc. 51 at 6), a warrant is sufficiently particular if it "'enables the searcher to reasonably ascertain and identify the things authorized to be seized.'" *United States v. Pulliam*, 748 F.3d 967, 972 (10th Cir. 2014) (citation omitted). "By contrast, an overly broad warrant 'describes in both specific and inclusive generic terms what is to be seized, but it authorizes the seizure of items as to which there is no probable cause.'" *United States v. Cotto*, 995 F.3d 786, 798 (10th Cir. 2021) (citation omitted), *cert. denied*, 142 S. Ct. 820 (2022).

Plaintiffs do not complain that the officers executing the Facebook Warrant would be unable to identify the things to be seized. Thus, the Facebook Warrant was sufficiently particular. *See United States v. Purcell*, 967 F.3d 159, 180 (2d Cir. 2020) (Facebook warrant that "authorized officers to search and seize an extensive list of categories of Facebook data, … identified the kinds of data subject to seizure with specificity … and was therefore adequately particularized").

Plaintiffs complain instead that the Facebook Warrant purportedly failed to "specif[y] the crime for which the evidence is sought." (Doc. 59 at 5) They characterize the "Obstructing Passage or Assembly" and "Resisting, Interference with a Public Official"

charges as "nothing but background" and, as such, argue that the warrant lacks "any particular wrongdoing as a limiting parameter for the search for evidence." (*Id.* at 7)

But Plaintiffs' argument rests on a "hypertechnical" reading of the Facebook Warrant, not the "practical and commonsense" construction the Court is to employ. *United States v. Suggs*, 998 F.3d 1125, 1133 (10th Cir. 2021). The Facebook warrant identified "Obstructing Passage or Assembly" and "Resisting, Interference with a Public Official" (see Docs. 51-2 and 67-1) as the crimes at issue and set forth the supporting facts:

- On July 31, 2021, "a group of approximately 60 protestors illegally march[ed] northbound up South Tejon Street, blocking vehicle traffic in the process." They moved around a police line and defied "numerous verbal warnings" informing them "it was illegal to march in the roadway and they needed to immediately exit the roadway to the sidewalk or face arrest. The announcements were made with a bullhorn megaphone and could be heard clearly." Despite the repeated commands, the protestors "continued to block both northbound and southbound lanes of South Nevada Avenue." (Doc. 51-1 at 3)

- Officers attempted to arrest the leader of the group, Shuan Walls, but he "was actively resisting the officers [sic] attempts to control him by remaining on his feet and attempting to pull away from officers." Officers eventually were able to arrest Mr. Walls. (*Id.*)

The judge who issued the warrant clearly understood that obstructing passage and resisting were the crimes under investigation. Moreover, by dismissing these factual averments as mere "background," Plaintiffs essentially argue that to satisfy the Fourth Amendment, a warrant must contain such magic words as, "Your Affiant seeks evidence that would be material in a subsequent criminal prosecution for Obstructing Passage or Assembly and Resisting, Interference with a Public Official." No authority that Plaintiffs cite stands for such a proposition, which runs contrary to the "practical and commonsense" construction this Court must apply. *See Suggs*, 998 F.3d at 1133.

Furthermore, the Facebook Warrant limited the search for evidence to the obstructing and resisting crimes in two additional ways: (1) Type of Material. It authorized the search and seizure of information from only four categories of the Chinook Facebook

account, those most likely to contain material evidence—Facebook posts, chats, events, and subscriber information, and (2) Date range. It authorized the search and seizure of such evidence for just seven days, from July 27, 2021, through August 2, 2021. (Doc. 51-1 at 5) Notably, Plaintiffs do not assert that the Facebook Warrant's limiting parameters should have been drawn differently. They don't contend that fewer or different Facebook categories should have been searched or that the seven-day date range was too long.

Instead, Plaintiffs argue that the Facebook Warrant lacked the magic words limiting the search and seizure to evidence of the obstructing and resisting crimes. They argue, "the warrant must specify that it authorizes the search and seizure only of evidence *related to* that crime;" otherwise, it is overbroad. (Doc. 59 at 7) Not so.

A Facebook search warrant is not overbroad where, as here, it incorporates the affidavit describing the alleged crimes, gives examples of items to seize, is limited with respect to the categories of Facebook data to be searched, and is limited with respect to time. *See, e.g., Purcell*, 967 F.3d at 181; *United States v. Turner*, No. 2:21-cr-00013-KJD-BNW, 2022 WL 195083, at *2 (D. Nev. Jan. 21, 2022), *aff'd*, No. 22-10194, 2023 WL 5696053 (9th Cir. Sept. 5, 2023); *United States v. Liburd*, No. 17-CR-296 (PKC), 2018 WL 2709199, at *3 (E.D.N.Y. June 5, 2018).

In *Turner*, a warrant authorized officers investigating a forgery scheme to search and seize eight different categories of Facebook account information, including all private chats for a two-month period. *Turner*, 2022 WL 195083, at *2. In a motion to suppress, the defendant argued that the warrant was overbroad. *Id.* The federal magistrate judge recommended the motion be granted, but the district court disagreed. *Id.* at *7.

The district court held that the warrant was not overbroad, first, because "[t]here

was a fair probability that evidence of the forgery scheme would be found in each of the enumerated categories, including Turner's private messages." *Id.* at *4. Next, although the warrant did not expressly limit the information to be seized to evidence of the forgery scheme, it found that "the warrant and incorporated affidavit set forth objective standards by which executing officers could differentiate items subject to seizure from those which were not" because "the affidavit described the alleged crimes and gave examples of items to seize." *Id.* at 5-6. Third, electronic searches necessarily overseize:

> "[O]verseizing is an accepted reality in electronic searches because there is no way to be sure exactly what an electronic file contains without somehow examining its contents." Additionally, the Supreme Court has indicated that specific, technical language is not expected in warrants. It found that "affidavits 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation,' " and suggested that warrants be granted "a standard less demanding than those used in more formal legal proceedings."

Id. (internal citations omitted). The Ninth Circuit affirmed the decision. 2023 WL 5696053.

Similarly, in a robbery conspiracy investigation, a court upheld a search warrant for "the entire contents of Defendant's Facebook account … because of the nature of digital media searches." *United States v. Liburd*, No. 17-CR-296 (PKC), 2018 WL 2709199, at *3 (E.D.N.Y. June 5, 2018). "[I]n the context of Facebook searches, 'courts … repeatedly have recognized that ... avoiding the intrusiveness of a search while maintaining its efficacy is largely infeasible.'" *Id.*

In this case, the Facebook Warrant was not overbroad. Like the warrant in *Turner*, it incorporated the affidavit which specified (1) the crimes for which the information was sought (obstructing passage and resisting) and (2) examples of items to be seized (posts regarding the march, "pictures and videos from the protest," "photographs of Mr. Walls

being taken into custody"). (Doc. 51-1 at 2-4) In addition, it did not authorize the search and seizure of all data available from Chinook's Facebook page, such as membership lists or location data. Rather, it sought only those categories of Facebook data where evidence of the crimes likely was to be found. (*Id.* at 5) It also imposed a very narrow date range: from just four days prior to the march to two days after the march. (*Id.*) It was "as specific as the circumstances and the nature of the activity under investigation permit[ted]." *Pulliam*, 748 F.3d at 972. Plaintiffs fail to cite any caselaw to support the notion that such a confined search of Facebook data was overbroad.

Finally, even if, as Plaintiffs contend, the Facebook Warrant "failed to specify *any* particular wrongdoing as the subject of the search authority it requested," that omission would not make the Officers liable. (Doc. 59 at 8) "[D]ue to the manner in which Facebook warrants are executed," "there [is] no appreciable practical effect" of an "omission of the specific crime" as a limitation on the Facebook data to be seized. *Purcell*, 967 F.3d at 182. Facebook warrants are a "novel hybrid of a traditional warrant and a subpoena" that render the specification of the suspected offense "functionally unnecessary." *Purcell*, 967 F.3d at 183. In *Purcell*, like here, "the [warrant] called for Facebook, Inc. to turn over specified information without first culling the information itself." *Id.* at 182. As a result, "the scope of Facebook's 'search' and its identification of the items to be seized were not tethered to its cognizance of the suspected criminal conduct." *Id.* But this "omission" did not "give[] rise to a less particularized search and seizure of evidence." *Id.* Facebook would have returned "the same data" to the government as it would have if the warrant had specified the relevant offense. *Id. See also United States v. Harris*, No. 20-CR-98 (SRN/TNL), 2021 WL 4847832, at *9 (D. Minn. July 16, 2021) ("[D]espite the omission of

the specific offense for which Defendant was being investigated in the warrant itself, there was no appreciable practical effect on the warrant's sweep due to the manner in which Facebook warrants are executed."), *rpt. & recomm. adopted*, 2021 WL 3929270 (D. Minn. Sept. 2, 2021). Thus, Plaintiffs' chief complaint here—that the Facebook Warrant failed expressly to limit the search and seizure of Facebook data to evidence of obstructing passage or resisting arrest—would not have changed the data Facebook returned.

2. Probable Cause

Plaintiffs also argue that the Facebook Warrant fails to demonstrate probable cause to believe that evidence of illegal activity would be found in Chinook's Facebook account during the week of the housing march. (Doc. 59 at 8-11)

To begin, this Court "must accord 'great deference' to the probable-cause assessment of the state court judge who issued the warrant." *Pulliam*, 748 F.3d at 971 (citation omitted). "[R]eview is limited to 'ensuring the Government's affidavit provided a substantial basis' for the issuance of the warrant." *Id.* (citation omitted) "Accordingly, even in a 'doubtful or marginal case,' [this Court is to] defer 'to the [judge's] determination of probable cause.'" *Id.* (citation omitted).

"An affidavit provided by the government in support of a warrant establishes probable cause if it evinces a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *Cotto*, 995 F.3d at 796 (citation omitted). A Facebook warrant establishes this nexus by averring why the government believes that relevant evidence may reside in the Facebook account. *See, e.g.*, *United States v. Arnold*, No. 15-20652, 2017 WL 4036312, at *2-3 (E.D. Mich. Sept. 13, 2017); *United States v. Yelizarov*, No. CR MJG-16-0309, 2017 WL 3022927, at *2 (D. Md. July 17, 2017); *United States v.*

Ortiz-Salazar, No. 4:13CR67, 2015 WL 2089366, at *3 (May 4, 2015), *rpt. & recomm. adopted*, 2015 WL 2194470 (E.D. Tex. May 8, 2015).

In three ways, the Facebook Warrant established probable cause to believe that evidence of Obstructing Passage and Resisting Arrest at the July 31, 2021, march would be found in Chinook's Facebook account. First, Chinook organized the July 31, 2021 "March for Housing" through the Chinook Facebook account. (Doc. 51-1 at 4) Second, in Officer Steckler's seventeen-year experience as a police officer and investigator, "people involved in illegal demonstrations [*i.e.*, those where approximately all participants illegally march in the street, blocking traffic] use social media to organize planned events." (*Id.* at 3-4) Third, participants in the march, including arrestee Shuan Walls, in fact utilized Facebook as a medium to communicate about and share photos of the march:

- At 10:39 PM on July 31, 2021, Mr. Walls posted to his Facebook page concerning his conduct at the march, as follows: "'Now it's fun… it was work before.. I could whoop all them pigs and they felt it too. I laid down so we could keep fighting with purpose. You can watch or help idgaf. I'm going to #Fuck12.'" (*Id.*)
- Nicholas Crutcher posted "pictures and videos from the protest," including "photographs of Mr. Walls being taken into custody" to his Facebook page. (*Id.*)

If the criminal conduct that occurred at the march was planned beforehand or confirmed by participants during or after the march, the Chinook Facebook page—the source of the event—likely would contain it. The above factual averments demonstrated as much to Judge McGuire, whose finding is entitled to "'great deference.'" *Pulliam*, 748 F.3d at 971.

Plaintiffs chastise the Officers for applying for the Facebook Warrant before identifying by name the approximately sixty march participants who obstructed passage, so that they could conduct an even more "particularized search." (Doc. 59 at 8) But Plaintiffs cite no authority for their contention, which turns the applicable authority on its head. Crimes were committed by individuals at an event Chinook organized through its

Facebook page, and participants used Facebook to communicate about them. The Facebook Warrant was valid.

B. Objective Reasonableness and No Clearly Established Law

In the Response, Plaintiffs rely on general Fourth Amendment caselaw to attempt to show that the Officers violated their clearly established rights. (Doc. 59 at 12-13) This is insufficient. *See Saucier v. Katz,* 533 U.S. 194, 201-02 (2001). None of the cases Plaintiffs cite to support their clearly established argument involved a Facebook warrant, which is a "novel" breed of warrant. *Purcell*, 967 F.3d at 183. Indeed, as far as Defendants can tell, in the Response, Plaintiffs cite just one case involving a Facebook warrant—*United States v. Ulbricht*, 858 F.3d 71 (2d Cir. 2017)—and there, the court upheld the warrant as sufficiently particular. *See Ulbricht*, 858 F.3d at 104. Plaintiffs fail to cite a single case finding a Facebook Warrant to be unconstitutional.

Courts routinely, if not universally, extend the good faith exception to officers relying on far broader Facebook warrants than the one at issue here, in recognition that "applying the Fourth Amendment to social media accounts is a relatively unexplored area of law with nuances that have yet to be discovered." *United States v. Chavez*, 423 F. Supp. 3d 194, 208 (W.D.N.C. 2019). *See also Harris*, 2021 WL 4847832, at *8 ("'The extent to which social media profiles can be searched is an evolving issue ….'" (citation omitted)); *United States v. Westley,* No. 3:17-CR-171 (MPS), 2018 WL 3448161, at *17 (D. Conn. July 17, 2018) ("the application of search warrants to Facebook accounts is a relatively new area of the law"). "Courts should not punish law enforcement officers who are on the frontiers of new technology simply because 'they are at the beginning of a learning curve and have not yet been apprised of the preferences of courts on novel

questions.'" *Chavez*, 423 F. Supp. 3d at 208.

II. First Amendment Retaliation

Plaintiffs give scant attention to their First Amendment retaliation claim (Doc. 59 at 13-14), failing altogether to respond to the arguments in the Motion. (Doc. 51 at 8-10) Where, as here, the Officers had probable cause to search the Chinook Facebook account for evidence of the obstructing and resisting crimes, Chinook cannot show any violation of its First Amendment rights. *See Novak v. City of Parma*, No. 1:17-CV-2148, 2021 WL 720458, at *7 (N.D. Ohio Feb. 24, 2021), *aff'd*, 33 F.4th 296 (6th Cir. 2022).

III. Stored Communications Act

Plaintiffs' Response confirms that their SCA claim depends entirely on their contentions that the Facebook Warrant lacks probable cause and particularity to an extent that makes it facially deficient (Doc. 59 at 13; Doc. 61 at 14-15), which, for the reasons stated in the Motion and above, is incorrect. In addition, *United States v. Councilman*, 418 F.3d 67, 84 (1st Cir. 2005), a criminal case under the Wiretap Act against an internet service provider employee, fails to undermine *John K. Maciver Inst. v. Schmitz*, 885 F.3d 1004 (7th Cir. 2018), where the Court held in a civil action just like this that it "may resolve the [SCA's] good-faith defense at the motion-to-dismiss stage." 885 F.3d at 1014. Finally, Plaintiffs maintain that their scienter allegations are sufficient (Doc. 61 at 15), even though they fail to allege any facts plausibly showing that the Officers intended to access Chinook's Facebook account without a valid warrant, as required. (Doc. 51 at 12)

IV. Colorado Constitution Claims

To support their search and seizure claim under the Colorado Constitution, Plaintiffs rely on the general notion that "'article II, section 7 [of the Colorado Constitution]

provides greater privacy protections than the Fourth Amendment.'" (Doc. 59 at 16, quoting *People v. McKnight*, 446 P.3d 397, 404 (Colo. 2019)) But Plaintiffs fail to cite any authority for their suggestion that the Facebook Warrant, even if valid under the Fourth Amendment, could run afoul of the Colorado Constitution. Indeed, the Colorado Supreme Court's opinions in both *McKnight* and *People v. Seymour*, 536 P.3d 1260 (Colo. 2023), are replete with references to federal cases interpreting the Fourth Amendment. Plaintiffs offer no reason to believe that the analysis of their search and seizure claims under the Colorado Constitution would differ in any material respect from the analysis of their claims under the Fourth Amendment to the United States Constitution.

Moreover, Plaintiffs cite *Seymour* for the principle that the analysis of search-and-seizures is "'fact-dependent.'" (Doc. 59 at 16, quoting *Seymour*, 536 P.3d at 1268.) But that doesn't mean that evidence is needed to assess the validity of the Facebook Warrant here. Indeed, *Seymour* was a criminal case where the Court upheld the reverse-keyword warrant as sufficiently particular, and it declined to suppress the evidence under the good-faith exception to the exclusionary rule. 536 P.3d at 1276, 1280. If anything, *Seymour* indicates that all of Plaintiffs' constitutional claims fail.

Plaintiffs fail to cite any Colorado caselaw finding any Facebook search warrant to be violative of the state constitution, let alone one as limited as the one at issue here. Plaintiffs' Colorado Constitutional claims should be dismissed.

Conclusion

All of Plaintiffs' claims against Officers Stekler and Otero should be dismissed with prejudice.

Respectfully submitted this 9th day of January 2024.

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on the 9th day of January 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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