IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
**Magistrate Judge Maritza Dominguez Braswell**

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.

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**ORDER**

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This matter is before the Court on two motions, hereinafter referred to as the "Motions to Stay": first, the "City Defendants' Motion to Stay Discovery" (["City MTS"], Doc. No. 29); and second, the "Motion to Stay Discovery by Defendants Daniel Summey and the Federal Bureau of Investigation." (["US MTS"], Doc. No. 30.) Plaintiffs have filed a combined response to both, (["Plaintiff Response"], Doc. No. 36), and Defendants have replied (["City Reply"], Doc. No. 38, ["US Reply"], Doc. No. 40.) Additionally, the Court held oral argument on December 18, 2023, giving the parties a meaningful opportunity to supplement their arguments. After carefully

considering all arguments and circumstances, and for the reasons set forth below, the Court orders that the Motions to Stay be **DENIED**.

## STATEMENT OF THE CASE

Plaintiffs bring this action against Defendants in connection with what they describe as the Defendants' "unconstitutional attempt to squelch Plaintiffs' peaceful exercise of free speech by invading their privacy rights." (Doc. No. 36 at 2.) According to Plaintiffs, they sought to "raise awareness for the…housing crisis in Colorado Springs," by organizing "a constitutionally protected housing march," in which "local activists," including Plaintiff Armendariz, participated. (*Id.*) Plaintiffs allege these local activists had previously "become a target for CSPD and FBI surveillance because of their association with earlier racial justice protests in the area." (*Id*.) Defendants therefore knew about the march and "used it as an opportunity to arrest community leaders[.]" (*Id.*; *see also* Doc. No. 12 at ¶ 4 ("CSPD targeted Chinook Center leaders for arrest at the march, sharing pictures of the activists in advance and stating that they would get a 'boot to the head.' Ultimately, a CSPD commander ordered arrests of prominent Chinook Center members for marching in the street, even after the protestors complied with police requests to move onto the sidewalk.").) Specifically, Plaintiff Armendariz was arrested and charged "for dropping her bicycle in the path of an officer during the march, even though the officer easily avoided the bicycle and was not injured in any way." (Doc. No. 12 at ¶ 6.) Later, Plaintiff Armendariz's cell phones, laptops, and an external hard drive were seized, allegedly "without any justification or probable cause that they contained specific, particularized evidence of the alleged bike-dropping crime." (*Id.*)

Plaintiffs also allege that after the march, Defendants "obtained a search warrant…to search the Chinook Center's private chats on Facebook Messenger….an unjustified effort to intrude on the private messages of a group whose political expression the CSPD dislikes." (*Id.* at ¶ 5.) They further allege that "[t]he unconstitutional search warrants targeting Chinook Center and Ms. Armendariz's digital devices were obtained by Colorado Springs police officers as part of a custom, policy, and practice of CSPD and the City of Colorado Springs[,]" by which "CSPD officers conduct a post-event investigation of offenses that occurred during a demonstration or protest," and "police seek broad-reaching warrants to search digital devices and social media accounts of participants[.]" (*Id.* at ¶¶ 130-31.) Plaintiffs contend that,

> [i]nstead of narrowly targeting information and evidence relevant or necessary for a criminal prosecution of particular, specified crimes under investigation, these warrants broadly seek information about activities, expression, views, and associations that are protected by the First Amendment and Article II, sections 10 and 24 of the Colorado Constitution. In doing so, they fail to comply with the constitutionally required standard of scrupulous exactitude that governs warrants seeking First Amendment protected materials.

(*Id.* at ¶ 131.) In other words, Plaintiffs challenge the alleged custom and practice to seek "warrants to search digital devices and social media messages" of individuals who committed some violation or had some association with an event that prompts an investigation.

As an example of this custom and practice, Plaintiffs reference a protest that occurred on August 3, 2020. On that date, "activists held a demonstration to commemorate the one-year anniversary of the shooting and killing of De'Von Bailey at the hands of Colorado Springs police officers." (*Id.* at ¶ 136.) The demonstration occurred at "a residential neighborhood that included the home, on Pulpit Rock Drive, of the officer who was accused of shooting and killing De'Von Bailey.") (*Id.*) According to Plaintiffs, "[i]n CSPD's later-written reports, (but not at the scene),

CSPD asserted that the protest had become a 'riot' pursuant to C.R.S. § 18-9-101[,]" and although "[n]o arrests were made at the event," they "launched an intensive investigation[,]" and "[s]ix weeks later, Colorado Springs police arrested two persons for alleged 'riot' and 'menacing[,]'" and the following year, "[t]hey obtained warrants for physical searches of homes and vehicles; they obtained warrants to search cell phones and other digital devices; warrants to search private information on social media accounts, and additional warrants issued to cell phone companies for customer data records." (*Id.* at ¶ 138-39.) Then, "[a]lmost six months after the De'Von Bailey commemoration, CSPD determined that M.A. was one of the participants who stood in front of the blocked vehicles while armed with a gun. Detectives seized not only M.A.'s phone, but also the phone of M.A.'s partner, E.B[,]" and according to Plaintiffs they did so based only on the "perceived romantic relationship with M.A.," with "no evidence that E.B. had attended the protest[.]" (*Id.* at ¶¶ 140-41.)

These alleged facts form the basis of Plaintiffs' six claims.

***Plaintiffs' Claims***

First—based on the search and seizure of Plaintiff Armendariz's devices and digital data—Plaintiff Armendariz brings claims for unlawful search and seizure in violation of the First and Fourth Amendments against Defendant Summey (who allegedly drafted and submitted the applications for the search warrants), Defendant Dritzler (who allegedly reviewed and approved the applications for the search warrants), and the City of Colorado Springs (because this is allegedly part of a larger custom and practice and because they apparently continue to retain copies of Plaintiff Armendariz's digital files). (*Id.* at ¶¶ 148-69.)

Second—based on the search and seizure of the Chinook Center's private Facebook messages—Plaintiff Chinook Center brings claims for unlawful search and seizure in violation of the First and Fourth Amendments against Defendant Steckler (who allegedly drafted and submitted the application for the search warrant), Defendant Otero (who allegedly reviewed and approved the application for the search warrant), and the City of Colorado Springs (because this is allegedly part of a larger custom and practice). (*Id.* at ¶¶ 170-183.) In their third claim, Plaintiffs also allege the Facebook warrant gives rise to a claim under the Stored Communications Act ("SCA") against Defendants Steckler, Otero, and the City of Colorado Springs. (*Id.* at ¶¶ 184-194.)

Plaintiff Armendariz brings claim four under Colorado's constitution and C.R.S. § 13-21-131 against all individual Defendants. (*Id.* at ¶¶ 195-205.) Plaintiff Chinook Center brings the same claims under claim five. (*Id.* at ¶¶ 206-213.) Finally, Plaintiff Armendariz brings claim six for injunctive relief against the Federal Bureau of Investigation ("FBI"), seeking the return or destruction of copies of her device files. (*Id.* at ¶¶ 214-216.)

***Defendants' Motions to Dismiss***

Defendants have moved to dismiss every claim. Specifically, Defendant Summey moves to dismiss the unlawful search and seizure claims against him because such relief would constitute a new *Bivens* remedy that is not warranted under the circumstances, and because he is entitled to qualified immunity. (*See* Doc. No. 49 at 3-18.) Defendant Summey also moves to dismiss the state law claims for lack of subject matter jurisdiction under the Federal Tort Claims

Act.[1] (*Id.* at 19-21.) The United States also moves to dismiss Plaintiff Armendariz's claim for injunctive relief against the FBI because there is no duty to destroy or return the information at issue. (*Id.* at 21-23.)

Defendant Dritzler joins in the arguments made in connection with Defendant Summey's motion to dismiss. (*See* Doc. No. 50.) He separately asserts qualified immunity, and briefly argues Plaintiff Armendariz has failed to allege a violation of her rights under the Colorado Constitution. (*Id.*)

Defendants Steckler and Otero also assert qualified immunity, failure to state a claim under the SCA, and failure to allege violations of the Colorado Constitution. (*See* Doc. No. 51.)

Finally, the City of Colorado Springs moves to dismiss all claims against it, arguing first under the constitutional violation prong, but also that Plaintiffs have failed to allege facts plausibly demonstrating a custom and practice that is causally linked to the deprivation of constitutional rights. (Doc. No. 52 at 2-8.) The City of Colorado Springs also argues Plaintiffs fail to allege a violation under the SCA, and that even if they had, the warrant was relied upon in good faith—which is a defense to liability under the SCA. (*Id.* at 9-10.)

## LEGAL STANDARD

The Federal Rules of Civil Procedure do not expressly provide for a stay of proceedings. Rule 26(c), however, permits a court to "make an order which justice requires to protect a

[1] This argument depends on the United States being substituted in for the individually named Defendants. When the United States filed its motion to dismiss on November 20, 2023, it had not yet been substituted in for Defendant Summey. (*See* Doc. No. 49 at 19, fn. 6.) However, on December 18, 2023, this Court permitted the substitution, noting that certain disputed factual issues prevent a final determination on the issue of substitution under the Westfall Act. Thus, the substitution is subject to a motion to re-substitute after the completion of certain limited discovery. (*See* Doc. No. 62.)

party...from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). Further, "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) (citing *Kan. City S. Ry. Co. v. United States*, 282 U.S. 760, 763 (1931)).

In this District, a stay of discovery is generally disfavored. *See, e.g.*, *LS3, Inc. v. Cherokee Fed. Sols., LLC*, 2021 WL 4947284, at *2 (D. Colo. Aug. 26, 2021); *Gold, Inc. v. H.I.S. Juveniles, Inc.*, 2015 WL 1650900, at *1 (D. Colo. April 8, 2015); *Rocha v. CCF Admin.*, 2010 WL 291966, at *1 (D. Colo. Jan. 20, 2010). Nevertheless, the decision whether to stay discovery rests firmly within the sound discretion of the Court. *United Steelworkers of Am. v. Or. Steel Mills, Inc.*, 322 F.3d 1222, 1227 (10th Cir. 2003) (quoting *Landis*, 299 U.S. at 254).

In ruling on a motion to stay discovery, five factors are generally considered: "(1) [the] plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to [the] plaintiff of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest." *String Cheese Incident, LLC v. Stylus Shows, Inc.*, 2006 WL 894955, at *2 (D. Colo. Mar. 30, 2006); *see United Steelworkers*, 322 F.3d at 1227. Further, "a court may decide that in a particular case it would be wise to stay discovery on the merits until [certain challenges] have been resolved." 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2040, at 198 (3d ed. 2010); *see, e.g.*, *Burkitt v. Pomeroy*, 2016 WL 696107, at *3 (D. Colo. Feb. 22, 2016) (observing that a stay may be appropriate pending the resolution of a motion to dismiss impacting immunity or jurisdictional issues). Additionally, where defendants assert qualified

immunity courts must consider that qualified immunity is a protection against the burdens of *suit*, not just a defense to liability. *Martin v. County of Santa Fe*, 626 Fed.Appx. 736, 740 (10th Cir. 2015).

## ANALYSIS

### I. Impact of Invoking Qualified Immunity

In support of their Motions to Stay, Defendants argue Supreme Court and Tenth Circuit precedent *dictate* a stay as soon as any defendant raises qualified immunity. (*See* Doc. No. 29 at 5; Doc. No. 30 at 2.) Indeed, the City Defendants articulate it as a "right." (Doc. No. 29 at 9.) Similarly, the Federal Defendants argue they are "entitled" to a stay. (Doc. No. 30 at 5.)

During the December 18, 2023, hearing, the Court expressed concern over this position and asked Defendants if it was truly their position that a stay is entirely *automatic* upon the mere invocation of qualified immunity (thus obviating the need to even consider the *String Cheese* factors). Defendants confirmed this position, stating courts in this district have erred in proceeding with discovery while a motion to dismiss based on qualified immunity is pending. (*See also* Doc. No. 29 at 6-7 (contending that where courts proceed "with discovery while a motion to dismiss based on qualified immunity is pending," they "do so in error.").)

In support of their position, Defendants offer several Supreme Court and Tenth Circuit cases for the broad-sweeping proposition that a stay is *mandated* in all cases where qualified immunity is invoked. However, a close look at Defendants' cases reveals each decision is more nuanced than Defendants suggest.

For example, the federal Defendants cite *Anderson v. Creighton*, 483 U.S. 635 (1987), for the proposition that the question of immunity must be decided before discovery. (Doc. No. 30 at 4.) The relevant text in *Anderson* is in a footnote and says this:

> …we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation. Thus, on remand, it should first be determined whether the actions the Creightons allege [the officer] to have taken are actions that a reasonable officer could have believed lawful. If they are, then [the officer] is entitled to dismissal prior to discovery. If they are not, and if the actions [the officer] claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before [the officer's] motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of [the officer's] qualified immunity.

*Anderson,* 483 U.S. at 646 fn. 6 (internal citations omitted). This footnote comes at the end of the decision as the Court remands the matter for further proceedings. It certainly emphasizes the importance of resolving the qualified immunity issue "at the earliest *possible* stage of a litigation." (*Id.* (emphasis added).) But it does not go as far as Defendants wish: it does not require a trial court to automatically grant a stay upon the mere invocation of qualified immunity—indeed, a stay request was not even at issue in *Anderson*. Moreover, in *Anderson,* the Court leaves open the possibility that some discovery may be necessary, acknowledging the trial court's discretion in managing the matter on remand. *Id.*

Defendants also cite *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). They argue the Supreme Court "prohibits *all* 'discovery, cabined or otherwise,' where defendants assert qualified immunity in the pending motion to dismiss." (Doc. No. 29 at 5 (emphasis in original) (quoting *Iqbal*, 556 U.S. at 686).) But the quoted language comes from a portion of the decision where the Court determines discovery will not be allowed, "cabined or otherwise," *because* the "complaint

is deficient[,]" not because the mere invocation of qualified immunity requires a stay. *Iqbal*, 556 U.S. at 686.

Defendants also rely heavily on *Crawford-El v. Britton*, 523 U.S. 574 (1998), quoting the following language: "if the defendant does plead the [qualified] immunity defense, the district court should resolve that threshold question before permitting discovery." (Doc. No. 29 at 5 (quoting *Crawford-El*, 523 U.S. at 598).) But like other cases, *Crawford-El* does not expressly consider whether a stay should or should not be issued upon the invocation of qualified immunity. Instead, in *Crawford-El,* the Supreme Court considered whether courts of appeal can craft procedural rules, and whether a prisoner plaintiff must adduce clear and convincing evidence to defeat a motion for summary judgment on qualified immunity grounds. *See generally Crawford-El*, 523 U.S. 574. In other words, the *Crawford-El* Court was not prescribing a particular approach for motions to stay, it was determining the necessary level of proof in the face of a qualified immunity defense. In so doing, the Court noted trial courts have various options at their disposal for determining whether a plaintiff can overcome a qualified immunity defense. *Id.* at 598. And it is worth noting *Crawford-El* was filed by a "litigious" prisoner, against the backdrop of "the very large number of civil rights actions filed by prison inmates[,]" with the Court noting those types of cases "deserve special attention because many of them are plainly frivolous and some may be motivated more by a desire to obtain a 'holiday in court,' than by a realistic expectation of tangible relief." *Id.* at 577, 596. The instant action is not a prisoner case, and the related considerations present in *Crawford-El,* are not present here.

Defendants also cite *Mitchell v. Forsyth*, 472 U.S. 511 (1985), for the proposition that Defendants are "entitled" to a stay pending resolution of the qualified immunity issue. (*See* Doc.

No. 29 at 5.) However, in that case the issue was not whether a stay should issue, but whether immunity existed at all and relatedly, whether the district court's denial of qualified immunity was appealable as a final decision. *Mitchell,* 472 U.S. at 530. Thus, the entitlement Defendants speak of when citing *Mitchell*, is an entitlement to immunity from suit, not an entitlement to a stay. It was the prospect of losing that immunity if the case went *all the way to trial*, that underpinned the Court's determination in *Mitchell*. *Id.* at 526–27.

Defendants also rely on *Workman v. Jordan*, 958 F.2d 332 (10th Cir. 1992), where the court stated, "[d]iscovery 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." (Doc. No. 40 at 2 (citing *Workman*, 958 F.2d at 336).) But again, that case did not concern a trial court's decision to grant or deny a stay. There, the issue was whether a trial court could postpone—until trial—its decision on the pending motion to dismiss based on qualified immunity. *Workman*, 958 F.2d at 333. The Tenth Circuit held the case should not proceed to trial before the qualified immunity question was resolved, and "the district court erred in postponing until trial a decision on the motions to dismiss." *Workman*, 958 F.2d at 336.

In short, none of Defendants' Supreme Court or Tenth Circuit cases stand for the position taken by Defendants that a stay of discovery is *automatic* and *must be* imposed upon the mere invocation of qualified immunity. Indeed, an automatic stay runs counter to the well-settled principle that courts have broad discretion in managing their dockets and taking into account the specific facts and circumstances of each case and the parties. *Landis,* 299 U.S. at 254 ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and

for litigants."); *see also Akinbode v. Colorado Dep't of Corr.,* 2019 WL 13444187, at *1 (D. Colo. Mar. 25, 2019) ("Whether to implement a stay 'calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.'" (quoting *Landis,* 299 U.S. at 254-55)); *Cole v. Ruidoso Mun. Sch*., 43 F.3d 1373, 1386 (10th Cir. 1994) ("As a general rule, discovery rulings are within the broad discretion of the trial court.") It is also contrary to this district's general inclination against stays. *See Love v. Grashorn*, 2022 WL 1642496 (D. Colo. May 24, 2022) (citing *Bustos v. United States*, 257 F.R.D. 617, 623 (D. Colo. 2009)). And finally, if the mere invocation of qualified immunity is enough to win delay, defendants have an incentive to invoke the defense—even at its weakest.

Still, it is worth noting that at least one court in this district appears to have taken the approach Defendants ask this Court to take. *See Lucero v. City of Aurora*, 2023 WL 5957126, at **3, 6 (D. Colo. Sept. 13, 2023). In *Lucero*, United States Magistrate Judge Susan Prose conducted a thorough analysis of this issue and concluded the "invocation of immunity" *does* "warrant[ ] a complete stay of discovery until the district court rules on the pending motions to dismiss." *Id.* at *3. In other words, she viewed the invocation of qualified immunity as sufficient to trigger a stay, and she found the analysis could end there—without consideration of the *String Cheese* factors. *Id.* at *6.

With great respect for Judge Prose's very careful analysis and reasoned decision, this Court cannot go so far as to conclude it *must* issue a stay upon the mere invocation of qualified immunity. To do so would foreclose application of the *String Cheese* factors altogether (or at a minimum render them superfluous). The Court sees a fundamental unfairness to that. The *String Cheese* factors offer a measured way of considering various interests—plaintiff's interests,

defendant's interests, even the interests of non-parties.[2] These interests are important when determining if the wheels of justice should grind to a near halt. *See generally Love,* 2022 WL 1642496, at *5 ("The wheels of justice turn slowly in any event, but issuing the requested stay would cause those wheels to nearly grind to a halt, further delaying the process of answering whether Defendants' actions in this case were consistent with the Constitution.") It cannot be that the unilateral invocation of qualified immunity—without anything more—forecloses a court from doing that which is so fundamental to a fair and reasoned decision.

This is not to say the invocation of qualified immunity has *no* effect on the Court's analysis. As the Tenth Circuit explained:

> Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation. The privilege is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, qualified immunity questions should be resolved at the earliest possible stage in litigation. *Even such pretrial matters as discovery are to be avoided if possible, as inquiries of this kind can be peculiarly disruptive of effective government.*

*Martin,* 626 Fed.Appx. at 740 (quoting *Jiron v. City of Lakewood*, 392 F.3d 410, 414 (10th Cir. 2004) (emphasis in original)). Thus, a Court must exercise its discretion in a way that protects the substance of the qualified immunity defense. *See Crawford-El*, 523 U.S. at 597-98 (stating the trial court "must exercise its discretion in a way that protects the substance of the qualified immunity defense.") To do that, courts consider many factors, including the types of claims filed, *see Estate of Ronquillo v. City and County of Denver,* 2016 WL 10842586, at **2-3 (D. Colo.

[2] *See generally Cook v. Whyde*, 2021 WL 981308, at *2 (D. Colo. Mar. 15, 2021) (acknowledging the importance of the *String Cheese* factors in this district, even in the face of a qualified immunity defense).

Nov. 14, 2016), and sometimes the types of arguments made on a motion to dismiss, *see Griffith v. El Paso Cnty.*, 2022 WL 20286303, at *2 (D. Colo. Nov. 2, 2022). In short, invoking qualified immunity does not force a stay, but it does mandate a court's careful consideration of the defense's application in the given context, and significant efforts to protect the substance of the immunity.

With this framework in mind, the Court now considers the specific circumstances of this case. Defendants persuasively note that the claims subject to qualified immunity might be straightforwardly resolved as a matter of law because they concern the issuance of warrants and the existence of probable cause.[3] (*See* Doc. No. 29 at 11.) In some instances, this would counsel in favor of a stay and end the inquiry. But here, Plaintiffs are correct to point out that only some of their claims are subject to a qualified immunity defense, not all. (*See* Doc. No. 36 at 6.) Additionally, the Court is of the view that in this case, discovery on the different claims and Defendants is inextricably intertwined because the warrants—though separately issued—are tied to the same event or set of events and issues. Thus, inquiry into the facts and circumstances surrounding the claims subject to qualified immunity, will necessarily overlap with claims that are not subject to qualified immunity. Said another way, the interwoven nature of the claims, inquiries, and discovery, makes this case less amenable to cabined discovery, which means all

[3] The pending motions to dismiss have not been referred and therefore this Court does not express a view on the merits of the claims or the strength of the arguments in those motions. Instead, the Court merely notes that because the crux of the dispute concerns warrants and probable cause, the qualified immunity defense in this context is more likely to require legal determinations, as contrasted with the types of factual determinations necessary in other contexts. *Cf. Estate of Ronquillo,* 2016 WL 10842586 at *2-3 (noting claims of excessive force are analyzed under a standard that requires inquiry into the factual circumstances, and that inquiry overlaps with the qualified immunity question).

discovery must proceed, or all discovery must be delayed. *See generally A.A. ex rel. Archuletta v. Martinez*, 2012 WL 5974170, *2 (D. Colo. Oct. 9, 2012) (finding discovery should not be stayed only as to one defendant, but as to all); *see also Griffith*, 2022 WL 20286303, at *2 (disfavoring piecemeal discovery). Thus, the Court turns to the *String Cheese* factors to determine whether a complete stay is appropriate under these particular circumstances.

## II. String Cheese Factors

Before applying the *String Cheese* factors, the Court again emphasizes the warning issued by the Supreme Court and Tenth Circuit: failure to adequately consider the implications of a qualified immunity defense can erode the important protections afforded by the doctrine. *See Mitchell*, 472 U.S. at 526–27; *Workman*, 958 F.2d at 333. Here, the Court finds it appropriate to begin its *String Cheese* analysis with great weight already on the side of a stay. Said another way, for the Court to reject Defendants' stay requests, the *String Cheese* factors must weigh heavily in Plaintiffs' favor.

### A. Plaintiffs' interests and the potential prejudice to them

Plaintiffs have a strong interest in proceeding expeditiously with their case. "Like the government official who rightfully invokes the defense of qualified immunity, a private citizen is entitled to claim the timely protection of the law." *Sanchez v. Hartley*, 2016 WL 7176718, at *7 (D. Colo. Apr. 26, 2016). This is true in any civil rights case. But here, there are additional considerations. First, Plaintiffs argue Defendants continue to unlawfully possess copies of Plaintiff Armendariz's devices and files. (Doc. No. 36 at 7.) In other words, Plaintiff has an interest in the return of her information and if she is indeed entitled to that, a stay would delay that relief. Second, Plaintiffs contend a swift resolution is necessary so they can engage in

activism without risk of police engagement (or fear of retribution). (*Id.*) This argument is particularly weighty given its tie to fundamental First Amendment rights. Without resolution of their claims, Plaintiffs are left to wonder whether they have any recourse should police engage them again, which may deter them from exercising their constitutional rights.

Additionally, the Court notes that judges in this District are extremely busy, motions to dismiss take time to resolve, and Defendants may decide to appeal an unfavorable decision on the issue of qualified immunity. This means any delay occasioned by a stay could be significant.[4] For these reasons, the first *String Cheese* factor weighs heavily in Plaintiffs' favor and against a stay.

**B. Burden on Defendants**

On this point, Defendants make many of the same arguments made in support of their qualified immunity "automatic stay" argument, noting the burden on them is great, and the protections afforded by qualified immunity may be eroded if they are forced to proceed. They also argue the pending motions to dismiss have the potential to dispose of the entire case, and that even if they do not, they may substantially narrow the claims.[5] (*See, e.g.*, Doc. No. 29 at 11.)

It is true that Defendants' pending motions *could be* entirely dispositive or may at least narrow the claims. *See Morrill v. Stefani*, 2017 WL 1134767, at *2 (D. Colo. Mar. 13, 2017)

[4] Defendants argue Plaintiffs' filing delay undermines their argument that swift resolution is of the essence. (*See, e.g.,* Doc. No. 40 at 7-8.) However, Plaintiffs were timely in their filing and the Court will not penalize the decision to use their allotted time under the applicable statute of limitations.

[5] For example, if the presiding judge finds the Facebook warrant lacked probable cause, but the warrant as to Ms. Armendariz's devices did not, then Defendants Summey and Ditzler would not need to participate in discovery. (Doc. No. 29 at 11.)

(finding plaintiff's interest in proceeding expeditiously with the case was overcome by the potential burden to the defendants "if they were forced to proceed with discovery only to have the case dismissed for lack of jurisdiction"); *see also String Cheese Incident, LLC*, 2006 WL 894955, at *2 ("[S]ubjecting a party to discovery when a motion to dismiss for lack of personal jurisdiction is pending may subject him to undue burden or expense, particularly if the motion to dismiss is later granted."). But the Court already factored this in when it considered the effect of the qualified immunity defense, above.

Moreover, because Defendants' briefing on the burden factor repeated so much of the qualified immunity argument, the Court gave them an opportunity to articulate a specific burden(s) during the December 18, 2023 hearing. For example, will preparing a specific discovery response or producing a certain set of documents be particularly burdensome and costly given the nature of the information or documents? Will responding to certain discovery requests require the deposition of a high-ranking official and meaningfully disrupt certain operations? Will certain discovery cause prejudice or harm in another case? The Court could not glean any of that from either the briefing or the oral arguments. "Of course, requiring Defendants to participate in discovery while a motion to dismiss remains pending is a burden," but if defendants do not establish "particularized facts that demonstrate they will suffer a clearly defined and serious harm associated with moving forward with discovery," this factor will not weigh in their favor. *Love*, 2022 WL 1642496 at *5. Thus, this factor does not weigh in favor of a stay.[6]

[6] Importantly, however, the determination on this single factor does not disturb or diminish the great weight already attributed to Defendants' qualified immunity arguments.

### C. Court convenience

The Court has a "strong interest in ensuring the speedy resolution of the cases before it." *Birse v. CenturyLink, Inc.*, 2019 WL 161642, at *3 (D. Colo. Jan. 2, 2019); *see also Genscape, Inc. v. Live Power Intel. Co. NA, LLC*, 2019 WL 78933, at *3 (D. Colo. Jan. 2, 2019) (finding that "the potential for discovery disputes does not outweigh the court's determination that it is most efficient to move forward without a stay"). Thus, delays are inherently inconvenient. Having a case "sit in limbo, without any progress, while a dispositive motion takes months (or potentially a year) to be decided," creates difficulties in gearing back up. *Love*, 2022 WL 1642496 at *5.

Defendants argue that "because this case arises out of a law enforcement investigation, it is reasonable for the Court to expect that difficult discovery disputes could arise over, for example, law enforcement privilege or other sensitive law enforcement issues." (Doc. No. 30 at 12 (citations omitted).) But "[d]iscovery disputes are the bread and butter of a magistrate judge's involvement in many civil actions and will no doubt continue to be such," and the court "cannot find that having to afford such guidance is a valid reason to stay...discovery in a particular action." *Love*, 2022 WL 1642496 at *5 (quoting *Salls v. Secura Ins.*, 2019 WL 1228068, at *2 (D. Colo. Mar. 16, 2019)). Moreover, this case does not appear to present meaningful hurdles to the resolution of discovery disputes or other pretrial matters. Counsel on both sides are sophisticated and capable. Both have proven to be strong advocates who know how to exercise good judgment and restraint. The Court does not foresee an unusually high number of disputes or motions, and to the extent difficult disputes do arise, the Court is confident in its and the parties' abilities to work through them efficiently. This factor therefore weighs against a stay.

**D. Interests of non-parties**

The City Defendants list several non-party witnesses with knowledge or information concerning this action. (Doc. No. 29 at 12-13.). The Court has no reason to doubt that list. But it is, of course, well-settled that courts—and in particular magistrate judges—have the ability to manage and place limits on discovery. Thus, Defendants' list of *possible* non-party witnesses from whom discovery *might* be necessary is not enough to tip the scales in their favor on this factor. *See Genscape, Inc.*, 2019 WL 78933, at *3. Additionally, if the Court takes as true that at least some non-parties will be called upon to share information and recount certain events, it is common sense that witness memories fade over time and meaningful delays will make the preparation and participation of those witnesses more difficult. For example, one witness, Lieutenant Chacon, is alleged to have directed the arrest of the protestors if they began to march on the street. (Doc. No. 29 at 13.) No doubt his recollection of directives and conversations is clearer today than it will be in five months, or even a year, depending on the time it takes to resolve the pending motions to dismiss. Additionally, the City Defendants contend that approximately forty police officers participated in responding to the July 31, 2021, protest in various roles. (*Id.*) With that many officers involved, it is possible that at least some are no longer employed—or will not be employed—by the City once the stay is lifted. The Court has experienced difficulties when former employees are called upon to testify—difficulties for the attorneys, the parties, the Court, and, of course, the witness her or himself. At best this factor is neutral, but given Defendants' long list of witnesses, the information they purportedly hold, and the fact that a stay in this case could be lengthy, this factor weighs slightly in favor of Plaintiffs and against a stay.

**E. Public interest**

"The public has a strong interest in seeing cases resolved, especially when public entities and violations of citizens' constitutional rights are involved." *Montoya v. City & Cnty. of Denver*, 2021 WL 8087380, at *5 (D. Colo. July 27, 2021). This case concerns public demonstrations and an alleged pattern and practice of targeting those who exercise their constitutional rights to assemble and speak out. The Court does not express a view on the merits of Plaintiffs' claims, but they allege:

> [t]he warrants targeting Chinook and Armendariz were part of a pattern and practice of unconstitutional actions intended to teach activists a lesson: Colorado Springs police would retaliate against political expression with dragnet warrants to chill free speech.

(Doc. No. 12 ¶ 7.) Additionally, the Court takes judicial notice of the fact that this case has garnered some attention, making it all the more present in the public eye. To the extent some people in Colorado Springs believe the police have engaged in a pattern of retaliation against political expression, the resolution of this case is important to them, and it is important to this City's residents. As noted by The Honorable John L. Kane, the resolution of these types of claims will provide a great benefit to the public, "either reform of inadequate municipal policies or increased confidence in local government." *Montoya*, 2021 WL 8087380, at *5. This factor weighs heavily against a stay.

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On this record then, having started with great weight on the side of a stay, the Court finds all five *String Cheese* factors weigh against a stay, and some weigh so heavily that they alone might overcome the considerations occasioned by Defendants' invocation of qualified immunity. Discovery shall proceed.

That said, the pending motions to dismiss may indeed resolve or at least narrow Plaintiffs' claims and Plaintiffs's may share Defendants' interest in minimizing the cost and burden of discovery while those motions are pending. The Court is amenable to a proposed scheduling order that stages discovery, starting with the Westfall Act discovery, moving on to whatever discovery would be most helpful to an early resolution (if one is possible), and leaving damages discovery to the end. Additionally, the parties may wish to consider some early attempts at resolving at least the injunctive relief claim, such that discovery on that issue may be front-loaded. The Court leaves it to the parties to consider what approach would be most efficient and serve the purpose of: (1) protecting Defendants from some burdens while the motions to dismiss are pending, and (2) encouraging early resolution of a case where the most productive way forward may be a negotiated or mediated agreement, rather than a protracted and expensive litigation.

**CONCLUSION**

For the foregoing reasons, **IT IS ORDERED THAT**:

(1) The pending Motions to Stay Discovery (Doc. Nos. 29, 30) are **DENIED**.

(2) The parties **SHALL** file a Proposed Scheduling Order on or before January 26, 2024.

DATED: January 16, 2024.

**BY THE COURT:**

Maritza Dominguez Braswell
United States Magistrate Judge