IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No: 23-cv-01951-SKC-MDB

JACQUELINE ARMENDARIZ and CHINOOK CENTER,

Plaintiffs,

v.

CITY OF COLORADO SPRINGS et al.,

Defendants.

CITY OFFICERS' SUPPLEMENTAL BRIEF PER COURT ORDER (DOC. 93)

Individual City Defendants Detective Brad Steckler, Sgt. Jason S. Otero, and Lt. Roy A. Ditzler (hereinafter, "City Officers"), file this supplemental brief as ordered by the Court. (Doc. 93)

Introduction

Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642 (10th Cir. 1988), no longer sets forth the standard governing a public official's entitlement to qualified immunity on a First Amendment retaliation claim, neither on the constitutional violation prong nor on the clearly established prong. Supreme Court precedent issued since *Pueblo* confirms that the City Officers are entitled to qualified immunity on Plaintiffs' retaliatory search warrant claims.

Argument

I. Plaintiffs Fail Plausibly To Allege A First Amendment Retaliation Claim Against the City Officers.

In *Pueblo*, the Tenth Circuit held that on a defendant's motion for summary judgment directed to claims where "the governmental actor's intent is the critical element of the plaintiff's underlying substantive claim," plaintiffs "may avoid summary judgment only by pointing to specific evidence that the official's actions were improperly motivated." 847 F.2d at 648-49. The Court further suggested that to survive a motion to dismiss on such claims, plaintiffs must satisfy a "heightened pleading standard." *Id.* at 649-50. Otherwise, the "liberal" federal notice pleading standard in effect at the time would allow "insubstantial lawsuits" to proceed against government officials who were meant to be protected from the burdens of discovery by qualified immunity. *Id.* at 648-650.

Two developments in the law since *Pueblo* demonstrate its obsolescence on the constitutional violation prong of qualified immunity. First, the Supreme Court rejected the notion of a "heightened pleading standard" for civil rights claims and ultimately imposed a plausibility standard for all claims. In 1993 and again in 2002, the Supreme Court held that the "liberal system of notice pleading set up by the Federal Rules" governed civil rights claims. *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993) (internal quotations omitted). *See also Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 513-14 (2002). At the time, the Court was content to rely "on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz*, 534 U.S. at 512.

Just five years later, however, the Supreme Court overhauled the federal

pleading standard for all claims. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 564 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court interpreted Federal Rule of Civil Procedure 8(a)(2) to require "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678, quoting *Twombly*, 550 U.S. at 570. "Naked assertions devoid of further factual enhancement" no longer suffice. *Id.* The Court is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.*

With the plausibility pleading standard imposed by *Iqbal* and *Twombly*, the Supreme Court accomplished what the "heightened pleading standard" discussed in *Pueblo* set out to do. Requiring facial plausibility in complaints, including added factual enhancement, should prevent insubstantial lawsuits from proceeding into resource-draining discovery. And the "further factual enhancement" now required of complaints is especially important in Section 1983 cases against public officials, to prevent "reimposing the burden *Harlow* sought to prevent." *Pueblo*, 847 F.2d at 648.

Here, Plaintiffs fail to meet the *Iqbal/Twombly* plausibility standard on their First Amendment retaliatory search warrant claims. As discussed in the City Officers' motions to dismiss, Plaintiffs fail to allege with facts that the City Officers harbored a retaliatory intent when reviewing and approving (Lt. Ditzler and Sgt. Otero) or drafting (Det. Steckler) the search warrants. (*See* Doc. 50 at 7-8; Doc. 51 at 9-10; Doc. 67 at 11). *See, e.g., Brown v. Newey*, No. 121CV00154JNPCMR, 2023 WL 6065099, at *10 (D. Utah Aug. 7, 2023), *report and recommendation adopted,* No. 121CV00154JNPCMR, 2023 WL 6065288 (D. Utah Sept. 18, 2023) (dismissing First

Amendment retaliation claim with prejudice under Tenth Circuit plausibility standards). Here, Plaintiffs neither allege facts suggesting that the City Officers harbored any disdain for Plaintiffs or their protected activity nor any facts connecting any such disdain to their actions of drafting or approving the search warrants.

Second, after *Pueblo*, the Supreme Court added an objective element to First Amendment retaliatory prosecution and arrest claims: the absence of probable cause. *See Hartman v. Moore*, 547 U.S. 250, 265-66 (2006) (adding the no-probable-cause element to retaliatory prosecution claims); *Nieves v. Bartlett*, 139 S.Ct. 1715, 1725 (2019) (adding it to retaliatory arrest claims). In *Nieves*, the Supreme Court explained why it added the objective element: a "purely subjective approach" to First Amendment retaliation claims would "undermine" qualified immunity by "allowing even doubtful retaliatory arrest suits to proceed based solely on allegations about an arresting officer's mental state." *Nieves*, 139 S.Ct. at 1725. "Because a state of mind is 'easy to allege and hard to disprove,' … a subjective inquiry would threaten to set off 'broad-ranging discovery' in which 'there often is no clear end to the relevant evidence.'" *Id.* (citations omitted). *See also Hinkle v. Beckham Cnty. Bd. of Cnty. Commissioners*, 962 F.3d 1204, 1227 (10th Cir. 2020) ("The *Nieves* Court adopted this objective test of probable cause to avoid an unwelcome result of using an officer's subjective state of mind: …. subject[ing] officers to suit despite an arrestee's legitimate arrest and despite the Fourth Amendment's 'objective standard[ ] of reasonableness.'" (quoting *Nieves*, 139 S.Ct. at 1725)).

In *Pueblo*, the Tenth Circuit employed the "purely subjective approach" to the

First Amendment retaliation claim. *Pueblo*, 847 F.2d at 648. As a result, the defendant officers in *Pueblo* were subjected to the burdens of discovery based solely on the allegation of a retaliatory mental state (*id.* at 650)—just what the Supreme Court later rejected in *Hartman* and *Nieves*.

In sum, post-*Pueblo*, the Supreme Court rectified the denigration of qualified immunity on claims where the actor's intent, motive, or purpose is at issue in two ways: plaintiffs now must (1) plead more facts up front, in the complaint (*see Iqbal* and *Twombly*), to show it is plausible, not merely possible, that the plaintiff's protected speech motivated the defendant's actions, and (2) show the absence of probable cause for the defendant's conduct (*see Hartman* and *Nieves*). Indeed, in *Nieves*, the Supreme Court suggested that the Court need not even reach the subjective element of the claim if there is probable cause for the defendant's actions:

> Absent [the no-probable-cause showing, a retaliatory arrest claim fails. But if the plaintiff establishes the absence of probable cause, "then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor behind the arrest, and, if that showing is made, the defendant can prevail only by showing that the arrest would have been initiated without respect to retaliation."

Nieves, 139 S. Ct. at 1725 (citations omitted).

While Plaintiffs, here, assert retaliatory search warrant claims against the City Officers (*see, e.g.,* Doc. 12 ¶¶ 7, 26, 151, 173) and not the retaliatory prosecution or retaliatory arrest claims at issue in *Hartman* and *Nieves*, district courts from around the country have extended *Hartman*'s and *Nieves*'s no-probable-cause requirement to retaliatory search warrant claims:

- *Hall v. Putnam Cnty. Comm'n*, No. CV 3:22-0277, 2024 WL 559603, at *10

(S.D.W. Va. Feb. 12, 2024) ("it makes sense to require plaintiffs to prove lack of probable cause in retaliatory search warrant claims");

- *Reguli v. Russ*, No. 3:22-CV-00896, 2023 WL 6129503, at *7 (M.D. Tenn. Sept. 19, 2023) ("The court finds that the holding in *Nieves*, which involved an allegedly retaliatory arrest, logically extends to a claim that a search warrant was retaliatory, such that the plaintiff must, as a threshold matter, plead and prove that the search warrant was issued without probable cause as an essential element of the claim.");
- *Fredin v. Clysdale*, No. 18-CV-0510 (SRN/HB), 2018 WL 7020186, at *7 (D. Minn. Dec. 20, 2018) ("The Court concludes that [plaintiff]'s search-warrant based retaliation claim against Sergeant McCabe fails as a matter of law because the search warrant was supported by probable cause."), *report and recommendation adopted,* No. 18-CV-0510 (SRN/HB), 2019 WL 802048 (D. Minn. Feb. 21, 2019), *aff'd,* 794 F. App'x 555 (8th Cir. 2020);
- *Pacherille v. Cnty. of Otsego*, No. 3:13-CV-1282, 2014 WL 11515848, at *7 (N.D.N.Y. Nov. 20, 2014) ("the question of whether the search warrant was supported by probable cause is determinative of any First Amendment or Fourth Amendment claim"), *aff'd*, 619 F. App'x 18 (2d Cir. 2015);
- *Chavez v. City of Albuquerque*, No. 13CV00557 WJ/SMV, 2014 WL 12796875, at *3 (D.N.M. Apr. 14, 2014) ("[T]he Court finds that a plaintiff claiming that a search warrant was executed in retaliation for a protected activity is required to show a lack of probable cause as an element of that claim.").

Here, the search warrants themselves (Docs. 49-1, 49-2, 51-1) demonstrate that, just as the magistrate judges who issued them concluded, ample probable cause supported them, dooming Plaintiffs' First Amendment retaliation claims. Plaintiffs' First Amendment retaliatory search warrant claims should be dismissed based on a failure to allege a plausible claim.

II. The City Officers Are Entitled to Qualified Immunity On Plaintiffs' First Amendment Claims.

On the clearly established prong of qualified immunity, *Pueblo* also is outdated. Since *Pueblo*, the Supreme Court has doubled-down on the principle that "the right allegedly violated must be established, 'not as a broad general proposition,' … but in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Reichle v. Howards*, 566 U.S. 658, 665 (2012). Moreover, *Hartman* and *Nieves* "injected uncertainty into the law governing retaliatory" search warrants, entitling the City Officers to qualified immunity now. *Id.* at 670.

In *Reichle*, Steven Howards sued law enforcement agents in this District Court alleging that he was arrested and searched (1) without probable cause in violation of the Fourth Amendment and (2) "in retaliation for criticizing the Vice President, in violation of the First Amendment." 566 U.S. at 662. The agents moved for summary judgment based on qualified immunity. *Id.* The District Court denied the motion. *Id.* The Tenth Circuit reversed in part, finding that the arrest was supported by probable cause and, thus, did not violate the Fourth Amendment. *Id.* But the Tenth Circuit affirmed the denial of qualified immunity on the First Amendment retaliatory arrest claim, summarized by the Supreme Court as follows:

> The [Tenth Circuit] first determined that Howards had established a material factual dispute regarding whether [the agents] were substantially motivated by Howards' speech when they arrested him. The court then rejected [the agents'] argument that, under this Court's decision in *Hartman v. Moore,* 547 U.S. 250 … (2006), probable cause to arrest defeats a First Amendment claim of retaliatory arrest. The court concluded that *Hartman* established such a rule only for retaliatory prosecution claims and, therefore, did not upset prior Tenth Circuit precedent clearly establishing that a retaliatory *arrest* violates the First Amendment even if supported by probable cause.

Reichle, 566 U.S. at 662–63 (internal citation omitted; emphasis in original).

The Supreme Court "granted certiorari on two questions: whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest, and whether clearly established law at the time of Howards' arrest so held." *Id.* at 663. It "elect[ed] to address only the second question." *Id.*

To answer that question, the Court first defined the right that Howards was required to demonstrate was clearly established at the time of his arrest:

> Here, the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause.

Reichle, 566 U.S. at 665.

Next, the Court considered the precedent that existed at the time of Howards' arrest. It readily concluded that the Supreme Court had "never held that there is such a right." *Id.* The Tenth Circuit had issued a decision in 1990 clearly establishing "the unlawfulness of an arrest in retaliation for the exercise of First Amendment rights, irrespective of probable cause." *Id.* at 666. But *Hartman*, which established the no-probable-cause requirement for retaliatory *prosecution* claims, was issued about a month-and-a-half before plaintiff's arrest. *See Hartman*, 547 U.S. 250

(decided April 26, 2006); *Reichle*, 566 U.S. at 660-61 (the arrest was on June 16, 2006). The Tenth Circuit concluded that "*Hartman's* no-probable-cause requirement did not extend to claims of retaliatory arrest and therefore did not disturb its prior precedent." *Reichle*, 556 U.S. at 666.

But that is where the Tenth Circuit erred. According to the Supreme Court, *Hartman*'s holding that plaintiffs asserting a retaliatory *prosecution* claim also must allege and prove the absence of probable cause called into question the Tenth Circuit authority on a retaliatory *arrest*:

> At the time of Howards' arrest, *Hartman's* impact on the Tenth Circuit's precedent governing retaliatory arrests was far from clear. Although the facts of *Hartman* involved only a retaliatory prosecution, reasonable officers could have questioned whether the rule of *Hartman* also applied to arrests…. A reasonable official also could have interpreted *Hartman's* rationale to apply to retaliatory arrests…. *Hartman* injected uncertainty into the law governing retaliatory arrests ….

Id. at 666-70. The Court held that "when Howards was arrested, it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation;" defendants were "entitled to qualified immunity." *Id.* at 669.

Although *Reichle* was decided at summary judgment, district courts have relied on it and *Hartman* to grant qualified immunity on a motion to dismiss to officers sued under the First Amendment for retaliatory search warrants. *See Joseph v. Abrams*, No. 14-CV-00005, 2018 WL 3545317, at *7 (D. Guam July 24, 2018) (granting motion to dismiss First Amendment retaliatory search warrant claim with prejudice because, based on *Hartman* and *Reichle*, it was not clearly established that a First Amendment retaliation claim "may proceed if there was probable cause to support the search warrant"); *Archer v. Chisholm*, 191 F. Supp. 3d 932, 954 (E.D. Wis.

2016) (granting motion to dismiss First Amendment retaliatory search warrant claim based on qualified immunity because "the defendants reasonably relied on a finding of probable cause" for the warrant), *aff'd,* 870 F.3d 603 (7th Cir. 2017). The Tenth Circuit recently affirmed the dismissal of First Amendment retaliation claims on a Rule 12(b)(6) motion based on qualified immunity, further confirming that dismissal is appropriate. *Frey v. Town of Jackson, Wyo.*, 41 F.4th 1223, 1234 (10th Cir. 2022).

Moreover, the Tenth Circuit recently acknowledged that "[f]ollowing *Nieves*, two circuits have held that a law-enforcement officer enjoys qualified immunity for retaliatory arrest when probable cause is at least arguable." *Hoskins v. Withers*, 92 F.4th 1279, 1294 n.14 (10th Cir. 2024), *citing Novak v. City of Parma, Ohio*, 33 F.4th 296, 305 (6th Cir. 2022) and *Nieters v. Holtan*, 83 F.4th 1099, 1109-10 (8th Cir. 2023). In *Hoskins*, the Tenth Circuit did not need to reach the question "whether arguable probable cause would trigger qualified immunity on the retaliation claim." *Id.*

In this case, "the right in question is [the] right to be free from a retaliatory [search] that is otherwise supported by probable cause." *Reichle*, 566 U.S. at 665. It was not clearly established in August 2021 that Plaintiffs had such a right. The search warrants Plaintiffs challenge were supported by probable cause or, at the very least, arguable probable cause. Thus, the City Officers are entitled to qualified immunity on Plaintiffs' First Amendment retaliation claims.

Conclusion

The City Officers respectfully request that this Court issue an order granting their motions to dismiss and dismissing this case with prejudice.

Respectfully submitted this 18th day of March, 2024

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CERTIFICATION REGARDING THE USE OF A.I.

No portion of this filing was drafted by artificial intelligence.

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on the 18th day of March, 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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