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,
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,
FEDERAL BUREAU OF INVESTIGATION, and
THE UNITED STATES OF AMERICA,

Defendants.

SUPPLEMENTAL BRIEF OF FEDERAL DEFENDANTS

Pursuant to the Court's Order for supplemental briefing, ECF No. 93, Defendants Summey, the Federal Bureau of Investigation, and the United States (the "Federal Defendants") file this brief regarding qualified immunity.

I. The Supreme Court and Tenth Circuit do not employ the *Pueblo* burden-shifting framework when the qualified immunity analysis does not turn on the defendant's improper motive.

In *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 648

(10th Cir. 1988), the Tenth Circuit noted that the "Supreme Court has yet to state how the *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982)] standard should be applied when the governmental actor's intent is the critical element of the plaintiff's underlying substantive claim." Absent guidance from the Supreme Court, the Tenth Circuit fashioned a burden-shifting framework to decide qualified immunity questions at the summary judgment stage that turned on the actor's subjective intent. *Id.* at 649-50. The Tenth Circuit later described this burden-shifting framework: "*When the qualified immunity inquiry turns on a subjective element*," the defendant must make "a prima facie showing of the objective reasonableness of the challenged conduct," and then the burden shifts to the plaintiff to "produce specific evidence of the defendant's culpable state of mind to survive summary judgment." *McBeth v. Himes*, 598 F.3d 708, 724-25 (10th Cir. 2010) (quoting *Bruning v. Pixler*, 949 F.2d 352, 356-57 (10th Cir. 1991)) (emphasis added).

However, the Supreme Court and the Tenth Circuit have since applied the objective *Harlow* standard (and not a burden-shifting framework) when granting qualified immunity to law enforcement defendants in other First Amendment retaliation cases. For example, in *Reichle v. Howards*, 566 U.S. 658, 664-70 (2012), the Supreme Court applied an unmodified, objective qualified immunity test to First Amendment claims against secret service agents. The plaintiff in *Reichle* alleged that he was subjected to a retaliatory arrest, based on his criticism of the Vice President and his policies. *Id.* at 660-62. The Supreme Court framed the

immunity question as whether the plaintiff had a "right to be free from a retaliatory arrest that is otherwise supported by probable cause." *Id.* at 665. Because "reasonable officers could have questioned whether the rule of *Hartman*[1] also applied to arrests," the Supreme Court granted qualified immunity to the agents, without examining evidence of the agents' subjective motives. *Id.* at 666, 669-70. Although the underlying claim would have required proof of an improper motive, the Supreme Court granted qualified immunity because the "clearly established" prong of the qualified immunity analysis was not established. *See id.* at 664-65.

The Tenth Circuit also has granted qualified immunity without using the *Pueblo* burden-shifting framework in First Amendment retaliation cases. In *Frasier v. Evans*, 992 F.3d 1003, 1023-24 (10th Cir. 2021), the Tenth Circuit granted qualified immunity to officers on First Amendment retaliation and conspiracy claims, concluding that the alleged violations were not clearly established at the time of the conduct. The Tenth Circuit reached the same conclusion in *Frey v. Town of Jackson*, 41 F.4th 1223, 1236 (10th Cir. 2022), holding—at the motion to dismiss stage—that law enforcement officers were entitled to qualified immunity for claims of retaliatory use of wristlocks when making an arrest. The Tenth Circuit stated: "We use an objective test to determine 'whether it would be clear to a reasonable

[1] In *Hartman v. Moore*, 547 U.S. 250, 252 (2006), the Supreme Court held that the absence of probable cause must be "alleged and proven" in cases asserting claims for retaliatory prosecution under the First Amendment. The Supreme Court later extended the *Hartman* rule to retaliatory arrests in *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725-27 (2019), which post-dated *Reichle*.

officer that his conduct was unlawful in the situation he confronted.'" *Id.* at 1235; *see also Eaton v. Meneley*, 379 F.3d 949, 955-56 (10th Cir. 2004) ("Even if issues of fact exist" as to the defendant's "actual motives" in performing the allegedly retaliatory action, qualified immunity presents "the legal question whether [the defendant's] conduct, as alleged by the plaintiffs and as construed in the light most favorable to them, would violate constitutional law").

Therefore, although the *Pueblo* burden-shifting framework might be applied in cases where the qualified immunity analysis *itself* turns on whether there is evidence that the defendant acted with an improper motive, the objective *Harlow* approach is appropriate in First Amendment retaliation cases where a defendant is entitled to qualified immunity on other grounds, such as that the alleged conduct—even assuming a subjectively improper motive—did not violate the constitution or was not clearly established as violating the constitution when the conduct occurred.

II. Assuming the *Pueblo* standard applies, the Court still may rule on qualified immunity at the motion to dismiss stage.

The Court asks the parties to assume that the *Pueblo* standard applies and to address whether the *Pueblo* framework applies "on a motion to dismiss or may it only be resolved at the summary judgment stage?" ECF No. 93. The modified qualified immunity approach in *Pueblo*, assuming it applied, would be applied on summary judgment when the qualified immunity analysis itself turns on disputed facts as to the defendant's improper motive. *See McBeth*, 598 F.3d at 724 ("When the qualified immunity inquiry turns on a subjective element . . . ."). The *Pueblo*

approach would not be applied at the motion to dismiss stage.

However, this conclusion does *not* mean that the Court must deny Summey's request for qualified immunity at the motion to dismiss stage, even if the parties dispute whether the defendant acted with a retaliatory motive. *See, e.g.*, *Frey*, 41 F.4th at 1236 (granting qualified immunity at the motion to dismiss stage with respect to a First Amendment retaliation claim). To the contrary, the Court must grant Summey's motion to dismiss on qualified immunity grounds if it makes either or both of the following determinations: (1) that Plaintiffs do not plausibly allege a violation of the First Amendment; *or* (2) that the alleged conduct was not clearly established as a First Amendment violation. *See Reichle*, 566 U.S. at 664 (describing the two prongs of the immunity analysis). Here, the Court may award qualified immunity on either basis.

To state a First Amendment retaliation claim based on a law enforcement action, the plaintiff must "allege[] and prove[]" that the defendant lacked an objective basis for the action. *See Hartman*, 547 U.S. at 252 (retaliatory prosecution); *Nieves*, 139 S. Ct. at 1725, 1727 (retaliatory arrest); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009) (the plaintiff must plausibly allege an improper purpose violating the First and Fifth Amendments). A plaintiff can meet this burden two ways: (1) by pleading and proving that the defendant lacked probable cause for his law enforcement conduct; or (2) by showing "similarly situated individuals not engaged in the same sort of protected speech" were not subject to

the same law enforcement action. *Nieves*, 139 S. Ct. at 1725, 1727.

District courts have properly extended this objective-basis pleading rule to retaliatory searches. *See Chavez v. City of Albuquerque*, No. 13-cv-557, 2014 WL 12796875, at *3 (D.N.M. Apr. 14, 2014) ("the reasoning set forth in *Hartman* applies equally to" claims alleging a "retaliatory search warrant"; "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"); *see also Hall v. Putnam Cnty. Comm'n*, No. 22-cv-0277, 2024 WL 559603, at *10 (S.D.W. Va. Feb. 12, 2024); *Fredin v. Clysdale*, No. 18-cv-510, 2018 WL 7020186, at *7 (D. Minn. Dec. 20, 2018).[2]

The federal defendants have explained why both warrants were supported by probable cause. *See* ECF No. 49 at 9-14; ECF No. 66 at 6, 10-12. Additionally, Plaintiffs fail to plead that other similarly situated individuals (*e.g.*, those who obstructed a police officer) who did not engage in the same alleged protected activity were not searched in a similar manner. Thus, even *assuming* that Summey acted

---

[2] The reasons for extending the *Hartman* rule to retaliatory arrests also support applying the *Nieves* rule to retaliatory search warrants. "[E]vidence of the presence or absence of probable cause . . . will be available in virtually every retaliatory" case, and "its absence will . . . generally provide weighty evidence that the officer's animus caused the [action], whereas the presence of probable cause will suggest the opposite." *Nieves*, 139 S. Ct. at 1724. As with retaliatory arrests, it will be "particularly difficult to determine whether the adverse government action"—the search—"was caused by the officer's malice or the plaintiff's potentially criminal conduct," and this "causal challenge should lead to the same solution" as in *Hartman*: the plaintiff "must plead and prove the absence of probable cause[.]" *Id.*

with an improper motive, Plaintiffs do not plausibly allege that the warrants lacked an objective basis and fail to state a First Amendment retaliation claim as a matter of law. For this reason alone, the Court should dismiss the First Amendment claim for failure to establish the first prong of qualified immunity.

Independently, it was not clearly established that Armendariz had a right to be free of an allegedly retaliatory search that was supported by probable cause. Neither the Supreme Court nor the Tenth Circuit has held that executing a search warrant supported by probable cause can give rise to a First Amendment violation. Because "it was at least arguable," *Reichle*, 566 U.S. at 669, that the *Hartman* and *Nieves* rules extended to retaliatory searches, reasonable officers could have believed that they were not violating the constitution, *even if they were acting with a retaliatory motive* when executing warrants supported by probable cause. The fact that several district courts, such as those cited above, extended the rules in this way supports this conclusion. Accordingly, Summey is entitled to qualified immunity, just as the agents in *Reichle* were. *See Reichle*, 566 U.S. at 665-70.

III. Plaintiffs' claim fails under the *Iqbal* pleading standard.

The Court also asks whether the heightened pleading standard suggested in *Pueblo* applies to Plaintiffs' First Amendment claim and, if so, "what is that standard and does the FAC meet it?" ECF No. 93.

The pleading standard for Plaintiff's First Amendment claim is the plausibility standard described in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,

556-57 (2007), and *Iqbal*, 556 U.S. at 678, both of which post-dated *Pueblo*.[3]

In *Iqbal*, the Supreme Court held that to state a claim for discrimination under the First and Fifth Amendments, the plaintiff "must plead and prove that the defendant acted with discriminatory purpose," meaning that he "must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin." 556 U.S. at 676-77. Allegations that the defendants "maliciously agreed to subject" the plaintiff "to harsh conditions of confinement . . . 'solely on account of [his] religion, race, and/or national origin'" were "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim," and thus were "conclusory and not entitled to be assumed true." *Id.* at 680-81. Allegations that the defendants "detained thousands of Arab Muslim men ... as part of its investigation" were *consistent* with defendants' "purposefully designating detainees 'of high interest' because of" their protected characteristics, "[b]ut given more likely explanations, they do not *plausibly* establish this purpose." *Id.* at 681 (emphasis added).

Under the *Iqbal* plausibility standard, Plaintiffs fail to state a First

---

[3] To the extent *Pueblo* announced a heightened pleading standard, that standard did not survive *Crawford-El v. Britton*, 523 U.S. 574, 594 (1998), in which the Supreme Court rejected the creation of special procedural rules for constitutional claims that require proof of improper intent. *See Currier v. Doran*, 242 F.3d 905, 916 (10th Cir. 2001) ("We conclude that this court's heightened pleading requirement cannot survive *Crawford-El*.").

Amendment retaliation claim against Summey for multiple reasons.[4] Plaintiffs' allegations focus on the facts that: (1) the warrants would allow the FBI to view Armendariz's protected speech (which is not illegal); (2) that social media posts were recited in the warrant applications (which is not illegal); or (3) that First Amendment concerns affect the Fourth Amendment analysis (which misstates the law). *See* ECF No. 12 ¶¶ 77, 86, 109 & 150; *see also* ECF No. 49 at 14-15 (addressing Plaintiffs' argument concerning the Fourth Amendment); ECF No. 66 at 9 (same); *Wellington v. Daza*, No. 21-2052, 2022 WL 3041100, at *7 (10th Cir. Aug. 2, 2022), *cert. denied*, 143 S. Ct. 788 (2023) ("The First Amendment does not bar the search for and seizure of materials that are evidence, fruits, and instrumentalities of crime."). Plaintiffs also allege that the warrants targeted protected speech because they were not limited to a specific crime, ECF No. 12 ¶ 94, but that reading cannot be squared with the warrants themselves. *See* ECF No. 49 at 10-11 (explaining how the warrants were particular as a matter of law); ECF No. 66 at 7-8. Allegations that Summey retaliated against Armendariz are conclusory recitations of elements of a claim, as were the allegations in *Iqbal*. *See* ECF No. 12 ¶¶ 7, 151. The amended complaint fails to state a First Amendment claim.

---

[4] To state a First Amendment retaliation claim, "a plaintiff must allege (1) that it was engaged in constitutionally protected activity, (2) the defendant's actions caused it to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that protected activity, and (3) the defendant's actions were substantially motivated as a response to [its] protected conduct." *VDARE Found. v. City of Colo. Springs*, 11 F.4th 1151, 1172 (10th Cir. 2021).

Plaintiffs also fail to plausibly allege that the searches would "chill the actions of persons of ordinary firmness." *Eaton*, 379 F.3d at 956. Armendariz admittedly obstructed a law enforcement officer. ECF No. 12 ¶ 119. Plaintiffs do not plead facts suggesting that searches responding to illegal conduct would chill the speech of a reasonable person who did not engage in illegal conduct. This "objective standard of a person of ordinary firmness is a vigorous standard," *Eaton*, 379 F.3d at 956; *see also VDARE Found.*, 11 F.4th at 1172-73 (same), and has not been satisfied here.

Plaintiffs also fail to plausibly plead that Summey investigated Armendariz because of the content of her protected speech. The more likely explanation, as stated in the warrant affidavits, ECF No. 49-1 at 4-10 & 49-2 at 6-12, is that Plaintiff was subject to search in response to her obstructionist conduct, not her speech. *See Iqbal*, 556 U.S. at 681 ("But given more likely explanations, they do not plausibly establish this purpose."). For these reasons, and because Plaintiffs also fail to plead the absence of an objective basis for the warrants, *see supra* Part II, Plaintiffs fail to state a First Amendment retaliation claim against Summey.[5]

The federal defendants respectfully request that the Court dismiss the action.

---

[5] Separately, there is no *Bivens* claim for First Amendment retaliation. *See Egbert v. Boule*, 596 U.S. 482, 498 (2022). Summey obtained the warrants as a Task Force Officer for the FBI. ECF No. 49-1 at 2-3 (seeking the warrants as a "Task Force Officer" "currently assigned to the FBI Joint Terrorism Task Force"); ECF No. 49-2 at 4-5 (same). A federally deputized local law enforcement officer "act[s] under color of federal law when acting in that capacity." *Logsdon v. U.S. Marshal Serv.*, 91 F.4th 1352, 1358 (10th Cir. 2024).

Respectfully submitted on March 18, 2024.

COLE FINEGAN
United States Attorney

s/ Thomas A. Isler
Thomas A. Isler
Assistant United States Attorney
1801 California Street, Ste. 1600
Denver, Colorado 80202
Tel. (303) 454-0336
thomas.isler@usdoj.gov
Counsel for the United States of America, the Federal Bureau of Investigation, and Daniel Summey

CERTIFICATION REGARDING THE USE OF A.I.

No portion of this filing was drafted by artificial intelligence.

CERTIFICATE OF SERVICE

I certify that March 18, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve all parties and counsel of record:

Mark Silverstein
Timothy R. Macdonald
Sara R. Neel
Theresa W. Benz
Jacqueline V. Roeder
Anna I. Kurtz
Laura B. Moraff
Kylie L. Ngu
Attorneys for Plaintiff Jacqueline Armendariz

Anne H. Turner
Attorney for Defendant City of Colorado Springs and Defendants Steckler, Otero, and Ditzler

s/ Thomas A. Isler
Thomas A. Isler
Assistant United States Attorney