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.

PLAINTIFFS' ADDITIONAL BRIEFING PER MARCH 7, 2024 ORDER

Plaintiffs submit this brief pursuant to the Court's Order For Additional Briefing dated March 7, 2024, ECF No. 93, and address the applicability of *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642 (10th Cir. 1988), to the present case.

I. Under *Pueblo*, the Court Must Consider the LEDs' Subjective Intent.

Plaintiffs agree that their "allegations raise the subjective intent of one or more of the LEDs [law enforcement defendants] in procuring the search warrants at issue." Court's Order, ECF No. 93. Plaintiffs' claims include a subjective component relating to the officers' state of mind and, accordingly, cannot be resolved under a purely objective standard. *See Pueblo*, 847 F.2d at 648. As the Tenth Circuit explained in *Pueblo*, the Supreme Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) "does not preclude inquiry into subjective factors when the applicable substantive law makes the official's state of mind an essential element of plaintiff's claim." *Id.*; *accord Hernandez v. Conde*, 272 F. App'x 663, 670 (10th Cir. 2008); *Willbanks v. Woodrow*, 65 F.3d 179 (10th Cir. 1995); *Bruning v. Pixler*, 949 F.2d 352, 356 (10th Cir. 1991). Here, as in *Pueblo*, the LEDs' retaliatory motives are central to Plaintiffs' claims and must be considered at this stage, with the appropriate consideration given to the well-pled and plausible allegations in Plaintiffs' complaint. *See infra* Section II.

In support of Plaintiffs' claim that the LEDs' searches and seizures of their digital data were retaliatory, Plaintiffs have detailed factual allegations showing "that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." *Irizarry v. Yehia*, 38 F.4th 1282, 1288 (10th Cir. 2022) (quoting *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000)); *see* First Amended Complaint ("FAC") ¶¶ 77, 86, 94, 98–101, 108, 109, 144, 147, 151, 173; *see also id.* ¶ 7 ("The warrants were part of a pattern and practice of

unconstitutional actions intended to teach activists a lesson: Colorado Springs would retaliate against political expression with dragnet warrants to chill free speech."). The LEDs' subjective intent is also central to Plaintiffs' claims because "[i]t goes without saying that a government official may not base her probable cause determination on an 'unjustifiable standard,' such as speech protected by the First Amendment." *Mink v. Knox*, 613 F.3d 995, 1003–04 (10th Cir. 2010). A "reasonably well-trained officer" would know that, if a search's purpose were not to uncover particular evidence of a crime, but to teach protestors a lesson and to retaliate for a person's speech and association, *see* FAC ¶¶ 7, 26, 40, 41, 49, 94, 95, 151, 173, "he should not have applied for the warrant." *Malley v. Briggs*, 475 U.S. 335, 345 (1986). Plaintiffs have plausibly alleged that such is the case here. *See infra* Section III. This Court must therefore consider the LEDs' retaliatory motives.[1]

II. Plaintiffs Are Not Subject to a Heightened Pleading Standard.

The Tenth Circuit has changed its pleading requirements since *Pueblo* was decided. In 1988, the *Pueblo* court suggested plaintiffs face a more demanding pleading standard "[w]here the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions." *Pueblo*, 847 F.2d at 649.

[1] The LEDs' retaliatory motives are likewise relevant to Plaintiffs' claims under the Colorado Constitution, to which qualified immunity is no defense.

But in 2001, the Tenth Circuit held that its "heightened pleading requirement cannot survive *Crawford–El* [*v. Britton*, 523 U.S. 574 (1998)]." *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir. 2001). In *Crawford-El*, the Supreme Court rejected a heightened burden of proof in civil rights cases where a plaintiff's "entitlement to relief depends on proof of an improper motive." 523 U.S. at 584. The Court observed that there was no support for such a heightened burden of proof in either "the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure." *Id.* at 594. And while the Court acknowledged the "strong public interest in protecting public officials from the costs associated with the defense of damages actions" and the concern that "allegations of subjective motivation might have been used to shield baseless lawsuits from summary judgment," it concluded that "countervailing concerns" counseled against a heightened burden of proof. *Id.* at 590–91. In particular, the Court recognized that "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Id.* at 591 (quoting *Harlow*, 457 U.S. at 814).

Now, the Tenth Circuit "appl[ies] the same standard in evaluating dismissals in qualified immunity cases as to dismissals generally." *Robbins v. Oklahoma,* 519 F.3d 1242, 1249 (10th Cir. 2008). Thus, "to survive a motion to dismiss under Rule 12(b)(6) where a qualified immunity defense is implicated, the plaintiff must allege facts sufficient to show (assuming they are true) that the defendants plausibly violated their constitutional rights." *Irizarry v. City & Cnty. of Denver*, 661 F. Supp.

3d 1073, 1083–84 (D. Colo. 2023) (quoting *Hale v. Duvall*, 268 F. Supp. 3d 1161, 1164 (D. Colo. 2017)) (cleaned up). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Sanchez v. Hartley*, 810 F.3d 750, 756 (10th Cir. 2016) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). "In the context of qualified immunity, [a court] may not dismiss a complaint for failure to state a claim unless it appears beyond doubt that plaintiffs cannot prove a set of facts that would entitle them to relief." *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 858 (10th Cir. 2016). Dismissal is improper where, as here, Plaintiffs' allegations demonstrate they can prove the improper motive that would entitle them to relief.

III. Defendants Cannot Satisfy the Standard of Review for Dismissal.

While no heightened pleading standard applies to Plaintiffs, *see supra* Section II, the Court is correct to note that the qualified immunity defense is reviewed differently at this stage than at summary judgment. Court's Order, ECF No. 93; *see Thompson v. Ragland*, 23 F.4th 1252, 1256 (10th Cir. 2022) ("The procedural posture of the qualified-immunity inquiry may be critical" to the outcome). The Tenth Circuit has noted that, "[b]ecause they turn on a fact-bound inquiry, 'qualified immunity defenses are typically resolved at the summary judgment stage' rather than on a motion to dismiss." *Thompson*, 23 F.4th at 1256 (quoting *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014)).

"Asserting a qualified immunity defense via a Rule 12(b)(6) motion . . . subjects the defendant to a more challenging standard of review than would apply on summary judgment." *Peterson v. Jensen*, 371 F.3d 1199, 1201 (10th Cir. 2004); *accord Sayed v. Virginia*, 744 F. App'x 542, 546 (10th Cir. 2018). Courts thus commonly deny defendants qualified immunity at the motion to dismiss stage. *See, e.g.*, *Thompson*, 23 F.4th at 1262 (denying defendant's motion to dismiss but noting the defendant "may be entitled to qualified immunity at the summary-judgment stage, when a clearer picture of what happened will have emerged."). This is particularly true where, as here, there are plausible allegations of improper motive. *See, e.g.*, *Grose v. Caruso*, 284 F. App'x 279, 283-84 (6th Cir. 2008) (denying motion to dismiss in Eighth Amendment case as premature because the subjective state of mind of prison officials was a fact-specific inquiry, and plaintiff had not yet had the opportunity to initiate discovery or to develop a factual record upon which the qualified immunity determination could be based); *Larsen v. Senate of Com. of Pa.*, 154 F.3d 82, 94 (3d Cir. 1998) (qualified immunity determination in First Amendment retaliation case "cannot be conducted without factual determinations as to the officials' subjective beliefs and motivations, and thus cannot properly be resolved on the face of the pleadings, but rather can be resolved only after the plaintiff has had an opportunity to adduce evidence in support of the allegations that the true motive for the conduct was retaliation rather than the legitimate reason proffered by the defendants.").

Plaintiffs have plausibly pled, with detailed allegations, that the LEDs acted with retaliatory motives. FAC ¶¶ 94–95 ("[A]fter conclusively determining that Ms. Armendariz was the person who had dropped her bike," Summey and Ditzler obtained another warrant "to continue their campaign of surveilling and seeking to suppress political speech and expression."); *Id.* ¶ 99 ("[T]he police search of Ms. Armendariz's devices and seizure of Chinook's private chats were intended to limit the Chinook Center's ability to serve effectively as . . . a 'central hub' for 'political activist groups.'"); *Id.* ¶¶ 1, 5, 7. Plaintiffs' allegations are far from conclusory. Plaintiffs demonstrate that the LEDs targeted them for their prior speech and association with specific allegations about CSPD's history of spying on the Chinook Center, which "coincided with the racial justice protests in the summer of 2020." *Id.* ¶ 25. A protest on the one-year anniversary of De'Von Bailey's killing "so outraged CSPD officers that they began an extraordinary campaign against activists to retaliate and surveil the social justice organizations in Colorado Springs." *Id.* ¶ 26. A CSPD detective "masquerading undercover as an activist, participant, and volunteer with Chinook" infiltrated the organization and "learned about the planned July 31, 2021 housing march." *Id.* ¶¶ 25, 29. "As CSPD gathered information, officers decided that, if given the opportunity at the march, they would arrest Chinook Center leaders and other activists, including Jon Christiansen and Shaun Walls." *Id.* ¶ 29; *see also id.* ¶¶ 4, 33. Plaintiffs further allege that "CSPD officers focused their attention on the two leaders of the Chinook Center to send a message in retaliation for their First

Amendment-protected activities." *Id.* ¶ 41. These detailed factual allegations of a concerted campaign to target Plaintiffs for their First Amendment-protected activities are far more specific than the allegations upon which plaintiffs relied in *Pueblo*. *See Pueblo*, 847 F.2d at 649 (referencing allegations that "Defendants herein did conspire for the purpose of depriving the Plaintiffs of the equal protection of the laws and equal privileges and immunities under the law, and one or more Defendants did perform overt acts in pursuance of said conspiracy" and "Said conspiracy was directed at each Plaintiff, individually, and at the Plaintiffs as a class, because of their race, and/or color, national origin, and because of their political beliefs and associations."). Plaintiffs were able to use body-worn camera footage and other files obtained independently to point to specific statements indicating the LEDs' animus towards Plaintiffs' speech and associations and explain how that animus motivated their procurement of the search warrants at issue. *See* FAC ¶¶ 4, 25, 26, 28, 29, 31, 33, 34, 35, 37, 38, 40, 87, 88, 95–101, 108, 130–134.

The FAC describes how specific language in the warrants further demonstrates that the LEDs acted with improper motives. For example, Summey and Ditzler "sought to use Ms. Armendariz's constitutionally protected speech and associations as a relevant basis for the warrant, asserting that 'Armendariz appears to be very active politically,' and claiming that the protest on July 31, 2021 was 'politically motivated.'" *Id.* ¶ 86. Summey's affidavit is "rife with his derogatory opinions and assertions about First Amendment-protected activities, including those

of the Chinook Center and other activists in Colorado Springs. Throughout, Summey equates political expression, activity, and associations with criminality." *Id.* ¶ 58. Steckler and Otero similarly referenced "illegal demonstrations" without "specify[ing] what was 'illegal' about the constitutionally protected housing march." *Id.* ¶¶ 51, 52.[2]

Furthermore, Plaintiffs specifically allege that "[instead 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." *Id.* ¶ 131.[3] "[T]he goal of Defendant Summey's affidavit was to obtain permission to search Ms. Armendariz's digital devices not for further proof she was the protestor who dropped her bike, but for information about the Chinook Center, its activities, and her own political expression." *Id.* ¶ 97. Plaintiffs' allegations of the LEDs' retaliatory intent would satisfy even the summary judgment standard, and they more than satisfy the standard at the motion to dismiss stage.

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[2] *See, e.g.*, *Id.* ¶¶ 48, 68, 100, 109; *Id.* ¶ 77 (Summey "relied on political speech and First Amendment protected activities . . . to purport to establish evidence of nefarious intent."); *Id.* ¶ 98 ("The reasoning in Defendant Summey's affidavit purports to justify searching Ms. Armendariz's devices primarily on the basis of her affiliation with the Chinook Center and Summey's animus toward their protected First Amendment-protected views and activities.").

[3] *See also id.* ¶¶ 49, 110; *Id.* ¶53 ("Had CSPD known who or what it was looking for in connection with its investigation, its officers could have limited the scope of the application for search warrant accordingly, rather than rummage through the communications of a hub of political organizing.").

Consideration of retaliatory motive here is consistent with the Supreme Court's guidance in *Lozman v. City of Riviera Beach*, 585 U.S. 87 (2018), and *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), on the intersection of principles that define when searches and seizures are lawful and principles that prohibit retaliation for expressive activity. In *Lozman*, the Court held that retaliatory arrest claims may proceed without a showing of the absence of probable cause where government actors conduct an arrest pursuant to a "premeditated plan to intimidate [a speaker] in retaliation for his criticisms of [the government]." 585 U.S. at 100. As in *Lozman*, Plaintiffs have alleged that the LEDs targeted them as part of a custom, policy, and practice—here, of retaliating against activists with overbroad warrants. FAC ¶¶ 7, 131, 132. And in *Nieves*, the Court held retaliatory arrest claims may proceed "where officers have probable cause to make arrests, but typically exercise their discretion not to do so." 139 S. Ct. 1715, 1727 (2019). In such cases, aberration from the norm serves as objective evidence that the officer acted with a retaliatory motive. The FAC is replete with detailed allegations that the search warrants here were for investigations of minor crimes or no crimes at all and are based on common activities like peacefully protesting, wearing red shirts, and posting about a protest on social media. FAC ¶¶ 4, 6, 63, 68, 86, 109, 157. These activities typically do not form the basis of a government search—let alone one that sweeps in any mention of "human," "rights," or "protest" from any point in time or all Facebook messages of a political

organization. The allegations thus support the inference that the LEDs crafted their search to retaliate against Plaintiffs for their protected speech and association.

To be sure, this Court need not consider *Lozman* or *Nieves*, because both cases deal with retaliatory arrests in which the arrest was supported by probable cause. Here, Plaintiffs have plausibly alleged that the search warrants were wholly unsupported by probable cause. *See* FAC ¶¶ 45, 47, 88, 94, 95, 101, 155; *see also Sexton v. City of Colorado Springs,* 530 F. Supp. 3d 1044, 1066 n.10 (D. Colo. 2021) (declining to address *Nieves* where plaintiff sufficiently pled absence of probable cause). Moreover, a requirement that plaintiffs plead the absence of probable cause in order to maintain a retaliatory search warrant claim would be nonsensical, because unlike arrests, searches may be *partially* supported by probable cause. The Fourth Amendment requires "that the scope of the search warrant be limited to the specific areas and things for which there is probable cause to search." *United States v. Leary*, 846 F.2d 592, 605 (10th Cir. 1988). Thus, the existence of probable cause for some portion of the search purportedly authorized by a warrant must not defeat a claim that the warrant's scope was based not on probable cause, but on a retaliatory motive.

Whether because the warrants were plausibly wholly unsupported by probable cause, or because the search and the warrant's scope were plausibly in retaliation for Plaintiffs' protected expression, Plaintiffs' allegations are sufficient to survive the LEDs' motions to dismiss.

Respectfully submitted on March 18, 2024.

s/ *Theresa W. Benz*

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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:

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