IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-00217-REB-KLM

WILLIAM MONTGOMERY,

Plaintiff,

v.

MATTHEW CHERNAK,
MIKE HOWARD,
MATTHEW BROUGH.

Defendants.

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**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY AND TO VACATE THE SCHEDULING CONFERENCE**

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Plaintiff, by and through undersigned counsel, hereby responds in opposition to Defendants' request that the Court stay discovery and vacate the scheduling conference. In support, Plaintiff state as follows:

## INTRODUCTION

This case involves straight-forward constitutional claims, seeking justice for the unconstitutional arrest, detention, and prosecution of Plaintiff after Plaintiff verbally questioned, criticized, and observed the conduct of the police officers during a routine encounter. Amended Compl. at ¶1-3. The Defendant officers knew Plaintiff as an activist for homeless populations in the Ft. Collins area, where the incident took place. *Id*. The Amended Complaint plausibly alleges that Plaintiff acted as a peaceful protester attempting to raise awareness to homelessness issues when the Defendant officers

incidentally made contact with him and found his questions and criticism to be annoying. *Id.* at ¶¶ 34-36, 38. The Amended Complaint plausibly alleges that the Defendant officers overreacted by punishing Plaintiff in retaliation for his First Amendment conduct, and seized him without probable cause in violation of the Fourth Amendment. *Id.* at ¶¶ 36-49, 71-94. While some of the background facts relating to the history of the public plaza at issue are lengthy (*See Id.* at ¶¶ 14-32), the type of claims at issue are not complex, nor are they novel. *See Id.* at ¶¶ 72-75, 78-82, 85-93. The law is clearly established that police officers must possess objective, reasonably trustworthy evidence amounting to probable cause to justify an arrest. The law does not support seizure to silence or retaliate against someone because the officers find verbal expressions to be offensive or annoying.

Defendants filed a Motion to Dismiss (Doc. 10) raising several alleged deficiencies in the original complaint that has been rendered moot by the filing of an Amended Complaint. *See* Doc. 14. The Amended Complaint addresses the previously articulated alleged deficiencies with substantial changes. *See* Doc. 15. To the extent that Defendants attempt a second motion to dismiss, the only arguments remaining will depend on factual evaluation of the merits and cannot be dismissed at this early stage.[1]

Defendants' Motion to Stay, which is predicated solely on the blanket assertion

[1] For example, Defendants reinterpret several allegations of conduct from the Complaint to assert that probable cause existed to arrest, including that Plaintiff: "injected himself" into an officer's voluntary conversation with another person by asking questions, "climbed a fence" surrounding a public plaza, and "raised his voice" to match the officers'. This conduct is a far cry from criminal activity, within context. But, more importantly, probable cause is a matter for the fact finder to determine. *See DeLoach v, Bevers,* 922 F.2d 618, 623 (10th Cir. 1990). Defendants' twisting of the complaint language and contention that the court should look to outside evidence in the probable cause affidavit signed by a Defendant officer demonstrates that the facts are disputed.

of qualified immunity in the, now, moot Motion to Dismiss, technically, remains pending. However, the motion lacks substantial justification and should be denied. Contrary to Defendants' assertions, a stay of discovery is not automatic in civil rights cases in this District and should not be treated as such. Defendants have not met their burden to show facts supporting that *this case* is one in which qualified immunity would obviously apply during a threshold review, or that a stay of discovery is necessary to protect Defendants from any overly-broad or burdensome injury.

**I. Defendants are not entitled to an automatic stay merely because they assert the defense of qualified immunity.**

Defendants' motion to stay discovery does not assert any particular burdens that the Defendant officers would suffer from proceeding with discovery. Defendants only assert that there are generalized burdens associated with defending a lawsuit and that qualified immunity should shield them from any and all such burdens upon the mere invocation of the qualified immunity defense. This blanket contention that there is an automatic "entitlement" to a stay based upon the language of *Harlow v. Fitzgerald*, 480 U.S. 800 (1982), is misleading, erroneous, and should be strongly repudiated.

While Plaintiff acknowledges that proper deference should be afforded to the concerns discussed in *Harlow* and its progeny – which have been used to protect law enforcement officers from the burdens associated with unnecessary discovery – the Court should be careful to apply the protection only where it is appropriate. Qualified immunity is not meant to shield government officials from all discovery, but only from discovery which is overly broad. *See Maxey by Maxey v. Fulton,* 890 F.2d 279, 282 (10th Cir. 1989).

The court in *Harlow* established the protection of qualified immunity out of a concern about insubstantial lawsuits that would present undue interference with an officer's duties. *Harlow,* 457 U.S. at 806, 808. It is clear that the insubstantial lawsuits that *Harlow* intended to discourage were those that were frivolous and expensive. *Id.* at 827. But even *Harlow* expressly acknowledged that "if the law [related to the alleged violation] was clearly established, the immunity defense ordinarily should fail…" *Id.* at 818. Thus, where a lawsuit facially alleges the violation of a right that is clearly established by the current state of prevailing law, it cannot be predictably dismissed based on a limited, threshold review. *Harlow's* cautionary language relating to the discovery protection of qualified immunity makes clear that the immunity is meant to shield officers from the burdens of cases that can be determined to be "insubstantial," on their face, during a threshold review of the legal norms governing officer conduct, not those cases requiring close factual and/or legal scrutiny at the summary judgment stage. *See Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985).

While Defendants argue that the policies behind qualified immunity will be subverted if *any* pretrial proceedings or discovery are held before their motion to dismiss is decided, that is only a *possibility* if Defendants are subjected to onerous discovery burdens *and* it later turns out that qualified immunity is proven to apply to every Defendant on each and every claim, based on the pleadings, alone. Yet, that is statistically unlikely, as motions to dismiss are, historically, denied more often than granted. *Tolliver v. True,* 2007 WL 1306459 *2 (D. Colo. 2007).

Moreover, any implied argument that the late application of qualified immunity risks unnecessarily burdening Defendants with *possibly* irrelevant discovery, overlooks the fact that premature application of qualified immunity to stay the proceedings, conversely, *will likely* have deleterious effects for Plaintiff's prosecution of the case (particularly if the broader pool of civil rights plaintiffs is considered). In this District, the average time required for civil litigation is approximately 30 months, and resolution of a dispositive motion can last several months or more, resulting in "substantial delay." *See Marks v. Lynch,* No. 16-cv-02106-WYD-MEH (D. Colo. Feb. 6, 2017). Unnecessary delay can cause meaningful evidentiary loss as minds fade and witnesses become unavailable. *Id.* The 2015 Amendments to the Federal Rules of Civil Procedure emphasize the importance of Rule 1's requirement of just and speedy determination in every case – especially those cases that highlight important public interest matters – and discourages the over-use, misuse, and abuse of procedural tools that result in delay. Civil rights claims, unquestionably, involve matters of public concern, as the prosecution of such claims often shed light on law enforcement misconduct that may, then, be recognized by the community and corrected by appropriate discipline or changes in policy and procedure. The public interest is supported by a system in which civil rights claims may be allowed to proceed in a timely manner so that future plaintiffs are not deterred by the number of years it takes to seek justice. *See Chavez v. Young America Ins. Co.,* 2007 WL 683973 *2 (D. Colo. 2007).

There are obvious costs associated with prematurely/erroneously granting the benefit of an automatic stay to defendants who do not deserve the benefit of qualified

immunity. For the Court to accept Defendants' generalized contention that uttering the magic words "qualified immunity" presumptively requires the Court to stay *any* police misconduct case, brazenly implies that *every* civil rights claimant must shoulder the costs of premature/erroneous application of immunity and the burdens of delay – even in circumstances where qualified immunity is improperly invoked and/or unlikely to succeed. Such an automatic delay – applied unique to civil rights claims – incentivizes meritless assertions of qualified immunity, forces all plaintiffs to disproportionately shoulder the costs/burdens associated with the assessment, and brings new meaning to the old adage "justice delayed is justice denied." This is clearly not what the court in *Harlow* had in mind.

**II. Defendants' shoulder the burden of proving a stay of discovery is appropriate and Defendants have failed to sustain that burden *in this case*.**

While this Court unquestionably possesses the authority to issue a stay of discovery, the procedural mechanism by which a defendant properly seeks such protection is Rule 26(c). *See* Fed.R.Civ.P. 26 (a court may, for good cause shown, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including forbidding the disclosure or discovery); *See also Paulsen v. Anderson,* No. 15-cv-00800-PAB-KMT, 2015 WL 5818244 at *1 (D. Colo. Oct. 6, 2015); *Martinez v. Carricato,* No. 16-cv-00098-WJM-KLM at *2 (D. Colo. April 8, 2016). Pursuant to Rule 26(c), the party who seeks a stay of discovery has the burden of demonstrating good cause and "cannot sustain that burden by offering simply conclusory statements." *Martinez v. Carricato,* No. 16-cv-00098-WJM-KLM at *2 (D.

Colo. April 8, 2016). The court requires "particular and specific demonstration of fact" to support its request. *Id.* (citing *Christou v. Beatport, LLC,* No. 10-cv-02912-CMA-KMT, 2011 WL 650377 at *1 (D. Colo. Feb 10, 2011)). The movant must show specific facts demonstrating that the challenged discovery will result in a clearly defined and serious injury to the party seeking protection. *Exum v. United States Olympic Comm.,* 209 F.R.D. 201, 206 (D. Colo. 2002); *See also Tolbert-Smith v. Bodman,* 253 F.R.D. 2, 4 (D.D.C.2008).

Defendants' motion to stay does not even attempt to meet this burden. Defendants spend the bulk of their motion quoting the general public policy interests associated with qualified immunity, before, conclusorily, asserting that those public policy interests will be subverted if discovery is commenced. *See* Def. Mot. at 4. Defendants attempt to place the burden on Plaintiff by asserting that there is "no basis not to [stay]." Def. Mot. at 5. But that argument does not properly reflect Defendants' burden and does little to meet it. Defendants provide no factual basis as to why *this case* is one in which qualified immunity would obviously facially apply or why these Defendants are uniquely situated to suffer any particularly onerous burdens without a stay of discovery. Defendants have made no showing that the claims at issue are, in some way, novel, such that the norms and/or contours of the rights and violations at issue would have been unknown to the Defendant officers. To the contrary, the law is clearly established in the areas of unlawful arrest/prosecution.[2] *See e.g. Cortez v.*

[2] Although Defendants assert that the law is not clearly established when it comes to First Amendment retaliation, Defendants argue this is only so if there exists probable cause – a nuanced legal issue pertaining to only one of the claims asserted.

*McCauley,* 478 F.3d 1108, 1115-1116 (10th Cir. 2007); *Stearns v. Clarkson,* 615 F.3d 1278, 1282-83 (10th Cir. 2010); *City of Houston v. Hill,* 482 U.S. 451, 462-63 (1987); *Wilkins v. Reyes,* 528 F.3d 790, 802 (10th Cir. 2008)*; Pierce v. Gilchrest,* 359 F.3d 1279, 1292 (10th Cir. 2004); *Taylor v. Meachum,* 82 F.3d 1556, 1564 (10th Cir. 1996). Defendants have not cited to any overly burdensome discovery requests that must be avoided at this specific juncture. Defendants have not made a showing of any unique factual matters that make the routine Scheduling Conference and 26(a)(1) Disclosures (typically handled by counsel with minimal involvement of the parties) to be overly burdensome.

Finally, defendants make no factual showing that an *indefinite* stay of discovery would be warranted in this case, as opposed to a stay for a more finite period of time (such as two-to-three months). If the Court finds that *Harlow* applies and that the Defendants should be provided protection from discovery, any such stay should be limited to a period of time that ensures Plaintiff is not too severely prejudiced.

WHEREFORE, for all the foregoing reasons, Plaintiff respectfully requests that this Court DENY Defendants' motion to stay discovery and to vacate the scheduling conference.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2018 I electronically filed the foregoing **PLAINITFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY AND TO VACATE THE SCHEDULING CONFERENCE** with the Clerk of the Court using the CM/ECF systems which is expected to send notification of such filing to the following e-mail addresses:

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***s/ Raymond K. Bryant***