IN THE

Supreme Court of the United States

OCTOBER TERM, 2023

No.

IN RE TINA PETERS,
Applicant.

To The Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court and the Circuit Justice for the Tenth Circuit

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EMERGENCY APPLICATION FOR A WRIT OF INJUNCTION

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QUESTIONS PRESENTED

Applicant Tina Peters served as County Clerk and Recorder of Mesa County, Colorado from 2018 to 2023, and was by law responsible for the administration of elections in her county. Federal statutes obligated her to preserve the records of federal elections for specific periods. In April 2021, the Colorado Secretary of State directed Ms. Peters to participate in the installation of a software update on the County's election management system server, following a protocol shielding the installation from public scrutiny, which would overwrite records of the 2020 general election, deleting them in violation of federal law. After failing to persuade the County's IT Department to preserve the records by making an image of the server before the installation of the software upgrade, Ms. Peters arranged for a consultant to make a forensic image of the server before the installation and another after the installation.

Respondent Daniel P. Rubinstein, who is the locally elected District Attorney, conducted a criminal investigation of Ms. Peters and obtained an indictment charging her with multiple counts of state criminal violations purportedly related to actions which she had taken in compliance with her duty to preserve the election records. She filed an action in the U.S. District Court for the District of Colorado claiming, among other things, immunity from state prosecution under the Supremacy Clause and the Fourteenth Amendment's Privileges or Immunities Clause and moved for preliminary injunctive relief. On January 8, 2024, the District Court granted Mr. Rubinstein's Motion to Dismiss and denied Ms. Peters' Motion

for Preliminary Injunction. The Court of Appeals denied Ms. Peters' Emergency Motion for Injunction Pending Appeal and for Expedited Review on February 5, 2024, and affirmed the order of the District Court on June 21, 2024. Ms. Peters' state criminal trial is scheduled to begin on July 29, 2024.

The questions presented are:

1. Whether issues related to a claim to immunity from state prosecution under the Supremacy Clause and the Privileges or Immunities Clause of the Fourteenth Amendment are reserved exclusively for adjudication by a federal court.

2. Whether the right to immunity from state prosecution for actions reasonably taken to comply with a duty imposed by federal law protects only current federal employees and individuals in state custody.

3. Whether the Privileges or Immunities Clause of the Fourteenth Amendment provides a citizen of the United States with the right to participate in the administration of the laws of the United States by taking actions reasonably necessary to comply with those laws and to the right to be immunized against state prosecution for such actions.

PARTIES

Applicant is Tina Peters, an individual and, at relevant times, the elected Clerk and Recorder of Mesa County, Colorado.

Respondent is Daniel P. Rubinstein, District Attorney for the Twenty-First Judicial District of the state of Colorado.

RELATED PROCEEDINGS

Tina Peters v. United States et al., No. 23-cv-3014-NMW (D. Colo.).

People v. Tina Peters, No. 21CR1100 (Mesa County District Court).

OPINIONS BELOW

The U.S. District Court for the District of Colorado's opinion granting Mr. Rubinstein's motion to dismiss on abstention grounds and denying Ms. Peters' motion for a preliminary injunction is reported at *Peters v. United States,* 2024 WL 8333 (D. Colo. Jan. 8, 2024), and is reproduced at Appendix ("App.") 21a. The U.S. Court of Appeals for the Tenth Circuit's opinion affirming the district court's decision is reported at 2024 WL 3086003 (10th Cir. June 21, 2024) and reproduced at App.1a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1651.

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TO THE HONORABLE NEIL M. GORSUCH
ASSOCIATE JUSTICE OF THE SUPREME COURT AND
CIRCUIT JUSTICE FOR THE TENTH CIRCUIT

Applicant Tina Peters, pursuant to Rule 22 of the Rules of this Court and 28 U.S.C. § 1651, respectfully requests a writ of injunction halting the state criminal prosecution of her in *People v. Peters,* Case No. 22CR371, with trial scheduled to begin in the Circuit Court of Mesa County, Colorado, on July 29, 2024, pending disposition of her petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit, to be timely filed, and, if the petition for a writ of certiorari is granted, pending the judgment of this Court.

Ms. Peters is being prosecuted in state court for actions she took, as the chief election official of Mesa County, to fulfill her duty under federal law to preserve election records. Under the Supremacy Clause and the Privileges or Immunities Clause of the Fourteenth Amendment, she is immune from such a prosecution. An injunction stopping the state trial while this Court considers this case is necessary to preserve the status quo and prevent an irreparable injury to the institutional interests of the federal government and to Ms. Peters' right not to be subjected to state trial for executing her duty under federal law.

STATEMENT OF THE CASE

A. Ms. Peters' Duties Under Federal Election Law

Ms. Peters was elected to a four-year term as County Clerk and Recorder of Mesa County, Colorado on November 8, 2018, and under Colorado law also served as the "chief election official for the county." C.R.S. §1-1-110(3). Ms. Peters' duties in

that capacity were largely dictated by federal law, by the command of a federal statute, 52 U.S.C. §21081(a)(voting systems used in the election of federal officers must meet federal requirements). *See also* Federal Election Comm'n, VOTING SYSTEMS STANDARDS, VOLUME I – PERFORMANCE STANDARDS (2002)("VSS").

Both the U.S. Code and the VSS create legal regimes designed to preserve all records needed to perform the audit of elections so critical in ensuring public confidence in those elections:

> Election audit trails provide the supporting documentation for verifying the correctness of reported election results. They present a concrete, indestructible archival record of all system activity related to the vote tally, and are essential for public confidence in the accuracy of the tally, for recounts, and for evidence in the event of criminal or civil litigation.

V.S.S. 2.2.5.1.

Accordingly, "[a]ll records and papers … relating to any application, registration, payment of poll tax, or other act requisite to voting in such election" must be preserved for 22 months by every election officer. 52 U.S.C. § 20701. "To ensure system integrity, all systems shall … (m)aintain a permanent record of all original audit data that cannot be overridden but may be augmented by designated officials in order to adjust for errors or omissions." V.S.S. 2.2.4.1(h). "System" is a comprehensive concept, including "the software required to program, control, and support the equipment that is used to define ballots, to cast and count votes, to report and/or display election results, and to maintain and produce all audit trail information." V.S.S. 1.5.1.

The U.S. Department of Justice has underscored the importance of the federal records-retention statute, which was originally enacted in the Civil Rights Act of 1960:

> The Act protects the right to vote by ensuring that federal elections records remain available in a form that allows for the Department to investigate and prosecute both civil and criminal elections matters under federal law…. [T]he detection, investigation, and proof of election crimes – and in many instances Voting Rights Act violations – often depend[s] on documentation generated during the voter registration, voting, tabulation, and election certification processes.

U.S. Department of Justice, *Federal Law Constraints on Post-Election "Audits,"* at 2 (July 28, 2021) (App.309a).

The Department has likewise emphasized the significance of the duty imposed on elections officials like Ms. Peters to preserve election records: "The Department interprets the Civil Rights Act to require that covered election records be retained either physically by election officials themselves, or under their direct administrative supervision…. This is because the document retention requirements of this federal law place the retention and safekeeping duties squarely on the shoulders of election officers." *Id.*, at 2-3 (App.309a-310a) (internal quotations omitted).

B. Ms. Peters' Response to the Secretive Protocol for the Installation of the "Upgrade" That Unlawfully Deleted Election Records

On April 30, 2021, Colorado Secretary of State Griswold's office issued a directive requiring local election officials to participate with state officials and a private vendor in installing the "Trusted Build" upgrade in their election management system ("EMS"). C.A. JA52. The directive established a secretive

protocol providing that if anyone other than state, county election, and the vendor's staff were present for the installation, the county's election equipment would be shipped to Denver, where the upgrade would be installed without any scrutiny beyond the vendor and the Secretary of State's staff. C.A. JA53.

Both a representative of the vendor and a member of the Secretary's staff advised Ms. Peters that the upgrade would delete records of the 2020 presidential election. C.A. JA543. Alarmed by this blatant violation of federal law, Ms. Peters requested that the County make a copy of the Mesa County EMS hard drive, but her request was denied. Ms. Peters was then confronted by the dilemma of (i) the erasing of election records by Trusted Build, (ii) its installation under tightly closed circumstances beyond any public scrutiny, and (iii) no official technical staff available to her to preserve the records as required by law.

To fulfill her duties to preserve election records, Ms. Peters engaged a consultant with expertise in cybersecurity to make, under her supervision, forensic images of Mesa County's EMS server before and after the May 25, 2021, installation of the upgrade. No law barred her from doing so, as the testimony of Colorado Deputy Secretary of State Beall made clear. C.A. JA556. To facilitate the consultant's access to the EMS, Ms. Peters provided the access badge of another consultant for his use.

Those forensic images were submitted to three cybersecurity experts for analysis. Their three detailed and voluminous reports – at C.A. JA68-149; C.A. JA191-335; C.A. JA336-422 -- confirmed that election records of the 2020

presidential election had been deleted and that unexpected databases had been created which masked the results of ballot tabulation from election officials. C.A. JA567; C.A. JA485-87. (These forensic images did not disclose the votes of individual voters, nor any other confidential information.) The experts' forensic examination determined that the County's computerized voting system did not meet Colorado's certification requirements, adopted from the federal VSS, and should not have been used in the election. C.A. JA67; C.A. JA 71; C.A. JA190.

With these experts' analyses in hand, Ms. Peters undertook no political grandstanding, brought no newsworthy lawsuits, nor in any other way sought to create havoc for the Trusted Build upgrade Secretary Griswold wanted to implement. Ms. Peters did not claim that the results of the 2020 election were wrong, or should in some way be overturned. Rather, Ms. Peters soberly treated the data on the forensic images as a weighty matter implicating momentous public concerns. Accordingly, she submitted these reports to the Board of County Commissioners, raising her concerns about the vulnerability and integrity of the County's voting system, and whether it should be used in the future.

The Board took no action. Nevertheless, Ms. Peters continued to speak publicly about her concerns regarding the use of computerized vote tabulation. C.A. JA546.

C. The State Prosecution of Ms. Peters

While Mr. Rubinstein never investigated, much less prosecuted, Secretary Griswold for her destruction of election records in violation of federal law, he launched an investigation of Ms. Peters in August 2021. Mr. Rubinstein indicted

Ms. Peters on March 8, 2022, 22 days after announcing her candidacy for Colorado Secretary of State, making her Secretary Griswold's direct competitor. C.A. JA548.

Ms. Peters was arrested as if she were a violent criminal, and initially held on a $500,000 bond. While she was incarcerated, her father passed away. C.A. JA549. When she was finally released on a $25,000 bond after 30 hours in jail, Mr. Rubinstein insisted on bond conditions that effectively removed Ms. Peters from office, prohibiting her from contacting her employees or even entering her offices. *Id*. When Ms. Peters continued to speak publicly, Mr. Rubinstein moved to revoke her bond. *Id*. Although Ms. Peters never failed to appear in court, Mr. Rubinstein advised the court that she was a "flight risk" when Ms. Peters asked court permission to use her passport to obtain TSA pre-check flight status for domestic travel. C.A. JA550.

Mr. Rubinstein's hostility to Ms. Peters' compliance with the federal election-record-retention statute was evident in his opposition to her request to attend the out-of-state premier of a movie advocating election transparency. He contended that Ms. Peters "is seeking permission to leave the state so that she can be celebrated as a hero for the conduct that a grand jury has indicted her for," C.A. JA554, a contention that not only relies on the falsehood that Ms. Peters was indicted for making the forensic images, but drips with contempt for the federal law she was trying to uphold.

The 10-count indictment in *People v. Peters,* Case. No. 22CR371, App.230a-242a, to the extent its general allegations can be deciphered, strains to accuse Ms.

Peters of outrageous wrongs – such as trying to obtain money by fraud – that are concocted out of thin air, while studiously avoiding any mention of the federal record-retention obligations that animated her conduct. A brief review of the indictment reveals a state prosecution at war with Ms. Peters' federal duty.

• Counts 1, 2 and 5 charge her with attempting to influence a public official by "deceit … with the intent thereby to alter or affect the public servant's decision, vote, opinion, or action" in violation of C.R.S. §18-8-30. App.232a-233a. These counts do not allege any specific "decision, vote, opinion or action" within the meaning of the statute – *i.e.*, some "formal exercise of government power," *McDonnell v. United States*, 579 U.S. 550, 578 (2016) – that Ms. Peters was supposedly trying to influence, nor do they allege facts showing that Ms. Peters acted with "deceit," that is, to "obtain money or property by false or fraudulent pretenses, representations or promises." *United States v. Kalu*, 791 F.3d 1194, 1204 (10th Cir. 2015).

• Counts 4, 6, and 7 charge Ms. Peters with criminal impersonation and a conspiracy to commit criminal impersonation in violation of C.R.S. §§18-5-113(1)(B)(1) and 18-2-201. App.233a-234a. They appear to focus on Ms. Peters' consultant's use of another person's access badge, but fail to allege how this amounted to "impersonation" legally. Colorado law recognizes that "there are lawful uses of assumed fictitious identities" and they are proscribed only when "undertaken to accomplish *unlawful* purposes," *People v. Gonzales*, 534 P.2d 626, 628 (Colo. 1975)(emphasis in original), such as the use of a false identity "to

unlawfully gain a benefit or injure or defraud another." *People v. Brown*, 562 P.2d 754, 756 (Colo. 1977). Complying with federal law does not qualify as such an unlawful purpose.

• Similarly, Count 8 arises from the use of the access badge, charging Ms. Peters with "identity theft" in violation of C.R.S. §18-5-902(1)(A), which makes it a crime to use someone's identification without permission to obtain cash or anything of value. App.234a. Again, not one aspect of Ms. Peters' actions to comply with federal law provides supports for such an absurd allegation.

• Count 9 charges Ms. Peters with official misconduct in violation of C.R.S. §18-8-404(1), which makes it an offense for an official to knowingly engage in conduct relating to his office, to refuse to perform a duty required by his office, or to violate any law relating to his office "with intent to obtain a benefit for the public servant or another or maliciously to cause harm to another." App.2234a. *See People v. Dilger,* 585 P.2d 918, 919-20 (Colo. 1978). Only a state prosecutor unabashedly hostile to compliance with federal election-records-retention law could generate such a risible allegation from Ms. Peters having the forensic images of election records made, having them studied by experts, and then formally presenting their findings to the County Board.

• Count 10 alleges that Ms. Peters failed to perform some unspecified duty imposed by Colorado law, or was "guilty of corrupt conduct" in discharging that duty, in violation of C.R.S. §1-13-107(1). App.234a. Ms. Peters acted to perform her duty under a federal statute requiring the preservation of election records. Since

making the forensic image was not unlawful, and Ms. Peters accompanied her consultant whenever he was in a secure area, *see* Rule 20.5.3(b), 8 CCR 1505-1, there is no basis for considering Ms. Peters' performance of that duty to be "corrupt."

• Finally, Count 11 charges a violation of C.R.S. §1-13-114, alleging that Ms. Peters refused to comply with the Secretary of State's rules, but does not specify the rules allegedly at issue. App.234a. No allegation challenges the fact that all of Ms. Peters' acts were directed at ensuring election records were preserved as required by statutes that are superior to the Secretary's rules. *See Hanlen v. Gessler*, 333 P.3d 41, 49 (Colo. 2014) ("[T]he Secretary lacks authority to promulgate rules that conflict with statutory provisions."); C.R.S. §24-2-103(8)(a) ("Any rule…which conflicts with a statute shall be void."). Any rule arguably violated by Ms. Peters was void as applied.

D. Procedural History

1. The State Prosecution. Ms. Peters was indicted on March 8, 2022. The schedule for the case was extended several times for reasons not important here. Currently, the case is scheduled to go to trial in the District Court of Mesa County, Colorado on July 29, 2024.

Two rulings of that court are relevant here. On April 1, 2024, Ms. Peters moved to dismiss the indictment on the ground that the court lacked subject matter jurisdiction because she was immune from this prosecution under the Supremacy Clause and the Privileges or Immunities Clause of the Fourteenth Amendment. *See*

App.166a-182a. The court denied that motion on May 7, 2024, reasoning that Ms. Peters was not entitled to that immunity because she was not a federal officer or "working at the behest of federal authorities." App.184a. The court also concluded that she "is not charged with crimes related to preserving election data." *Id.* As the court put it, if immunity did apply, "the conduct which would have been protected was to maintain election records, and not the alleged scheme to influence public servants and steal someone else's identity." *Id.* At bottom, the court held that the means Ms. Peters employed were not, in the court's view, necessary to meet her goal of preserving election records. *Id.*

Second, on July 1, 2024, Mr. Rubinstein moved to strike a variety of Ms. Peters' defenses, including her claim to Supremacy Clause immunity. App.304a-305a. Mr. Rubinstein argued that Supremacy Clause immunity "is not a defense in Colorado." *Id.* Mr. Rubinstein noted that the application of this immunity was a legal question that the court had already rejected in denying Ms. Peters' motion to dismiss for lack of jurisdiction. Accordingly, Mr. Rubinstein asked the court to preclude Ms. Peters from raising the Supremacy Clause issue as a defense during the trial. *Id.* The next day, the court granted the motion with a simple "SO ORDERED." App.303a.

2. This Case. Ms. Peters filed her Complaint for Declaratory and Injunctive Relief on November 14, 2023, which was superseded by her First Amended Complaint for Declaratory and Injunctive Relief on December 22, 2023, App.248a, seeking to enjoin the state prosecution. Ms. Peters moved for a preliminary

injunction on November 27, 2023. App.185a. On December 13, 2023, Mr. Rubinstein filed a Motion to Dismiss for Lack of Jurisdiction, which Ms. Peters opposed. App.292a.

On January 8, 2024, the District Court granted the Motion to Dismiss – and denied the Motion for Preliminary Injunction as moot – on the ground that abstention was required under *Younger v. Harris,* 401 U.S. 37 (1971), App.21a-40a, reasoning that the state criminal proceedings would provide an adequate forum to adjudicate Ms. Peters; constitutional claims. App.33a.

Ms. Peters appealed to the Tenth Circuit on January 10, 2024. She filed an Emergency Motion for Injunction and for Expedited Review, which was denied on February 5, 2024.

The Tenth Circuit affirmed, citing *Georgia v. Meadows,* 88 F.4th 1331 (11th Cir. 2023), on the ground that the state court could adjudicate whether Ms. Peters was entitled to Supremacy Clause immunity, App. 13a-14a, and suggested that the district court could adjudicate her immunity claim only in a proceeding on a request for a writ of habeas corpus or after removal from state court pursuant to 28 U.S.C. § 1442(a)(1). App.9a n.6. Despite these rulings on the merits, the Tenth Circuit concluded that Ms. Peters had waived her immunity claim because she did not sufficiently present the argument to the district court. App.7a-8a. The court went on to conclude that no exception to the *Younger* doctrine applied, so that abstention was required. App. 9a-18a.

REASONS FOR GRANTING THE APPLICATION

A. There is a Substantial Likelihood That This Court Will Grant Certiorari and a Strong Likelihood of Reversal.

1. Since at least *Cunningham v. Neagle,* 135 U.S. 1 (1890), the Supremacy Clause has been understood to divest state legal regimes of jurisdiction over alleged state law violations by individuals for acts "authorized … by the law of the United States" when those acts amount to "no more than what was necessary and proper for [them] to do." *Id.,* at 75. Supremacy Clause immunity arises from the fact that "the states have *no power* … to retard, impede, burden, or in any manner control" the execution of federal law. *McCulloch v. Maryland,* 17 U.S. 316, 436 (1819) (emphasis added). This immunity polices the bounds between the dual sovereignties created when "[t]he Framers split the atom of sovereignty" to establish a system of dual "political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc., v. Thornton,* 514 U.S. 779, 838 (1995) (Kennedy, J. concurring). Supremacy Clause immunity has been applied in a variety of circumstances over the years, from the attempted assassination of a Supreme Court Justice, *Neagle*,[1] through the building of a federally authorized telegraph line, *Ex parte Conway,* 48 F. 77 (C.C.D.S.C. 1891), to federal efforts to

[1] Though not so dramatic, the recent altercation in which one of Justice Sotomayor's bodyguards shot a would-be carjacker outside her home is a recent example of the stuff of which Supremacy Clause immunity cases are made. Thomas McKenna, *Sonia Sotomayor's Bodyguard Shoots Would-Be Carjacker Outside Justice's Home,* NATIONAL REVIEW, July 9, 2024, https://www.nationalreview.com/news/sonia-sotomayors-bodyguard-shoots-would-be-carjacker-outside-justices-home/?utm_source=email&utm_medium=breaking&utm_campaign=newstrack&utm_term=36002490.

desegregate the University of Mississippi. *Petition of McShane,* 235 F.Supp. 262 (N.D. Miss. 1964).

Notwithstanding its location where the constitutional tectonic plates of federal and state power meet, Supremacy Clause immunity has not been the subject of much litigation. Indeed, as then-Judge McConnell pointed out, this Court "has decided no Supremacy Clause immunity case since 1920." *Wyoming v. Livingston,* 443 F.3d 1211, 1220 (10th Cir. 2006). As a result, "[m]odern Supremacy Clause immunity doctrine has…largely been developed in the lower federal courts." *Id.* But the principles set out early on by this Court remain the foundation of Supremacy Clause immunity doctrine. A person acting pursuant to federal law "cannot be guilty of a crime under … [state] law." *Neagle,* 135 U.S. at 75. Justice Holmes echoed that point in *Johnson v. Maryland*: "[E]ven the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States." 254 U.S. 51, 56-57 (1920). *See also Ohio v. Thomas,* 173 U.S. 276, 283 (1899)(Individuals "discharging duties under federal authority pursuant to and by virtue of valid federal laws, are not subject to arrest or other liability under the laws of the state in which their duties are performed."). The proposition animating Supremacy Clause immunity is "that the states have no power to determine the extent of federal authority. To rule otherwise would allow a state to punish the exercise of federal authority under the guise of

questioning the right of federal officials to act." *Clifton v. Cox,* 549 F.2d 722, 730 (9th Cir. 1977).

Lower-court development has reached a consensus on the key attributes of Supremacy Clause immunity. "[B]y providing immunity from suit rather than a mere shield against liability, the defense of federal immunity protects federal operations from the chilling effect of state prosecution." *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004). The goal of Supremacy Clause immunity "is not only to avoid the possibility of *conviction* of a federal agent, but also to avoid the necessity of undergoing the entire process of the state criminal procedure." *Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988)(emphasis in original). *See also Livingston,* 443 F.3d at 1221("Both qualified immunity and Supremacy Clause immunity reduce the inhibiting effect that a civil suit or prosecution can have on the effective exercise of official duties by enabling government officials to dispose of cases against them at an early stage of litigation."); *Texas v. Kleinert*, 143 F. Supp. 3d 551, 556 (W.D. Tex. 2015), *aff'd,* 855 F.3d 305 (5th Cir. 2017)(When Supremacy Clause immunity applies, "[a] state court is without jurisdiction to prosecute a federal officer.").

Two generally agreed-upon elements are required for Supremacy Clause immunity to apply. First, the conduct at issue must be "derived from the general scope of the officer's duties." *Sowders v. Damron,* 457 F.2d 1182, 1183 (10th Cir. 1972). Second, the conduct at issue must have been "reasonably necessary to the performance of his duties." *Livingston,* 443 F.3d at 1227-28.

2. It is the application of those principles in particular procedural contexts that has given rise to conflicts, inconsistencies, and uncertainties among the circuits, with striking departures from the operative constitutional principles protecting federal operations from scrutiny and second-guessing in state tribunals. Early Supremacy Clause immunity cases arose in the context of *habeas corpus* petitions because the defendants were commonly in state custody. *Id.,* at 1222-23. Because *habeas* petitions are adjudicated in federal court, both of the required elements of Supremacy Clause immunity can be determined in a federal forum, doing no violence to the principle that a state court has no jurisdiction to consider those issues.

Over time, it became more frequent for Supremacy Clause immunity claims to be adjudicated on motions to dismiss after a case had been removed to federal court under 28 U.S.C. §1442(a)(1). *Id.* Under what appears to be the majority of courts' thinking, removal requires only a threshold showing that the individual had been performing a duty imposed by federal law, *Texas v. Kleinert,* 855 F.3d 305, 312 (5th Cir. 2017), and that there is a causal connection between the state criminal charges and the duty imposed by federal law. *Jefferson County v. Acker,* 527 U.S. 423, 424 (1999). Whether the actions were immunized depends on whether they were reasonably necessary to comply with the duty imposed by federal law. That judgment is left to the federal courts to make once the action has been removed under statute. *Tanella,* 374 F.3d at 147-48; *Venezia v. Robinson,* 16 F.3d 209, 212 (7th Cir. 1994); *Long,* 837 F.2d at 743-44; *West Virginia v. Laing,* 133 F. 887, 891-92

(4th Cir.1904). Once in federal court, according to these precedents, the burden shifts to the State "to come forward with an evidentiary showing sufficient at least to raise a *genuine* factual issue whether the federal officer was…doing more than was necessary and proper for him to do in the performance of his duties," *Long,* 837 F.2d at 752.

But other appellate opinions, even within the same circuit, diverge from this approach. For example, the Second Circuit held in *Whitehead v. Senkowski,* 943 F.2d 230 (2d Cir. 1991), that the state court had jurisdiction to determine the relevant facts because the State had disputed the factual basis for invoking the Supremacy Clause. The *Whitehead* court denied a petition for a writ of habeas corpus because the State presented material facts disputing the claim that the actions taken by an undercover informant were necessary to fulfill his duties, and because "there was no urgency or indication that the state sought to thwart federal law enforcement…." *Id.,* at 235-36.

Similarly, the Ninth Circuit, in *Morgan v. California,* 743 F.2d 728 (9th Cir. 1984), held that federal officers were not entitled to writs of habeas corpus because the state had disputed the entitlement to Supremacy Clause immunity by presenting evidence that the officers were acting outside of the scope of their duties and that their actions were not necessary and proper to fulfill their duties. *Id.,* at 733-34.

Decisions like *Whitehead* and *Morgan*, which allow state courts to determine the validity of a Supremacy Clause immunity claim by making the value judgment

whether certain conduct was necessary to fulfill federal duties, are directly at odds with what this Court has recognized is the whole point of the removal statute: "to have the validity of the defense of official immunity tried in a federal court." *Willingham v. Morgan,* 395 U.S. 402, 407 (1969). *See also Arizona v. Manypenny,* 451 U.S. 232, 242-43 (1981) ("Federal involvement is necessary in order to insure a federal forum, but it is limited to assuring that an impartial setting is provided in which the federal defense of immunity can be considered during prosecution under state law.").

More recently, the Eleventh Circuit has even more directly rejected this Court's understanding of the protections the Supremacy Clause affords to federal operations by claiming that there is "no authority suggesting that state courts are unequipped to evaluate federal immunities." *Meadows,* 88 F.4th at 1343. What is so insidious about *Meadows* is not simply that it contradicts this Court's precedents, but that it ignores the importance of constitutional structure at the heart of Supremacy Clause immunity, which is not a matter of whether state courts are "equipped" to adjudicate claims of Supremacy Clause immunity, but whether they have the authority to do so under the Constitution's allocation of government power.

But only state cases against current federal employees are covered by the removal statute. The disarray in the caselaw is amplified when consideration is broadened to individuals in the position of Ms. Peters, who are neither federal employees nor in state custody, but whose execution of clear duties under federal law is met with punitive state legal action. Some courts, like the Tenth Circuit in

this case, have questioned whether Supremacy Clause immunity is even available to such individuals. App.9a n.6. Other courts, such as the Eleventh Circuit in *Baucom v. Martin,* 677 F.2d 1347 (11th Cir. 1982), have recognized that a Declaratory Judgment action in federal court provides an avenue for a state defendant to claim Supremacy Clause immunity when neither habeas corpus nor removal is available.

A final procedural question concerns how a claim to Supremacy Clause immunity can be handled in a state court. Underscoring the problem, the state court in which the prosecution of Ms. Peters is pending simply rejected Ms. Peters' claim to Supremacy Clause immunity because the court concluded that it was not a cognizable defense under state law. App.303a, 304a-305a. What, if anything, can a defendant who is entitled to Supremacy Clause immunity do in state court proceedings without subjecting the whole issue to that court's jurisdiction, thereby defeating the whole purpose of Supremacy Clause immunity?

3. In this case, the Tenth Circuit entered into this chaotic territory of Supremacy Clause immunity to hold that a state court provides a lawful and adequate forum to adjudicate whether a person claiming Supremacy Clause immunity acted pursuant to a duty created by federal law and took only actions reasonably necessary to fulfill that duty. App.13a-14a. That decision conflicts with decisions of this Court in *Tennessee v, Davis,* 100 U.S. 257, 262-63 (1879); *Neagle,* 135 U.S. at 75; *Ohio v. Thomas,* 173 U.S. at 283; *Hunter v. Wood,* 209 U.S. 205, 210 (1908); *Johnson v. Maryland,* 254 U.S. at 56-57; *Midland Asphalt Corp. v. United*

States, 489 U.S. 794, 800 (1989); and *Armstrong v. Exceptional Child Center, Inc.,* 575 U.S. 320, 326 (2015). Likewise, the Tenth Circuit's decision conflicts with precedents of her sister Courts of Appeals for the Second, Fourth, Fifth, Sixth, Seventh Circuit, and Ninth Circuits. *Tanella,* 374 F.3d at 147; *Laing,* 133 F. at 891-92; *Texas v. Kleinert,* 855 F.3d 305, 311-13 (5th Cir. 2017); *Long,* 837 F.2d at 750-52; *Venezia,* 18 F.3d at 212; *Clifton,* 549 F.2d at 730.

4. An additional, important question raised in this case that has not been addressed by this Court is whether the Privileges or Immunities Clause of the Fourteenth Amendment provides immunity to a citizen of the United States against state prosecution for actions taken that are reasonably necessary to comply with a duty imposed on the citizen by federal law. The majority opinion in *Slaughter-House Cases* identified "the right of the citizen of this country…to engage in administering [the national government's] functions" as among the privileges and immunities guaranteed by that Clause. 83 U.S. 36, 79 (1872). That right had been recognized before the ratification of the Fourteenth Amendment in *Crandall v. Nevada,* 73 U.S. 35, 44 (1867). It "owe[s] [its] existence to the Federal government, its National character, its Constitution, or its laws." *Slaughter-House Cases,* 83 U.S. at 79. The immunity that protects those whose duty it is to execute federal laws is "incidental to, and implied in the several acts by which these [federal] institutions are created…." *Osborn v. Bank of the United States,* 22 U.S. 738, 865-66 (1824). "[G]uided by the history and tradition that map the essential components of our Nation's concept of ordered liberty," immunity against state prosecution for

performing a function required of a citizen by federal law should be deemed among the rights guaranteed by the Privileges or Immunities Clause. *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215, 240 (2022). It should be included in "a minimum baseline of rights for all American citizens." *McDonald v. City of Chicago,* 561 U.S. 742, 838 (2010) (Thomas, J., concurring in part and concurring in the judgment).

5. Arising as it does from the Constitution's foundational allocation of power between the federal and state governments, it is critically important that the immunity provided by the Supremacy Clause for federal actors contending with hostile state officials be properly applied. As described above, the varied approaches of the lower courts have created a body of precedents inconsistently applying Supremacy Clause immunity and often at odds with the mandate of the Supremacy Clause itself.

The intervention of this Court in these issues is overdue. The demand for this Court's action is amplified by the need to recognize the irreducible operation of the Fourteenth Amendment's Privileges or Immunities Clause in protecting the right of citizens to aid in the administration of federal law. At a minimum,

1. this Court should decide whether issues related to application of Supremacy Clause immunity are reserved exclusively for adjudication by a federal court;

2. this Court should resolve the conflict between Circuits over whether a person's entitlement to Supremacy Clause immunity can be adjudicated by a federal court in an action for declaratory judgment; and

3. this Court should decide whether the Privileges or Immunities Clause of the Fourteenth Amendment provides citizens of the United States with

immunity against state prosecution for actions taken to comply with a duty imposed by federal law.

B. Ms. Peters Is Likely to Succeed on the Merits.

1. Ms. Peters is entitled to immunity from the pending state prosecution under the Supremacy Clause and the Privileges or Immunities Clause of the Fourteenth Amendment.

a. If certiorari is granted, Ms. Peters is likely to prevail on her claim that she is entitled under the Supremacy Clause to immunity against state prosecution for actions she took that were reasonably necessary to comply with her duty under federal election-records-preservation statutes.

The Supremacy Clause comes into play when state authorities claim that federal law is being enforced by "illegal means" according to state law. In *Livingston,* federal officials violated state trespass and littering laws to install monitoring devices on wolves. *Id.,* at 1213-15. In *Petition of McShane*, 235 F.Supp. 262 (N.D.Miss. 1964), federal marshals violated state laws concerning breach of the peace and unlawful use of force in their efforts to secure James Meredith's entrance into the University of Mississippi. In both cases, the federal actions were held to be immune from state prosecution. Federal officers have been held immune from state prosecution even for using lethal force in carrying out their duties under federal law. *Clifton,* 549 F.2d at 730; *Laing,* 133 F. at 891; *In re Fair,* 100 F. 149, 151 (D. Neb. 1900). They have also been held immune from state prosecution when their actions provoked a riot in which people were killed. *Petition of McShane, supra*

This Court has recognized that States lack authority to interfere with the execution of federal law in decisions applying the Supremacy Clause from

McCullogh, 17 U.S. at 436 ("[T]he states have no power…to retard, impede, burden, or in any manner control" the execution of federal law.) to *Armstrong,* 575 U.S. at 326 ("[A] court may not convict a criminal defendant of violating a state law that federal law prohibits."). State courts lack subject matter jurisdiction to prosecute a person for "discharging duties under federal authority pursuant to and by virtue of valid federal laws…." *Thomas,* 173 U.S. at 283; *see also Midland Asphalt Corp.,* 489 U.S. at 800; *Flanagan v. United States,* 465 U.S. 259, 266-67 (1984); *Johnson v. Maryland,* 254 U.S. at 56-57; *Hunter,* 209 U.S. at 210; *Neagle,* 135 U.S. at 75; *Tennessee v. Davis,* 100 U.S. at 263.

There is no dispute that Ms. Peters was performing a duty expressly imposed on her as an officer of election by 52 U.S.C. §§ 20701 and 21801(b)(1)(D) to preserve records of elections when she arranged as the election official of Mesa County for forensic images of the County's EMS server to be made to assure that the records of the 2020 and 2021 elections in her County were not deleted. "Officer of election" is defined in 52 U.S.C. § 20706 as "any person who, under color of and Federal, State, Commonwealth, or local law, statute, ordinance, regulation, authority, custom or usage, performs or is authorized to perform any function, duty, or task in connection with any … act requisite to voting." And Ms. Peters was the "chief election official for the county." C.R.S. §1-1-110(3). This statutory language makes it abundantly clear that Ms. Peters was acting pursuant to an express federal order to preserve election records.

Moreover, Ms. Peters need not be a federal employee or an official federal "officer" to be immunized from state prosecution for carrying out her obligation under federal law. *Slaughterhouse Cases,* 83 U.S. at 79 (The Fourteenth Amendment's Privilege or Immunities Clause protects "the right of the citizen of this country …to engage in administering [the national government's] functions."); *In re Quarles,* 158 U.S. 532, 535 (1895). "[F]ederal immunity…extends to any person, including a private citizen like defendant, who acts under the direction and control of federal authorities or pursuant to federal law or court order." *Connecticut v. Marra,* 528 F. Supp. 381, 385 (D. Conn. 1981); *see Hunter,* 209 U.S. at 210 (railroad clerk selling tickets pursuant to a federal court order which contradicted state law); *Laing,* 133 F. at 891-92 (members of a *posse comitatus* called upon to assist a federal marshal); *Ex parte Conway,* 48 F. at 77-78 (individuals building a federally authorized telegraph line); *Brown v. Nationsbank Corp.,* 188 F.3d 579, 589 (5th Cir. 1999) ("If…private defendants act[] in good faith by reasonably relying upon the authority of government agents, their actions are shielded from state law action.").

b. In rejecting Ms. Peters' immunity claim, the Tenth Circuit failed to follow the well-established precedents regarding the operation of Supremacy Clause immunity. It affirmed the analysis of the district court that the state court provided Ms. Peters with an adequate forum in which to litigate her immunity claim. App.13a-14a. Such reasoning stands the law establishing her immunity claim – which, after all, is intended to advance the *supremacy* of federal law -- on its head.

The state court is prohibited from trying Ms. Peters at all. *Midland Asphalt,* 489 U.S. at 800 (a "right not merely not to be convicted, but *not to be tried at all*") (emphasis in the original). "[I]f [federal officers'] protection must be left to the action of the State court,--- the operations of the general government may at any time be arrested at the will of its members." *Tennessee v. Davis,* 100 U.S. at 263. Then-Judge McConnell in *Livingston* further explained the reason for providing a federal forum for adjudicating Supremacy Clause immunity issues: "[W]hile state criminal law provides an important check against abuse of power by federal officials, the supremacy of federal law precludes the use of state prosecutorial power to frustrate the legitimate and reasonable exercise of federal authority." 443 F.3d at 1213. In short, permitting the prosecution of Ms. Peters to proceed in state court, even if Supremacy Clause immunity issues were to be addressed there in some fashion, would violate a core principle of the Supremacy Clause.

c. No serious argument, supported by any credible evidence, has been advanced that Ms. Peters' conduct was unreasonable or unnecessary to fulfill her federal duty to preserve election records. She chose a modest, low-key course that was essentially dictated by the rejection of her request that the County copy the EMS hard drive, and by the restrictive, secretive protocol imposed by the Secretary of State to avoid public scrutiny of the "upgrade."

To be sure, the Peters indictment is a transparently punitive move to criminalize her efforts to comply with federal law. As such, it is a classic example of

the kind of state hostility to the workings of the federal government that animates Supremacy Clause immunity. This is what Supremacy Clause immunity is for.

As described above, the charges in the indictment are baseless, grossly out of line with the actual facts. But that is ultimately irrelevant. Even if as a matter of fact Ms. Peters committed the offenses charged in the indictment, which she did not, like the marshal who killed the man assaulting Justice Field in *Neagle*, Ms. Peters cannot be guilty of a crime under state law.

d. Ms. Peters is also likely to prevail on her argument that she is entitled to immunity from state prosecution under the Fourteenth Amendment's Privileges or Immunities Clause on charges involving actions that she took as reasonably necessary to comply with the federal election-records-preservation statutes. This Court has included among the privileges and immunities guaranteed by that Clause "the right of a citizen of the United States to engage in administering [the national government's] functions." *Slaughter-House Cases,* 83 U.S. at 79; *see also In re Quarles,* 158 U.S. 532, 536-37 (1895):

> To leave to the several states the prosecution and punishment of conspiracies to oppress citizens of the United States, in performing the duty and exercising the right of assisting to uphold and enforce the laws of the United States, would tend to defeat the independence and the supremacy of the national government.

2. Ms. Peters did not waive her claim to immunity under the Supremacy Clause and the Privileges or Immunities Clause of the Fourteenth Amendment.

The Tenth Circuit concluded that Ms. Peters had waived her argument under the Supremacy Clause and the Fourteenth Amendment's Privileges or Immunities

Clause because, according to the court, Ms. Peters never presented an argument to the district court that she was immune under the Supremacy Clause and the Fourteenth Amendment's Privileges or Immunities Clause from state prosecution for her efforts to comply with federal election law. App.7a-8a. The Tenth Circuit also held that the district court's dismissal of the case on *Younger* abstention grounds did not implicate the court's jurisdiction, and so Ms. Peters' immunity arguments were waivable. App.8a. The Tenth Circuit was wrong on both counts.

a. It is simply an inaccurate portrayal of the record for the Tenth Circuit to claim Ms. Peters failed to present her immunity claim in the proceedings in the district court. The Court of Appeals acknowledged that the First Amended Complaint asserted Ms. Peters' immunity claim, App.7a n.5, but brushed those allegations aside as only a "passing mention" of the claim. *Id.* Ms. Peters made her immunity argument in detail in Plaintiff's Motion for Preliminary Injunction. App.203a-207a. Thereafter, she made it in a shorter form in her Opposition to Mr. Rubinstein's Motion to Dismiss. App.737a-738a. The district court granted, in one Order, Mr. Rubinstein's Motion to Dismiss and denied Ms. Peters' Motion for a Preliminary Injunction as moot. App.40a.In that Order, the district court acknowledged that Ms. Peters had made an immunity claim, App.25a, but denied it on the grounds that the state prosecution provided an adequate forum for adjudicating all the issues raised by that claim. App.33a-35a. The Tenth Circuit affirmed the dismissal based in part on that reasoning. App.13a-14a.

The Court of Appeals also erred in concluding that Ms. Peters had not presented her argument in the opening appellate brief that the Privileges or Immunities Clause provides an additional basis for her immunity. App.9a n.6. In fact, she made that argument in the brief. App.74a, 75a, 80a, 84a n.2. It was not made as a "perfunctory and underdeveloped manner" because the Privileges or Immunities Clause immunity claim overlaps and reinforces the Supremacy Clause immunity claim, which was appropriately explained in the brief and required no repeated exposition.

At bottom, the record not only shows that Ms. Peters properly advanced her immunity arguments, but that the district court and the Court of Appeals acknowledged those arguments and addressed the merits of her immunity claim. That being the case, that claim is properly before this Court and must be considered in addressing Ms. Peters' application for a writ of injunction and her forthcoming petition for a write of certiorari. *See City of St. Louis v. Praprotnik,* 485 U.S. 112, 120 (1988); *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 697-98 (1984).

b. The Tenth Circuit also rejected our argument that Ms. Peters' immunity claim barred *Younger* abstention was not waivable as a matter of law because, according to the Tenth Circuit, it did not concern the federal court's subject matter jurisdiction. App.8a.[2] But that is an inaccurate understanding of the legal character of *Younger* abstention.

[2] The Tenth Circuit cited *Livingston* as "holding that Supremacy Clause immunity arguments are waivable." App.8a. But all the cited section in *Livingston* addressed was the failure of the opponent to the immunity claim to address a particular argument in its opening brief. 443 F.3d at 1216. The waiver of a discrete argument against Supremacy Clause immunity cannot fairly be stretched to a proposition that all Supremacy Clause immunity arguments are waivable.

Federal courts have a "virtually unflagging obligation … to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). *See also Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013)("[F]ederal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant, and should not refus[e] to decide a case in deference to the States.")(internal citation omitted).

Subject-matter jurisdiction creates a court's fundamental "adjudicatory capacity." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). While courts have a responsibility to exercise the jurisdiction they are given, they have "an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Id.,* at 434. *See also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006)("The objection that a federal court lacks subject-matter jurisdiction … may be raised at any stage in the litigation, even after trial and the entry of judgment."); FED.R.CIV.P. 12(h)(3).

Younger abstention operates to trim a federal court's jurisdiction. "*Younger* exemplifies one class of cases in which federal-court abstention is *required*." *Sprint Commc'ns,* 571 U.S. at 72(emphasis added). As this Court had emphasized, "Where a case is properly within this category of cases, there is no discretion to grant injunctive relief." *Colorado River Water Conservation Dist.,* 424 U.S. at 817 n.22. *See also* Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 825

(2008)(Abstention doctrines "exist … in spite of explicit jurisdictional grants in the enacted law.").

Thus *Younger* abstention, where it applies, is an element defining a federal court's "adjudicatory capacity," that is, its subject-matter jurisdiction. An argument concerning the applicability or inapplicability of *Younger* abstention, then, marks the scope of a court's jurisdiction, and, like any other argument concerning jurisdiction, is not waivable.

Finally, both Mr. Rubinstein and the district court understood the application of *Younger* abstention to be jurisdictional. Mr. Rubinstein made his motion to dismiss on *Younger* grounds under Rule 12(b)(1). App.29a. While Tenth Circuit precedent has not fully resolved the question of whether *Younger* abstention is jurisdictional, *id.,* the district court identified one particular Tenth Circuit case, *D.L. v. Unified School Dist. No. 497*, 392 F.3d 1223, 1228 (10th Cir. 2004), which held, "*Younger* abstention is jurisdictional," *id.,* and concluded it was bound by it. App.30a. So, again, Ms. Peters' argument that the immunity arising from the Supremacy Clause and the Fourteenth Amendment's Privileges or Immunities Clause barred *Younger* abstention is jurisdictional and not waivable.

C. Both Ms. Peters and the United States Will Suffer Irreparable Harm if the State Prosecution Is Not Enjoined.

Supremacy Clause immunity is not a personal right of anyone, unlike those set out in the Bill of Rights that are commonly raised as defenses to a criminal prosecution, such as the Fourth Amendment's protection against unreasonable searches. A state or federal trial court can adjudicate defenses grounded on such

constitutional rights, and appellate courts can provide the additional protection for those rights by their review of the adjudication below. Nothing about the forum in which such constitutional defenses are adjudicated is inherently implicated in those defenses. That is not the case with respect to the constitutional interests protected by Supremacy Clause immunity.

Supremacy Clause immunity does not arise from rights guaranteed to individuals, but from the Constitution's allocation of powers between the federal government and the states, specifically, as this Court put it, from the "mutual checking function" this structure created. *Livingston,* 443 F.3d at 1217. Supremacy Clause immunity is designed to prevent the "evil" that can occur when that "checking" goes too far, that is, when "states would impede or frustrate the legitimate execution of federal law." *Id.* The Supremacy Clause operates to "secure federal rights by according them priority whenever they come in conflict with state law." *Chapman v. Hous. Welfare Rights Org.,*441 U.S. 600, 613 (1979).

Federal rights are secured by Supremacy Clause immunity, as described above, by stripping a state court of jurisdiction over alleged state crimes committed by an individual acting pursuant to a federal law. As the Ninth Circuit explained:

> [T]he Supreme Court has determined that when a petitioner is held by the state "to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do . . . and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the (s)tate . . .." When this is true the prosecution has no factual basis upon which to prosecute and *the entire proceeding is a nullity*.

Clifton, 549 F. 2d at 730 (internal quotations omitted; emphasis added). At bottom, Supremacy Clause immunity creates one of a small category of rights – a "right not merely not to be convicted, but *not to be tried at all*." *Midland Asphalt Corp.*, 489 at 800 (emphasis in original). Likewise, Ms. Peters' right under the Privileges or Immunities Clause of the Fourteenth Amendment guarantees her, as a citizen of the United States, a right not to be tried in state court for her reasonably necessary actions to comply with federal law.

Given that the constitutional interests here of both the United States and Ms. Peters are secured by a right not-to-be-tried by a state court, once Ms. Peters is subjected to a state criminal trial that right is lost and the constitutional interests protected by that right are injured irreparably.

D. The Balance of Hardships and the Public Interest Favor Injunctive Relief.

Any harm that would come to the State of Colorado from a grant of injunctive relief pending the completion of proceedings in this Court would be a postponement of her prosecution, which has already been continued on several occasions. Moreover, the State's contention that it has an important interest in prosecuting Ms. Peters is belied by the lack of merit on the face of each of the ten counts of the indictment.

The public interest is served by protecting the appropriate balance between federal and state authority. *See Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 850-51 (1986); *Kuretski v. Comm'n,* 755 F.3d 929, 937 (D.C. Cir. 2014). The violation of the Supremacy Clause causes injury to the interests of the United

States, not merely to Ms. Peters herself. That provision operates to protect the interests of the national government when those interests come into conflict with state law. *Chapman,* 441 U.S. at 613.

CONCLUSION

For the reasons stated in this Application, Ms. Peters respectfully requests that the Circuit Justice or the Court enjoin proceedings in *People v. Peters,* Case No. 22CR371 (Circuit Court, Mesa County, Colorado) before trial begins in that case on July 29, 2024, pending disposition of her petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit, to be timely filed, and, if the petition for a writ of certiorari is granted, pending the judgment of this Court.

Respectfully submitted,

/s/ *Patrick M. McSweeney*

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July 17, 2024

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APPENDIX

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FILED
United States Court of Appeals
Tenth Circuit

June 21, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TINA PETERS,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA; MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; JENA GRISWOLD, in her official capacity as Colorado Secretary of State,

Defendants,

and

DANIEL P. RUBINSTEIN, in his official capacity as District Attorney for the Twenty-First Judicial District,

Defendant - Appellee.

No. 24-1013
(D.C. No. 1:23-CV-03014-NYW-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Tina Peters asked the district court to prevent Daniel P. Rubinstein, the District Attorney for Mesa County, Colorado, from criminally prosecuting her in state court because he allegedly retaliated against her for exercising her First Amendment rights. She now appeals the district court's decision to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), from reaching the merits of her claim. She contends that the court (1) could not abstain because she is immune from state prosecution and (2) improperly applied *Younger*. We affirm.

I. BACKGROUND[1]

A. *Factual History*

Ms. Peters is the former Mesa County Clerk in charge of elections. While serving as clerk, she arranged for a consultant to enter a secured area of the clerk's office and to copy county voting records. She gave the copies to experts to analyze. Based on the experts' analysis, Ms. Peters concluded the county's voting system had vulnerabilities and petitioned the Board of County Commissioners to stop using its system.

Federal, state, and local law enforcement searched her home.

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[1] Because Ms. Peters appeals from a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), we need not assume the complaint's factual allegations are correct, and we may consider the exhibits attached to her original complaint. *See United States v. Rodriquez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001). Ms. Peters did not reattach them to her First Amended Complaint, but like the district court, we consider them as incorporated into the First Amended Complaint. Joint App., Vol. IV at 765 n.7. We also assume Rule 12(b)(1) is a proper vehicle for a *Younger* abstention motion.

B. ***State Court Proceedings***

On March 8, 2022, a state grand jury indicted her on 10 criminal counts. The indictment alleged that Ms. Peters (1) "devised and executed a deceptive scheme . . . designed to influence public servants, breach security protocols, exceed permissible access to voting equipment, and set in motion the eventual distribution of confidential information to unauthorized people" and (2) used someone else's "name and personal identifying information" "without permission or lawful authorization" "to further [her] criminal scheme." Joint App., Vol. III at 527.

On May 5, 2022, Mr. Rubinstein moved to quash a subpoena duces tecum that Ms. Peters had sent him requesting certain physical evidence related to the county's voting system.

On May 12, 2022, Ms. Peters moved for review of the grand jury indictment to determine whether probable cause supported the charges against her.

On June 3, 2022, the state court held that probable cause supported each of the charges in the indictment.

On June 5, 2022, the state court granted the motion to quash.

On April 1, 2024, Ms. Peters moved to dismiss the indictment, arguing she was immune from prosecution under the Supremacy Clause in Article VI of the United States Constitution. On May 7, 2024, the state court denied her motion.

C. *Federal Court Proceedings*

1. **Federal District Court**

On November 14, 2023, Ms. Peters sued Mr. Rubinstein in his official capacity under 42 U.S.C. § 1983 in the United States District Court for the District of Colorado.[2] She brought a First Amendment retaliation claim, alleging Mr. Rubinstein's investigation and prosecution were in retaliation for her public criticism of the county's voting system.[3] She contended that when she learned a technology upgrade would delete some data from the county's voting records, she acted to protect election integrity and to comply with federal election law's record management requirements. She sought declaratory and injunctive relief to prevent Mr. Rubinstein from investigating and prosecuting her in state court.

On November 27, 2023, Ms. Peters moved the district court for a preliminary injunction to stop Mr. Rubinstein "from conducting, continuing, or participating in

[2] Ms. Peters also sued Jena Griswold in her official capacity as Colorado Secretary of State; Merrick Garland in his official capacity as Attorney General of the United States; and the United States of America. Those claims are not at issue in this appeal.

[3] For a First Amendment retaliation claim where the government defendant is neither the plaintiff's employer nor a party to a contract with the plaintiff, the plaintiff must show (1) "the plaintiff was engaged in constitutionally protected activity"; (2) "the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity"; and (3) "the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000) (quotations omitted). "The First Amendment applies to the States under the Due Process Clause of the Fourteenth Amendment." *iMatter Utah v. Njord*, 774 F.3d 1258, 1263 (10th Cir. 2014) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 749 n.1 (1976)).

any way in proceedings in [the state court case], or any other criminal proceedings against or harassment of [Ms.] Peters." Dist. Ct. Doc. 8 at 1; Joint App., Vol. I at 3.

On December 13, 2023, Mr. Rubinstein responded by moving to dismiss the case, arguing for the district court to abstain under *Younger* from reaching the merits, including the request for a preliminary injunction.

On January 8, 2024, the district court granted Mr. Rubinstein's motion, holding that abstention was appropriate and denying the preliminary injunction motion as moot. It reasoned that *Younger* abstention was mandatory because state proceedings were ongoing, implicated important state interests, and afforded Ms. Peters an adequate opportunity to present her "constitutional challenges arising under the First Amendment or the Privileges and Immunities Clause of the Fourteenth Amendment." Joint App., Vol. IV at 767; *see also id.* at 766-69. On the adequate-opportunity issue, it said that Ms. Peters could raise her First Amendment claim in the state proceedings and that she had not shown "she was prevented by the [state court] from" doing so. *Id.* at 768.

The district court also found that Ms. Peters had failed to show Mr. Rubinstein's actions constituted "harassment or prosecutions undertaken by [a] state official[] in bad faith without hope of obtaining a valid conviction"—an exception to *Younger* abstention. *Id.* at 769 (quotations omitted); *see also id.* at 770. It explained that the state court had made a "thorough and well-reasoned" determination that probable cause supported the charges against Ms. Peters and that

"[w]ithout more evidence," she had not made even a prima facie showing that the prosecution was in bad faith. *Id.* at 770-73.

The district court dismissed the claim against Mr. Rubinstein without prejudice, certified its order under Federal Rule of Civil Procedure 54(b), and entered judgment for Mr. Rubinstein.

2. **U.S. Court of Appeals**

On January 10, 2024, Ms. Peters appealed. We have jurisdiction under Rule 54(b).[4] *See, e.g.*, *Stockman's Water Co., LLC v. Vaca Partners, L.P.*, 425 F.3d 1263, 1265 (10th Cir. 2005).

On January 19, 2024, Ms. Peters moved this court to enjoin the state court proceeding pending appeal. On February 5, 2024, we denied the motion because Ms. Peters had not carried her burden to show she met the standards for an injunction pending appeal.

After Ms. Peters filed her opening brief in this court, she unsuccessfully moved the state court to dismiss the indictment based on the same Supremacy Clause immunity arguments she raised in her opening brief here.

[4] After Ms. Peters filed her docketing statement, we noted that the district court did not make two express determinations required by Rule 54(b). We gave Ms. Peters time to file a proper Rule 54(b) certification, and she did. Doc. 11063320; Joint App., Vol. IV at 801-09.

On May 24, 2024, Ms. Peters moved this court to expedite the appeal, urging us to hear and decide her case before her criminal trial is scheduled to begin on July 29, 2024. We deny the motion as moot.

II. DISCUSSION

Ms. Peters argues the district court (1) could not abstain because she is immune from state prosecution and (2) improperly applied *Younger*. We disagree.

A. *Immunity*

Ms. Peters argues that her "efforts to comply with federal election law" made her conduct "immune from state prosecution under the Supremacy Clause," Aplt. Br. at 25 (capitalization altered without notation), and thus "deprive[d] [the] state court of subject-matter jurisdiction," *id.* at 27. But Ms. Peters never presented this argument to the district court.[5] Appellants waive issues not raised before the district court absent arguing the "rigorous plain-error test" on appeal. *In re Syngenta AG MIR 162 Corn Litig.*, 61 F.4th 1126, 1180 (10th Cir. 2023). Ms. Peters does not argue plain error, so any Supremacy Clause immunity argument is "surely" at the

[5] Ms. Peters argues she did present the issue to the district court by stating in her complaint that she was "immune from prosecution" under "the Privileges and Immunities Clause in the Fourteenth Amendment and the Supremacy Clause in Article VI of the United States Constitution." Aplt. Br. at 30 (quoting Joint App., Vol. I at 44; Joint App., Vol. III at 725). But this passing mention was insufficient. We do not address arguments made before the district court in only a "perfunctory and underdeveloped manner," including "[v]ague, arguable," or "[f]leeting references." *In re Rumsey Land Co.*, 944 F.3d 1259, 1271 (10th Cir. 2019) (quotations omitted).

"end of the road." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011).

Ms. Peters counters that waiver is inapplicable because her immunity claim goes to the state court's subject matter jurisdiction, Aplt. Reply Br. at 2, but she misses the mark. A party cannot forfeit or waive an argument about *this court's* subject matter jurisdiction. *See, e.g.*, *Gad v. Kan. State Univ.*, 787 F.3d 1032, 1035 (10th Cir. 2015); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *Sheldon v. Golden Bell Retreat*, No. 22-1428, 2023 WL 8539442, at *2 (10th Cir. Dec. 11, 2023) (unpublished) (cited for persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1). This principle does not extend to Ms. Peters's merits argument that the federal district court or this court should issue a declaratory judgment and an injunction because she is immune from state prosecution. *See Big Horn Coal Co. v. Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab.*, 55 F.3d 545, 551 (10th Cir. 1995) (holding that party may be held to waiver when it challenges a merits determination, even if the party characterizes it as a subject matter jurisdiction issue); *Wyoming v. Livingston*, 443 F.3d 1211, 1216 (10th Cir. 2006) (holding that Supremacy Clause immunity arguments are waivable).[6]

[6] Ms. Peters also contends that the Fourteenth Amendment's Privileges and Immunities Clause provides a separate immunity claim, *see* Aplt. Br. at 24, or "reinforces" her Supremacy Clause immunity claim, Aplt. Reply Br. at 21. But she

B. ***Abstention***

1. **Legal Background**

"We review de novo the district court's decision to abstain from exercising jurisdiction under *Younger*." *Phelps v. Hamilton* ("*Phelps II*"), 122 F.3d 885, 889 (10th Cir. 1997).

a. Younger *abstention requirements*

"In *Younger*, the Supreme Court held that federal courts, except in the most exceptional circumstances, must dismiss suits for declaratory or injunctive relief against pending state criminal proceedings." *Id.* (citing *Younger*, 401 U.S. at 43, 53-54). "Before a federal court abstains, it must determine that: (1) the state proceedings are ongoing; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to present the federal

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waived those arguments by failing to raise them before the district court or in her opening brief. *See In re Syngenta*, 61 F.4th at 1180-81.

Further, it is not clear a federal court could properly adjudicate Ms. Peters's immunity claims outside a request for a writ of habeas corpus or on motion to dismiss an indictment after the case has been removed to federal court under 28 U.S.C. § 1442(a)(1). *See Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969) (noting that to take advantage of "the protection of a federal forum" and to have "the validity of the defense of official immunity tried in a federal court," a federal officer should use 28 U.S.C. § 1442(a)(1)'s removal provision); *Whitehead v. Senkowski*, 943 F.2d 230, 233 (2d Cir. 1991) (describing habeas and removal provisions in the Supremacy Clause context as "alternative[s]"); Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195, 2251 (2003) ("Supremacy Clause immunity does not displace state law in any categorical way. Rather, it merely limits the application of state law against a discrete, numerically limited set of potential defendants—federal officers."). The parties fail to address this limitation.

constitutional challenges." *Id.* (citing *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982)).

On the third requirement, "unless state law clearly bars the interposition of the federal statutory and constitutional claims, a plaintiff typically has an adequate opportunity to raise federal claims in state court." *Winn v. Cook*, 945 F.3d 1253, 1258 (10th Cir. 2019) (quotations omitted). "*Younger* requires only the availability of an *adequate* state-court forum, not a favorable result in the state forum." *Id.*

"Once these three conditions are met, *Younger* abstention is non-discretionary . . . ." *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1215 (10th Cir. 2003).

b. Younger *exceptions*

Courts have recognized exceptions to *Younger* abstention: the prosecution "was (1) commenced in bad faith or to harass, (2) based on a flagrantly and patently unconstitutional statute, or (3) related to any other such extraordinary circumstance creating a threat of 'irreparable injury' both great and immediate." *Phelps v. Hamilton* ("*Phelps I*"), 59 F.3d 1058, 1064 (10th Cir. 1995) (quoting *Younger*, 401 U.S. at 53-54). "[T]he[se] exceptions to *Younger* only provide for a very narrow gate for federal intervention" because of "respect[] [for] prosecutorial discretion and federalism." *Id.* Thus, the plaintiff bears a "heavy burden" to show an exception applies. *Phelps II*, 122 F.3d at 889 (quotations omitted).

To determine whether a state commenced a prosecution in bad faith or to harass, courts consider three factors:

> (1) whether it was frivolous or undertaken with no reasonably objective hope of success;
>
> (2) whether it was . . . in retaliation for the defendant's exercise of constitutional rights; and
>
> (3) whether it was conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions.

Id. (paragraph structure added). The plaintiff must set forth "more than mere allegations of bad faith or harassment" through "additional, supplemental evidence." *Id.* at 889-90. If the plaintiff can make this "initial showing of retaliatory animus, the burden shifts back to the defendant to rebut the presumption of bad faith by offering legitimate, articulable, objective reasons to justify the decision to initiate these prosecutions." *Id.* (quotations omitted).

2. **Application**

Ms. Peters argues (a) the third *Younger* factor is not met and (b) the bad faith exception applies. We disagree.

a. Younger *applies*

The parties do not dispute that the first two *Younger* requirements are met—there is an ongoing state criminal proceeding and state criminal proceedings implicate important state interests. As explained below, the third requirement is also met.[7]

[7] To the extent Ms. Peters argues *Younger* applies but the state court's actions constitute an "extraordinary circumstance[] that would render [the] state court unable to provide [her] a full and fair hearing on [her] federal claims," *Phelps II*, 122 F.3d at 891,

i. First Amendment claim

Ms. Peters argues in her opening brief that the state court "foreclosed consideration of [her] constitutional claims" because it "concluded" in resolving a motion to quash "that th[e] merits" of her constitutional claims "would not be adjudicated." Aplt. Br. at 38 (capitalization altered without notation). We infer she means the state court would not consider her First Amendment retaliation claim. We reject her argument.

Ms. Peters must show the state court proceedings could not "afford [her] an adequate opportunity to present" her First Amendment claim. *Phelps II*, 122 F.3d at 889. She has not.[8] She has made no argument that "state law clearly bars" her from raising her claims. *Crown Point*, 319 F.3d at 1215 (quotations omitted). Rather, she asserts that the state court "made a ruling that precluded consideration of [her] federal claims." Aplt. Br. at 39. The record does not support her contention.

In the state court's ruling on Mr. Rubinstein's motion to quash, it determined that he was not required to turn over computer equipment related to the county's election system. It held that "the issue of election equipment [wa]s collateral" and the evidence was unnecessary for Ms. Peters's argument that her "alleged crimes

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we disagree for the same reasons discussed below. She has not pointed to authority or procedural history to show such an extraordinary circumstance.

[8] Ms. Peters recently filed a Federal Rule of Appellate Procedure 28(j) letter calling our attention to *National Rifle Ass'n v. Vullo*, 144 S. Ct. 1316 (2024). *Vullo* does not show that she lacked an opportunity to present her First Amendment claim in state court.

were necessary . . . to avoid an imminent public or private injury . . . of sufficient gravity to outweigh the criminal conduct." Joint App., Vol. III at 541 (quotations omitted). The court said that any threat of injury was not imminent. *Id.* at 542. Ms. Peters did not even mention the First Amendment in her briefing on the motion to quash. *See* Joint App., Vol. IV at 810-34. The state court's evidentiary ruling did not, therefore, "conclude that th[e] merits" of her First Amendment claim "would not be adjudicated in the prosecution" or that such a claim would be "out-of-bounds." Aplt. Br. at 40.

ii. Immunity claim

After she filed her opening brief in this court, Ms. Peters moved in state court to dismiss the indictment for lack of jurisdiction based on the same Supremacy Clause immunity arguments she presents here. The state court adjudicated her arguments, rejected them on the merits, and denied Ms. Peters's motion. In her motion to expedite filed with this court, she now argues *Younger* abstention should not apply because the state court "exceeded its authority to address questions of federal law regarding whether she was" entitled to immunity. Doc. 11093062 at 5.

This new argument also fails. "Under normal circumstances, . . . state courts . . . can and do decide questions of federal law . . . ." *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 485 n.7 (1999). None of the cases Ms. Peters cites supports the proposition that the state court, which she asked to adjudicate her Supremacy

Clause immunity argument, lacked jurisdiction to do so.[9] "State courts have long adjudicated . . . whether federal officers are entitled to Supremacy Clause immunity[,] . . . [a]nd they have continued to do so after the codification of the modern federal-officer removal statute . . . ." *State v. Meadows*, 88 F.4th 1331, 1343 (11th Cir. 2023) (citations omitted).

b. *Bad faith exception*

Ms. Peters argues the bad faith exception to *Younger* abstention applies. Aplt. Br. at 34-38; Aplt. Reply Br. at 23-27. She fails to establish any of the three bad faith factors.

i. Frivolousness

Ms. Peters has not shown the prosecution was "frivolous or undertaken with no reasonably objective hope of success." *Phelps II*, 122 F.3d at 889. She contends that "[t]he plainly apparent deficiencies in each of the counts of the indictment demonstrate . . . bad faith." Aplt. Br. at 37. But as the district court noted, the state court concluded that probable cause supported each of the charges against Ms. Peters,

[9] The precedential cases Ms. Peters cites, Aplt. Br. at 25-30; Aplt. Reply Br. at 9-21; Doc. 11093062 at 5-6; Doc. 11095215 at 2, considered situations where federal officers removed cases from state to federal court or where state jurisdiction was at issue on habeas review. *See Livingston*, 443 F.3d at 1224 (explaining that a federal officer may remove a case from state to federal court under 28 U.S.C. § 1442); *Tennessee v. Davis*, 100 U.S. 257, 263-71 (1879) (upholding the constitutionality of a statute like 28 U.S.C. § 1442 allowing federal officers to remove proceedings from state to federal court); *Cunningham v. Neagle*, 135 U.S. 1 (1890) (considering state jurisdiction on habeas review); *Ohio v. Thomas*, 172 U.S. 276 (1899) (same). Another involved an appeal from state court to the Supreme Court. *Johnson v. Maryland*, 254 U.S. 51 (1920).

which weighs against her. *See* Joint App., Vol. IV at 770 (district court opinion); Joint App., Vol. III at 646-50 (probable cause review). She has not provided cases or evidence showing the charges had "no reasonably objective hope of success." *Phelps II*, 122 F.3d at 889; *see Phelps I*, 59 F.3d at 1067 (noting that a prosecution was not in bad faith where "the parties' briefs suggest[ed] that the criminal . . . prosecutions were based on probable cause"); *Carrillo v. Wilson*, No. 12-cv-03007, 2013 WL 1129428, at *5 (D. Colo. Mar. 18, 2013) (finding prosecution nonfrivolous when state court determined charges were supported by probable cause); *Wrenn v. Pruitt*, No. 5:21-cv-00059, 2021 WL 1845968, at *4 (W.D. Okla. May 7, 2021) (same).

ii. Retaliation

Ms. Peters argues Mr. Rubinstein's investigation and prosecution was retaliation for her exercise of constitutional rights.[10] Aplt. Br. at 36-37. She points to several parts of the record, none of which "prove[s] that retaliation was a major motivating factor and played a dominant role in the decision to prosecute." *Phelps I*, 59 F.3d at 1066 (quotations omitted).

[10] Ms. Peters argues that prosecutions may be retaliatory even if supported by probable cause. Aplt. Br. at 37 (citing *Phelps I*, 59 F.3d at 1064 n.12). This proposition may be in tension with the Supreme Court's holding in *Hartman v. Moore*, 547 U.S. 250 (2006), that a plaintiff cannot state a claim of retaliatory prosecution in violation of the First Amendment if the charges were supported by probable cause. *Id.* at 265-66. But we need not resolve that issue here because even if we accept Ms. Peters's contention, she has not met her burden to show retaliation.

First, Ms. Peters says Mr. Rubinstein's office "harassed her 93-year-old mother" and "interjected . . . in a domestic matter involving [her] husband." Aplt. Reply Br. at 24.[11] But she cites only her own declaration for this proposition, and "conclusory and self-serving affidavits" are insufficient. *Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991). She also contends that Mr. Rubinstein "participated with the Federal Bureau of Investigation in securing and executing a search warrant in an excessive manner." Aplt. Reply Br. at 24. This contention is similarly insufficient as based only on a "conclusory and self-serving affidavit[]" from her political associate. *Hall*, 935 F.2d at 1111; *see also* Aplt. Reply Br. at 24.

Second, Ms. Peters argues she was prosecuted "for actions that she was obligated to take." Aplt. Reply Br. at 24. This may be a possible defense to the state charges, but it has nothing to do with her theory of retaliation for voicing public criticism. Also, "the critical inquiry is not whether [she] engaged in some protected activity; rather, it is whether the prosecutor sought to limit [her] ability to conduct constitutionally protected speech by these criminal prosecutions." *Phelps I*, 59 F.3d at 1068. Ms. Peters has not shown Mr. Rubinstein sought to do so.

Third, Ms. Peters argues Mr. Rubinstein failed to prosecute the Colorado Secretary of State, who allegedly knew the technology upgrade would delete some data from the county's voting records. Aplt. Reply Br. at 24. Apart from failing to

[11] Ms. Peters presents these arguments as support for why she thinks the prosecution was retaliatory, but the result would be the same if she argued they went to harassment.

show that she and the Secretary of State were similarly situated, Ms. Peters provides no basis to infer that Mr. Rubinstein's exercise of prosecutorial discretion was retaliatory. *See Oyler v. Boles*, 368 U.S. 448, 456 (1962) (holding that even where individuals commit the same conduct, "the conscious exercise of some selectivity in enforcement" is acceptable).

Fourth, Ms. Peters argues as suspect the time between when she "formally petitioned the county Board to discontinue its contract to use a computerized voting system" and the indictment. Aplt. Reply Br. at 24. The timing is not relevant here because Ms. Peters admits that the state began investigating her before she formally petitioned the Board. *See, e.g.*, Joint App., Vol. III at 546-48.

Fifth, Ms. Peters argues Mr. Rubinstein advocated for her bond to be set much higher than what the state court approved and opposed her request to travel for a film screening. Aplt. Reply Br. at 24; *see also* Joint App., Vol. III at 549. She fails to show these recommendations to the court fall outside the norms of state prosecution or the needs of the case, let alone show a retaliatory motive. Even if they demonstrate "a history of personal animosity between [Mr. Rubinstein] and [Ms. Peters, this would] not, by itself, [be] sufficient to show that [the] prosecution was commenced in bad faith." *Phelps I*, 59 F.3d at 1067.

Sixth, Ms. Peters argues Mr. Rubinstein made a report to the Board of County Commissioners with the sole "focus [of] punish[ing] Ms. Peters for uncovering the deletion of election records." Aplt. Reply Br. at 25. This statement is unsupported and conclusory. Mr. Rubinstein's report is insufficient to establish a retaliatory

motive. *See Nielander v. Bd. of Cnty. Comm'rs*, 582 F.3d 1155, 1165 (10th Cir. 2009) ("A plaintiff's subjective beliefs about why the government took action, without facts to back up those beliefs, are not sufficient" to establish retaliatory motive.).

iii. Harassment

Ms. Peters also fails to show evidence of "harassment and an abuse of prosecutorial discretion," which is "typically [shown] through the unjustified and oppressive use of multiple prosecutions." *Phelps II*, 122 F.3d at 889. She argues that multiple prosecutions are not required to show harassment. Aplt. Reply Br. at 26-27. But she does not explain why this case otherwise constitutes "harassment and an abuse of prosecutorial discretion." *Phelps II*, 122 F.3d at 889.

III. CONCLUSION

Younger abstention was appropriate, and Ms. Peters has not met her heavy burden to show the bad faith exception applies. We affirm. We deny Ms. Peters's motion to expedite as moot.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-03014-NYW-SKC

TINA PETERS,

Plaintiff,

v.

UNITED STATES OF AMERICA,
MERRICK B. GARLAND, in his official capacity as Attorney General of the United States,
JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and
DANIEL P. RUBINSTEIN, in his official capacity as District Attorney for the Twenty-First Judicial District,

Defendants.

FINAL JUDGMENT AS TO DEFENDANT DANIEL P. RUBINSTEIN

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 54(b) and 58, the following Final Judgment as to Defendant Daniel P. Rubinstein is hereby entered.

Pursuant to the Order [Docket No. 39] of United States District Judge Nina Y. Wang, entered on January 8, 2024, it is

ORDERED that Defendant Daniel P. Rubinstein's Motion to Dismiss [Docket No. 23] is GRANTED. It is

ORDERED that Plaintiff's claims for declaratory and injunctive relief against Defendant Daniel P. Rubinstein in his official capacity are DISMISSED without prejudice. It is

ORDERED that Plaintiff's Motion for a Preliminary Injunction [Doc. 8] is DENIED as moot. It is

ORDERED that judgment is hereby entered in favor of Defendant Daniel P. Rubinstein and against Plaintiff, in light of the Court's determination that there is no just reason for delay. *See* Fed. R. Civ. P. 54(b). It is

ORDERED that Defendant Daniel P. Rubinstein is awarded his costs, to be taxed by the Clerk of the Court, pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

Dated at Denver, Colorado this 8th day of January, 2024.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/M. Smotts
M. Smotts, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Nina Y. Wang

Civil Action No. 23-cv-03014-NYW-SKC

TINA PETERS,

Plaintiff,

v.

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DANIEL P. RUBINSTEIN, in his official capacity as District Attorney for the Twenty-First Judicial District,

Defendants.

ORDER ON MOTION TO DISMISS

In this action, Plaintiff Tina Peters asks this Court to intervene to prevent the State of Colorado from prosecuting her for various criminal charges brought pursuant to a grand jury indictment. *See* [Doc. 8; Doc. 33 at 39–43]. Defendant Daniel P. Rubenstein moved to dismiss Plaintiff's claims for declaratory and injunctive relief brought against him in his official capacity, arguing that this Court must abstain from interfering with the ongoing state prosecution. Based on the record before it, this Court concludes that Ms. Peters has failed to establish an exception to *the Younger* doctrine of abstention and accordingly, abstention is appropriate.

BACKGROUND

The court draws the following facts from the First Amended Complaint for Declaratory and Injunctive Relief (the "First Amended Complaint"),[1] [Doc. 33], and the docket for the United States District Court for the District of Colorado.[2] Plaintiff Tina Peters ("Plaintiff" or "Ms. Peters") is the former Clerk and Recorder for Mesa County, Colorado. [*Id.* at ¶ 5]. On March 8, 2022, a grand jury for Mesa County, Colorado, returned an Indictment against Ms. Peters (the "Indictment" or "Mesa County Indictment"), charging her with 10 criminal counts arising from the Colorado Secretary of State's trusted build election management software update (the "trusted build") that was scheduled to begin in Mesa County on May 25, 2021. [Doc. 1-28].

The Mesa County Indictment alleges that on April 16, 2021, Jessi Romero ("Mr. Romero"), the Voting Systems Manager with the Colorado Secretary of State, informed Mesa County's election staff that only required personnel from Dominion, the Secretary of State, and Mesa County would be permitted to observe the trusted build, but that the

[1] Ms. Peters filed her initial Complaint for Declaratory and Injunctive Relief, [Doc. 1], on November 14, 2023. On December 22, 2023, Ms. Peters filed the First Amended Complaint as a matter of right, within 21 days of the filing of Defendant Rubinstein's Motion to Dismiss on December 13, 2023. [Doc. 33]; *see also* Fed. R. Civ. P. 15(a)(1)(B).

[2] Courts may take judicial notice of and consider documents on their own dockets on a motion to dismiss without converting it into a motion for summary judgment. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006). Ms. Peters has also engaged in motions practice and made certain representations about her state criminal prosecution in *Coomer v. Lindell*, Case No. 22-cv-01129-NYW-SKC (D. Colo.). This Court takes judicial notice of that docket and to the extent it relies on certain documents from that docket, uses the convention of *Coomer*, Case No. 22-cv-1129, ECF No. ___. In addition, this Court may take judicial notice of the state court docket in *People v. Peters*, No. 22CR371. *See St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979) (observing that, whether requested by the parties or not, "federal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue").

trusted build would occur under camera, and members of the public could review the footage afterward. [Doc. 1-28 at 9–10]. On April 26, 2021, the Indictment alleges, Mr. Romero informed Ms. Peters and other clerks across Colorado that if unauthorized individuals were onsite during the trusted build, the Secretary of State would "move on to the next county." [*Id.* at 10]. According to the Indictment, by the end of the day on May 17, 2021, the security cameras in the trusted build area had been turned off and remained non-operational through the entire installation process, and on the day of the trusted build, Ms. Peters introduced a person named "Gerald Wood," who participated in the trusted build process. [*Id.* at 11–12]. The actual Gerald Wood later denied accessing the Mesa County Clerk and Recorder's Office, either on the date of the trusted build or on other dates that a key card assigned to him was utilized. [*Id.* at 12]. In August 2021, Secretary of State employees learned that images of the Mesa County election management systems and related passwords were available on the internet and issued Election Order 2021-01, directing Ms. Peters and the Mesa County Clerk and Recorder's Office to provide certain information, documentation, communications, and images related to the May 2021 trusted build. [*Id.*].

Plaintiff is charged with three counts of Attempt to Influence a Public Servant, in violation of Colo. Rev. Stat. § 18-8-306; two counts of Conspiracy to Commit Criminal Impersonation, in violation of Colo. Rev. Stat. §§ 18-5-113(1)(B)(I), 18-2-201; one count of Criminal Impersonation, in violation of § 18-5-113(1)(B)(I); one count of Identity Theft, in violation of Colo. Rev. Stat. § 18-5-902(1); one count of First Degree Official Misconduct, in violation of Colo. Rev. Stat. § 18-8-404; one count of Violation of Duty, in violation of Colo. Rev. Stat. § 1-13-107(1); and one count of Failure to Comply with

Requirements of Secretary of State, in violation of Colo. Rev. Stat. § 1-13-114. [Doc. 28-1 at 1–2]. Ms. Peters's trial has been continued twice upon her request, first from March 2023 to August 2023, [*Coomer*, Case No. 22-cv-1129, ECF No. 111-1 at ¶ 3], and now to February 24, 2024. [Doc. 20 at 2]. Ms. Peters disputes these factual allegations and criminal charges. She contends that her actions related to the trusted build were efforts to protect the integrity of the election process and to comply with federal law to maintain election records. *See generally* [Doc. 33].

Believing that the state prosecution and associated state and federal investigations of her election-related activities were in retaliation for her public challenges to the validity of the 2020 presidential election and the reliability of the electronic voting system used by Mesa County as well as her criticism of the trusted build, Ms. Peters initiated this action on November 14, 2023, against the United States of America; Defendant Merrick B. Garland, in his official capacity as Attorney General of the United States ("Defendant Garland" or "Attorney General Garland");[3] Defendant Jena Griswold, in her official capacity as Colorado Secretary of State ("Defendant Griswold" or "Secretary of State Griswold"); and Defendant Daniel P. Rubinstein, in his official capacity as District Attorney for Mesa County, Colorado, ("Defendant Rubinstein" or "District Attorney Rubinstein"), invoking this Court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1346(a)(2). [Doc. 1].

[3] This Court notes that while Ms. Peters separately names as defendants the United States and Attorney General Garland in his official capacity, "[w]hen an action is one against named individual defendants, but the acts complained of consist of actions taken by defendants in their official capacity as agents of the United States, the action is in fact one against the United States." *Atkinson v. O'Neill*, 867 F.2d 589, 590 (10th Cir. 1989).

Specifically, Count I alleges that the United States and Attorney General Garland retaliated against Ms. Peters for her exercise of her First Amendment rights of free speech, free association, and petition for redress by investigating her election-related conduct. [Doc. 33 at ¶¶ 147–53]. Count II alleges that Defendants Griswold and Rubinstein similarly have undertaken an investigation and prosecution of Ms. Peters in violation of federal law, namely, in retaliation for Ms. Peters's exercise of her above-delineated First Amendment rights and her efforts to comply with federal law with respect to the maintenance of voting records, in violation of her privileges and immunities as a citizen under the Fourteenth Amendment of the United States Constitution. [*Id.* at ¶¶ 154–58]. Ms. Peters seeks declaratory and injunctive relief with respect to both counts. [*Id.* at 42–43].

On November 27, 2023, Ms. Peters moved for a preliminary injunction, seeking to enjoin District Attorney Rubinstein from pursuing conducting, continuing, or participating in any way in proceedings in *People v. Peters*, or any other criminal proceedings against or investigation of Ms. Peters (the "Motion for Preliminary Injunction").[4] [Doc. 8 at 6]. The following day, Ms. Peters filed the return of Service for Defendant Rubinstein, reflecting service that same day. [Doc. 17]. On December 6, 2023, Ms. Peters filed the return of service for the United States,[5] reflecting service on the United States Attorney's Office for

[4] The filing of the Motion for Preliminary Injunction caused the case, which had originally been assigned to the Honorable S. Kato Crews, to be drawn to a District Judge. [Doc. 12]. Ultimately, the action was assigned to the undersigned on November 28, 2023. [Doc. 15].

[5] Because Attorney General Garland is sued in his official capacity, Ms. Peters was required to serve the United States. Fed. R. Civ. P. 4(i)(2).

the District of Colorado. [Doc. 18]. To date, Ms. Peters has not filed a return of service for Defendant Griswold.

On December 11, 2023, Ms. Peters moved to expedite the proceedings on her Motion for Preliminary Injunction, given that her state criminal trial was set to begin on February 24, 2024. [Doc. 20]. That same day, counsel for District Attorney Rubinstein first entered his appearance. [Doc. 21]. The Court then ordered Defendant Rubinstein to respond to the Motion to Expedite no later than December 13, 2023. [Doc. 22]. On December 13, 2023, Defendant Rubinstein filed (1) the instant Motion to Dismiss Plaintiff's Complaint [ECF No. 1] Pursuant to Fed. R. Civ. P. 12 (the "Motion to Dismiss"), [Doc. 23]; (2) a Motion to Stay Briefing and Scheduling of Hearing on Motion for Preliminary Injunction (the "Motion to Stay"), [Doc. 24]; and (3) an Opposition to Motion to Expedite Proceedings ("Defendant Rubinstein's Opposition"), [Doc. 25]. Because the Motion to Dismiss raised a significant question as to whether this Court should abstain from reaching the merits of Count II as asserted against Defendant Rubinstein under *Younger v. Harris*, 401 U.S. 37 (1971)—and thus, any request for preliminary injunction—this Court denied Plaintiff's request to expedite the preliminary injunction proceedings and ordered her to file a response to the Motion to Stay on or before December 28, 2023. [Doc. 27]. The following day, Ms. Peters filed (1) a Motion for Reconsideration of the Court's Minute Order [ECF No. 27] Denying Plaintiff's Motion for Expedited Proceedings on Motion for Preliminary Injunction (the "Motion for Reconsideration"), [Doc. 28]; (2) her Response to Defendant Rubinstein's Motion to Stay Briefing and Scheduling of Hearing on Motion for Preliminary Injunction [ECF No. 24] and Opposition to Motion to Expedite Proceedings [ECF No. 25] ("Plaintiff's Response"), [Doc. 29]; and (3) her Opposition to

Defendant Rubinstein's Motion to Dismiss (the "Opposition to Motion to Dismiss"), [Doc. 30].

On December 20, 2023, the Court denied the Motion for Reconsideration; granted the Motion to Stay, staying the briefing on the Motion for Preliminary Injunction pending the Court's resolution of the Motion to Dismiss; and ordered Defendant Rubinstein to file any Reply to the Motion to Dismiss no later than December 29, 2023. [Doc. 32]. Mindful of Ms. Peters's concerns regarding her upcoming February 24 trial date, this Court also ordered Defendant Rubinstein to respond to the Motion for Preliminary Injunction within three days of any ruling on the Motion to Dismiss, if the case was not dismissed. [Doc. 36]. Defendant Rubinstein filed his Reply to Plaintiff's Opposition to Defendant Rubinstein's Motion to Dismiss ("Reply") on December 28, 2023.[6] [Doc. 38]. Neither Party sought an evidentiary hearing or identified any evidence to be presented beyond documents already on the Court's docket with respect to the instant Motion. *See* [Doc. 23; Doc. 28; Doc. 37]. The Motion to Dismiss is now ripe for review, and this Court concludes, based on its review of the record, that oral argument will not materially contribute to the resolution of the issues before it.

[6] On December 22, 2023, Ms. Peters filed the operative First Amended Complaint, [Doc. 33], as a matter of right pursuant to Rule 15(a)(1) of the Federal Rules of Civil Procedure; a Notice of Filing First Amended Complaint, [Doc. 34]; and an Unopposed Motion for Leave to File Amended Opposition to Defendant Rubinstein's Motion to Dismiss (the "Motion to Amend Opposition"), [Doc. 35]. While ordinarily the filing of an amended pleading moots any pending motion to dismiss directed at the prior pleading, *see Gotfredson v. Larsen LP*, 432 F. Supp. 2d 1163, 1172 (D. Colo. 2006) (explaining that an amended pleading moots any motions to dismiss aimed at an inoperative pleading), this Court construed the filing of Plaintiff's Motion to Amend Opposition as the Parties' assent that the instant Motion to Dismiss could be construed as directed at the First Amended Complaint. [Doc. 36]. Ms. Peters's Amended Opposition to Defendant Rubinstein's Motion to Dismiss (the "Amended Opposition to Motion to Dismiss" or "Amended Opposition"), [Doc. 37], was docketed that same day.

LEGAL STANDARDS

As identified above, the central issue presented by Defendant Rubinstein's Motion to Dismiss is whether this Court should abstain from reaching the merits of Count II, and in turn, Plaintiff's Motion for Preliminary Injunction, based on the *Younger* abstention doctrine.

I. *Younger* Abstention Doctrine

While federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given to them, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), the *Younger* abstention doctrine dictates that "a federal court must abstain from deciding a case otherwise within the scope of its jurisdiction in certain instances in which the prospect of undue interference with state proceedings counsels against federal relief," *Graff v. Aberdeen Enters., II, Inc.*, 65 F.4th 500, 522 (10th Cir. 2023) (cleaned up). Generally, pursuant to the *Younger* abstention doctrine, federal courts must refrain from enjoining pending, parallel state criminal proceedings, *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013), where the state proceedings are (1) ongoing, (2) implicate important state interests, and (3) afford an adequate opportunity to present the federal constitutional challenges, *Murphy v. El Paso Co. (CO) Dist. 4 Dist. Att'y*, No. 23-1188, 2023 WL 5423509, at *2 (10th Cir. Aug. 23, 2023) (citing *Phelps v. Hamilton* (*Phelps II*), 122 F.3d 885, 889 (10th Cir. 1997)).

But exceptions to *Younger* abstention exist; federal courts are permitted to enjoin a pending state criminal prosecution provided that the prosecution was (1) commenced in bad faith or to harass; (2) based on a flagrantly and patently unconstitutional statute; or (3) related to any other such extraordinary circumstance creating a threat of irreparable

injury both great and immediate. *See Phelps v. Hamilton* (*Phelps I*), 59 F.3d 1058, 1064 (10th Cir. 1995). According to the Tenth Circuit, however, the "twin rationales of respecting prosecutorial discretion and federalism" dictate that "the exceptions to *Younger* only provide for a 'very narrow gate for federal intervention.'" *Id.* (quoting *Arkebauer v. Kiley*, 985 F.2d 1351, 1358 (7th Cir. 1993)).

II. Proper Framework

While noting the ambiguities, Defendant Rubinstein proceeds pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. [Doc. 23 at 2–4]. In her Amended Opposition, Ms. Peters is silent as to whether Rule 12(b)(1) is the proper vehicle for raising the issue of abstention. *See generally* [Doc. 37].

In *Graff*, the United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit") observed that it was unclear whether *Younger* abstention implicates a federal court's subject matter jurisdiction—and thus, whether the framework of Rule 12(b)(1) applies—in this Circuit. *See Graff*, 65 F.4th at 523 n.32 (comparing *D.L. v. Unified School District No. 497*, 392 F.3d 1223, 1228 (10th Cir. 2004) ("*Younger* abstention is jurisdictional"), with *Elna Sefcovic, LLC v. TEP Rocky Mountain, LLC*, 953 F.3d 660, 666 (10th Cir. 2020) ("[W]hen cases present circumstances implicating [abstention] doctrines, no question is raised as to the court's subject matter jurisdiction."). Though the Tenth Circuit did not revolve the issue in *Graff* and has not spoken to it since, district courts within the Tenth Circuit continue to treat *Younger* abstention as jurisdictional, or akin to jurisdictional. *See, e.g.*, *Halliburton v. Eades*, No. 5:23-cv-970-F, 2023 WL 9007299, at *2 n.4 (W.D. Okla. Dec. 28, 2023) ("Younger abstention is jurisdictional." (citing *D.L*, 392 F.3d at 1232)); *Balderama v. Bulman*, No. 1:21-cv-1037-JB-JFR, 2023 WL 2728148, at

*12 (D.N.M. Mar. 31, 2023) (describing abstention as "akin to jurisdictional" (quotation omitted)); *El-Bey v. Lambdin*, No. 22-cv-00682-DDD-MDB, 2023 WL 2187478, at *4 n.4 (D. Colo. Feb. 23, 2023) (observing that "[a]lthough the *Younger* abstention doctrine is often referred to as a 'jurisdictional' issue, technically speaking, '*Younger* is a doctrine of abstention'" (quoting *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1230 n.8 (10th Cir. 2013)).

While mindful of the distinction between a court's subject matter jurisdiction to entertain a matter versus whether a court is required to refrain from exercising jurisdiction, *see, e.g.*, *El-Bey*, 2023 WL 2187478, at *4 n.4, definitive resolution of this issue is beyond the scope of this Court's determination here and ultimately, immaterial. First, the Parties have not placed the issue precisely before the Court. *Cf. Graff*, 65 F.4th at 523 n.32 (observing that "no party has addressed, let alone suggested, that the jurisdictional/non-jurisdictional nature of the *Younger* doctrine affects how this Court should address the issues on appeal"). Second, this Court is unaware of any Supreme Court or en banc decision of the Tenth Circuit that expressly overrules *D.L.*, and thus, this court is bound by it. *See Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir. 1996) ("A published decision of one panel of [the Tenth Circuit] constitutes binding circuit precedent constraining subsequent panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court."); *United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990) ("A district court must follow the precedent of this circuit . . . ."). Third, regardless of the procedural framework, a district court must resolve any question of *Younger* abstention before it proceeds to the merits, as a conclusion that *Younger* abstention applies "ends the matter." *Goings v. Sumner Cty. Dist. Attn'y's Office*, 571 F.

App'x 634, 639 (10th Cir. 2014) (quotation and emphasis omitted). Fourth, dismissals based on lack of subject matter jurisdiction or based on abstention principles are both without prejudice. *See id.* at 639; *see also Graff*, 65 F.4th at 523 n.32 ("Given that dismissal without prejudice is the proper result whether or not *Younger* abstention affects a federal court's subject matter jurisdiction, this court does not further consider the doctrine's jurisdictional pedigree." (citation omitted)).

With respect to the proper record, the Court may consider evidence outside the four corners of the operative pleading whether or not the instant Motion to Dismiss is considered a factual attack upon this Court's subject matter jurisdiction over Count II. *See United States v. Rodriquez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001) ("In addressing a factual attack, the court does not presume the truthfulness of the complaint's factual allegations, but has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." (quotation omitted)); *Stein v. Legal Advert. Comm. of Disciplinary Bd.*, 272 F. Supp. 2d 1260, 1264 n.3 (D.N.M. 2003) (observing that "[i]t is proper to consider matters outside the pleadings for purposes of deciding a motion to dismiss that is based on abstention"). In addition, this Court may also consider documents that are attached to or incorporated in the pleading[7] and are central to the First Amended Complaint, without converting the instant Motion to Dismiss to one for summary judgment. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997). Finally, as previously

[7] Ms. Peters did not re-attach exhibits to her First Amended Complaint, but that operative pleading references the same exhibits filed with the original Complaint. *See* [Doc. 33]. Accordingly, this Court considers [Doc. 1-3] through [Doc. 1-29] incorporated into the First Amended Complaint.

noted, this Court may take judicial notice of the court filings of its own docket and those of the state court. *See supra* n.2.

ANALYSIS

As discussed above, before a federal court can abstain under the *Younger* doctrine, it must determine that "(1) the state proceedings are ongoing; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to present the federal constitutional challenges." *Phelps II*, 122 F.3d at 889. It is clear that *People v. Peters* is still ongoing. [Doc. 20 at 2]. There is also little doubt that *People v. Peters* implicates important state interests, as "state criminal proceedings are viewed as a traditional area of state concern." *Winn v. Cook*, 945 F.3d 1253, 1258 (10th Cir. 2019) (internal quotations omitted); *see also Bruce v. Clementi*, No. 15-cv-01653-REB, 2016 WL 660120, at *11 (D. Colo. Feb. 17, 2016) (citations omitted) (recognizing the important state interests in the administration of its judicial system and enforcement of its criminal laws). And Ms. Peters's own allegations underscore the important state interest in election integrity identified by District Attorney Rubinstein.[8] *See* [Doc. 33 at ¶ 135]; *see also* [Doc. 23 at 9–10]. Thus, this Court's analysis focuses upon Ms. Peters's contention that the Mesa County District Court will not afford her an adequate

[8] Although Ms. Peters argues that Colorado's interests pale in comparison to her constitutional rights, [Doc. 37 at 3], *Younger* and its progeny do not command this Court to weigh the state's interests against Ms. Peters's. Rather, *Younger* stands for the proposition that, even in the face of alleged threats to the constitutional rights of individuals, there are certain exceptional circumstances where the principles of equity, comity, and federalism require federal courts to abstain from reviewing such claims so as to "permit state courts to try state cases free from [federal] interference." *See* 401 U.S. at 43–44. Ms. Peters has not presented any authority otherwise, or that contradicts the Tenth Circuit's holding in *Winn*. *See* [Doc. 37 at 3].

opportunity to present her constitutional challenges arising under the First Amendment or the Privileges and Immunities Clause of the Fourteenth Amendment. [*Id.* at 4–5].

I. State Proceedings Afford an Adequate Opportunity to Present Federal Constitutional Challenges

The Supreme Court has recognized that "ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Kugler v. Helfant*, 421 U.S. 117, 124 (1975). To that end, the Tenth Circuit explained that a plaintiff has an adequate opportunity to raise federal constitutional claims in state court unless state law clearly bars their interposition. *See Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1215 (10th Cir. 2003). Ms. Peters insists that the Mesa County District Court is an inadequate forum to raise her federal constitutional claims, but has presented no authority that state law prohibits her from doing so.

With respect to the purported violation of her First Amendment rights, Ms. Peters makes a single statement: "The Mesa County District Court will not provide Peters with an adequate opportunity to litigate the federal constitutional issues essential to prevailing on her First Amendment claim." [Doc. 37 at 4]. But neither *Younger* nor *Dombrowski v. Pfister*, 380 U.S. 479 (1965)—the only two cases that Ms. Peters cites—stands for the proposition that a Colorado state court prosecution does not afford Ms. Peters a fair and sufficient opportunity for vindication of her First Amendment rights or that Colorado law bars her from raising such an argument in Mesa County District Court.[9]

[9] To the extent that Ms. Peters contends she was subject to malicious prosecution and prosecutorial misconduct for exercising her rights to free speech, freedom of association and petitioning for the redress of grievance under the First Amendment, *see, e.g.*, [Doc. 33 at ¶ 118–34], this Court notes that Colorado state district courts may dismiss an indictment for prosecutorial misconduct that arises during grand jury proceedings. *See*

Ms. Peters also argues the June 5, 2022, Order by the Honorable Matthew D. Barrett, [Doc. 1-29; Doc. 23-4][10]—in which Judge Barrett concluded that Ms. Peters had failed to show that she was entitled to a choice of evils defense—deprived her of the ability to vindicate her rights under the Fourteenth Amendment Privileges and Immunities clause. *See* [Doc. 37 at 4–6]. But again, Plaintiff cites no authority that state law clearly barred her from raising her Fourteenth Amendment Privileges and Immunities arguments within the context of her criminal prosecution. *See generally* [*id.*]. Nor does she demonstrate that she was prevented by the Mesa County District Court from framing her argument to Judge Barrett as a constitutional issue under the Fourteenth Amendment. *See* [*id.* at 5–6]; *see also Wilson v. Morrissey*, 527 F. App'x 742, 744 (10th Cir. 2013) (citing *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987) ("[W]hen a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.")). In addition, it is undisputed that she did, in fact, raise her desire to present evidence that she engaged in the conduct at issue in order to expose issues with election equipment before Judge Barrett. [Doc. 1-29 at 3, 4]. Thus,

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People v. Bergen, 883 P.2d 532, 543 (Colo. App. 1994) ("Prosecutorial misconduct during grand jury proceedings can result in dismissal if actual prejudice accrues to the defendant or the misconduct compromises the structural integrity of the grand jury proceedings to such a degree as to allow for the presumption of prejudice."). In addition, Ms. Peters sought and received a probable cause review of the grand jury proceedings and indictment from the Mesa County District Court. [Doc. 23-3].

[10] Ms. Peters cites "Ex. 16 at 3" for Judge Barrett's June 5, 2022, Order. [Doc. 37 at 4]. Ms. Peters did not attach any exhibits to her original or Amended Opposition to the Motion to Dismiss. [Doc. 30; Doc. 37]. Elsewhere in the Amended Opposition, the June 5, 2022, Order is cited as "Ex. D to the Motion." [Doc. 37 at 6]. It appears that the June 5, 2022, Order is attached as Exhibit 16 to Plaintiff's Motion for Preliminary Injunction. [Doc. 10-2]. In referring to the June 5, 2022, Order, this Court cites to [Doc. 1-29], as it has the only legible markings from the CM/ECF system.

the June 5, 2022, evidentiary ruling does not persuade this Court that Ms. Peters was deprived of an adequate *opportunity* to raise her constitutional claims. *Younger* requires only the availability of an adequate state-court forum, not a favorable result in that forum. *See Winn*, 945 F.3d at 1258.

Accordingly, this Court concludes that the three requirements of *Younger* are met here.

II. Bad Faith Exception to *Younger* Abstention

Even where these requirements are met, federal abstention can be overcome in cases of "proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction."[11] *Perez v. Ledesma*, 401 U.S. 82, 85 (1971). In determining whether a prosecution was commenced in bad faith or to harass, courts consider whether it was (1) "frivolous or undertaken with no reasonably objective hope of success"; (2) "motivated by the defendant's suspect class or in retaliation for the defendant's exercise of constitutional rights"; and (3) "conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions." *Phelps I*, 59 F.3d at 1065.

Importantly, it is a federal plaintiff's "heavy burden" to overcome the bar of *Younger* abstention by setting forth more than mere allegations of bad faith or harassment. *See*

[11] *Younger* also authorizes federal courts to enjoin a state criminal prosecution where it was "based on a flagrantly and patently unconstitutional statute," or was "related to any other such extraordinary circumstance creating a threat of irreparable injury both great and immediate." *Phelps I*, 59 F.3d at 1063–64. As Ms. Peters has not alleged that her prosecution was based on an unconstitutional statute or that "this case fits into the catch-all but ill-defined category of 'extraordinary circumstances,'" this Court need only consider whether Ms. Peters's prosecution was brought in bad faith or to harass. *Id.* at 1064; *see also* [Doc. 37 at 6–11 (arguing only that Plaintiff's prosecution was undertaken in bad faith or to harass)].

Amanatullah v. Colo. Bd. of Med. Exam'rs, 187 F.3d 1160, 1165 (10th Cir. 1999). To warrant federal court intervention, a plaintiff must offer sufficient evidence to demonstrate that the prosecution was substantially motivated by a bad faith motive or was brought to harass. *Phelps I*, 59 F.3d at 1068.

Ms. Peters has not met her burden here. First, as the *Phelps I* court recognized, a bad faith prosecution will not ordinarily be predicated upon probable cause. 59 F.3d at 1064 n.12. Ms. Peters's criminal charges arise from a thirteen-count Indictment issued by a grand jury for Mesa County, Colorado. [Doc. 1-28]. Ms. Peters sought a probable cause review of the grand jury proceedings and indictment, and, in a thorough and well-reasoned order, Judge Barrett concluded that each of the charges asserted against Ms. Peters was supported by probable cause. [Doc. 23-3 at 5]. Without more evidence, in light of the probable cause finding, Ms. Peters fails to carry her heavy burden of establishing that her prosecution was frivolous or undertaken with no reasonably objective hope of success. *See Carrillo v. Wilson*, No. 12-cv-03007-BNB, 2013 WL 1129428, at *5 (D. Colo. Mar. 18, 2013) ("Because the state district court determined that 24 of the 25 charges in the superseding indictment were supported by probable cause, the Court finds that the state criminal charges are not frivolous or undertaken with no reasonably objective hope of success."); *Wrenn v. Pruitt*, No. 5:21-cv-00059-JD, 2021 WL 1845968, at *4 (W.D. Okla. May 7, 2021) (finding that the plaintiff could not "show that the prosecution was 'undertaken with no reasonably objective hope of success' given that the state court made a finding of probable cause").

Next, the Court considers whether Ms. Peters has made a prima facie *evidentiary* showing that her prosecution was brought in retaliation for the exercise of her

constitutionally-protected rights[12] or was otherwise motivated by bad faith or for purposes of harassment. *See Phelps I*, 59 F.3d at 1066; *Phelps II*, 122 F.3d at 890. Fundamentally, Ms. Peters's reliance on allegations from her First Amended Complaint, [Doc. 37 at 6–11; *id.* at 8–11 ¶¶ 3, 5, 7–9, 12, 14–16], which are not otherwise supported by evidence, is insufficient to carry her heavy burden.[13] *Amanatullah*, 187 F.3d at 1165 (rejecting the plaintiff's claim "that Younger *abstention* [wa]s not appropriate because the district court erred in failing to consider his amended complaint," which, the plaintiff argued, "demonstrated the [defendant's] bad faith"). For example, Ms. Peters alleges that District Attorney Rubinstein "instructed a lawyer representing [Ms.] Peters and her husband not to communicate with [Ms.] Peters because she was under investigation in connection with her exercise of a power of attorney she had been given." [Doc. 37 at 8 ¶ 5 (citing [Doc. 1 at ¶ 133])]; *see also* [Doc. 33 at ¶ 131].[14] But neither as part of the First Amended Complaint, nor in support of her Amended Response to the Motion to Dismiss, does Ms. Peters proffer an affidavit by the unnamed lawyer to support the allegation.[15]

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[12] In order to prevail on such a retaliation claim, Ms. Peters must prove that "retaliation was a major motivating factor and played a dominant role in the decision to prosecute." *Phelps I*, 59 F.3d at 1066.

[13] Some of Ms. Peters's citations to her First Amended Complaint are otherwise inapposite because the cited allegations relate only to the conduct of other Defendants, not Mr. Rubinstein, or to the investigation of other individuals. *See, e.g.*, [Doc. 37 at 8 ¶ 1 (citing allegations regarding Defendant Griswold); *id.* at 8 ¶ 2 (citing allegations related to "the Department of Justice, including the FBI"); *id.* at 10 ¶ 13 (citing allegations regarding the execution of a search warrant at the residence of Sherronna Bishop)].

[14] Although Ms. Peters appears to cite to her original Complaint, [Doc. 1], throughout her Amended Opposition to the Motion to Dismiss, the Court construes these citations as related to the corresponding factual allegations made in her operative First Amended Complaint, [Doc. 33].

[15] This Court further notes that Ms. Peters's characterization of Mr. Rubinstein's alleged contact with this attorney is materially different between the First Amended Complaint and

Plaintiff's reliance upon certain exhibits to her Motion for Preliminary Injunction to demonstrate her prosecution was undertaken in retaliation for her exercise of her First or Fourteenth Amendment rights or commenced in bad faith or for the purpose of harassment is equally unavailing. Some of the documents do not even address the factual allegations for which they are cited. For instance, Ms. Peters cites Exhibit 22 to the Motion for Preliminary Injunction for the proposition that District Attorney Rubinstein intentionally and knowingly submitted a report to the Board of County Commissioners without expert assistance in order to undermine the credibility of Ms. Peters's experts. [Doc. 37 at 8 ¶ 4]. But Exhibit 22 to the Motion for Preliminary Injunction, [Doc. 10-10], is simply an e-mail from District Attorney Rubinstein to an outside media source discussing FBI involvement in Ms. Peters's investigation, and entirely fails to address the factual issue for which it is cited.[16] In any case, Ms. Peters points to no authority for a

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her Amended Opposition to the Motion to Dismiss. In Paragraph 131 of the First Amended Complaint, Ms. Peters alleges

> [a] lawyer representing [Ms.] Peters and her husband in November 2021 in connection with domestic matters emailed [Ms.] Peters to advise her that a member of the District Attorney's office had left a voicemail on the lawyer's telephone notifying the lawyer that [Ms.] Peters was the subject of a potential investigation into her actions as an agent under a power of attorney. The voicemail prompted the lawyer to advise [Ms.] Peters that he had a conflict of interest and could no longer represent her and her husband.

[Doc. 1 at ¶ 133; Doc. 33 at ¶ 131]. The allegation that the voicemail then prompted the lawyer to advise Ms. Peters that he could no longer represent her is materially different than the allegation that Mr. Rubinstein *instructed* the lawyer not to communicate with Ms. Peters.

[16] This Court "cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record," *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005), particularly when Ms. Peters has been represented by counsel throughout this action, *United States v. Davis*, 622 F. App'x 758, 759 (10th Cir. 2015) ("[I]t is not this court's duty, after all, to make arguments for a litigant that he has not made for himself."); *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 800 n.10

constitutional requirement that District Attorney Rubinstein retain a computer expert before submitting a report to the Board of County Commissioners. *Cf. Jaffery v. Atl. Cty. Prosecutor's Office,* 695 F. App'x. 38, 41 (3d Cir. June 19, 2017) (rejecting the plaintiff's argument that the bad faith exception applied based, in part, on the plaintiff's failure to point to any constitutional requirement that police or prosecutors obtain a medical expert prior to prosecuting a doctor for allegedly criminal actions that occured in the course of medical treatment). Other documents do not support the factual allegation for which they are cited. For example, Ms. Peters asserts that District Attorney Rubinstein coordinated retaliatory efforts against Ms. Peters with Defendant Griswold, the Colorado Attorney General, and the Department of Justice. [Doc. 37 at 11 ¶ 17]. But the document to which Ms. Peters cites, Exhibit 2 to the Motion for Preliminary Injunction, [Doc. 9], is her own Declaration. These unsupported, conclusory allegations are insufficient to establish unlawful motivations on the part of District Attorney Rubinstein. *Carrillo*, 2013 WL 1129428, at *6.

Having found that all three factors of *Younger* abstention have been met, and no exceptions apply, abstention by this Court with respect to the claims against Defendant Daniel P. Rubinstein,[17] is mandatory. *See Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253, 1267 (10th Cir. 2002) ("Once a court finds that the required conditions are present, abstention is mandatory.").

(10th Cir. 2001) (observing that the court has no obligation to make arguments or perform research on behalf of litigants).

[17] Defendant Rubinstein seeks dismissal of "the Complaint" or "the case and all claims without prejudice." [Doc. 23 at 15; Doc. 38 at 9]. *Younger* abstention does not apply to claims against the United States, and Defendant Griswold has not appeared. Accordingly, this Court may only properly dismiss Count II as it relates to Defendant Rubinstein.

CONCLUSION

For the reasons set forth herein, **IT IS ORDERED** that:

(1) Defendant Daniel P. Rubinstein's Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12 [Doc. 23] is **GRANTED**;

(2) Plaintiff's claims for declaratory and injunctive relief against Defendant Daniel P. Rubinstein in his official capacity are **DISMISSED WITHOUT PREJUDICE**;

(3) Plaintiff's Motion for a Preliminary Injunction [Doc. 8] is **DENIED as moot**; and

(4) Defendant Daniel P. Rubinstein is entitled to his costs pursuant to Federal Rule of Civil Procedure 54(d) and D.C.COLO.LCivR 54.1.

DATED: January 8, 2024

BY THE COURT:

Nina Y. Wang
United States District Judge

Case No. 24-1013

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

TINA PETERS,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA; MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; JENA GRISWOLD, in her official capacity as Colorado Secretary of State,

Defendants,

—and—

DANIEL P. RUBINSTEIN, in his official capacity as District Attorney for the Twenty-First Judicial District,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HONORABLE NINA WANG
D.C. NO. 1:23-CV-03014-NYW-SKC

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March 12, 2024

ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

There are no prior appeals of, or appeals related to, this case.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 1346(a)(2). The district court granted the motion of appellee Daniel Rubinstein to dismiss, denied appellant Tina Peters' motion for a preliminary injunction, and purported to enter "Final Judgment as to Defendant Daniel P. Rubinstein" on January 8, 2024 pursuant to FED.R.CIV.P. 54(b), expressly noting "that there is no just reason for delay." ADD-21-22. This judgment did not dispose of Ms. Peters' claims against the United States, Attorney General Garland, or Secretary of State Griswold. (Ms. Peters dismissed her claims against Secretary Griswold pursuant to FED.R.CIV.P. 41(a)(1) on January 28, 2024.)

Ms. Peters timely filed her notice of appeal to this Court on January 10, 2024. Ms. Peters filed her Docketing Statement form on January 22, 2024, responding affirmatively to the question whether the district court directed entry of judgment in accordance with Rule 54(b). However, acting *sua sponte,* this Court on January 23, 2024 entered an Order (Doc. 010110988503) concluding that the district court failed to make the determinations required by Rule 54(b) and giving Ms. Peters 30 days to file a copy of a district court order granting a "proper Rule 54(b) certification" or a final judgment for all claims. Ms. Peters complied on January 30, 2024, filing copies of the district court's Rule 54(b) certification (ADD-23) and amended final judgment. ADD-30.

In response, this Court entered an Order on February 1, 2024 (Doc. 010110993672) referring "the questions regarding the finality of the district court's judgment and the propriety of the Rule 54(b) certification" to the panel who will hear the merits of this appeal.

The district court's Rule 54(b) certification fully passes muster under the requirements set out by this Court in *Stockman's Water Co., LLC v. Vaca Partners, L.P.,* 425 F.3d 1263 (10th Cir. 2005). The district court carefully explained that the Rubinstein claims are distinct from the claims left unresolved in the litigation, ADD-25-27, and that there was no just reason to delay Ms. Peters' appeal. ADD-27-28. Thus this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

In the Constitution, "[t]he Framers split the atom of sovereignty" to establish a system of dual "political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc., v. Thornton,* 514 U.S. 779, 838 (1995)(Kennedy, J. concurring). The distinctive structure of the dual sovereignty created, and the liberties expressly guaranteed, by this constitutional scheme give rise to the issues in this case. These issues implicate a narrow category of rights "not to be tried" in state court necessary to enforce federal law and to assure the protection of the bedrock expressive rights guaranteed by the First Amendment. The issues in this case are:

1. Did the district court have the authority to abstain from an action seeking an injunction of a state prosecution on the grounds that the defendant is immune from that prosecution under the Supremacy Clause?

2. Did the district court abuse its discretion by abstaining from an action seeking an injunction of a state prosecution on the grounds that that prosecution was initiated to retaliate against the defendant's expression protected by the First Amendment?

STATEMENT OF THE CASE

I. Factual Background

A. Ms. Peters' Response to the Threatened Deletion of Election Records

1. On November 8, 2018, Ms. Peters was elected to a four-year term as County Clerk and Recorder of Mesa County, Colorado, an office created by the Colorado Constitution. COLO. CONST. Art. 14 § 8. Under Colorado law, each county clerk and recorder is the "chief election official for the county," and the "chief designated election official for all coordinated elections." C.R.S. §1-1-110(3).

Many of Ms. Peters' legal obligations as Mesa County's chief election official were dictated by federal law because every voting system used in an election of a federal officer must meet federal requirements. 52 U.S.C. § 21081(a). These federal requirements provide that the voting system must

"produce a record with an audit capacity for such system," 52 U.S.C. § 21081(a)(2)(A), which includes "a permanent paper record with a manual audit capacity." 52 U.S.C. §21081(a)(2)(B)(i). That record must be "available as an official record for any recount…." 52 U.S.C. § 21081(a)(20)(B)(iii). Most importantly for this case, another federal statute provides that "[e]very officer of election shall retain and preserve" for 22 months after an election for federal office "all records and papers … relating to any application, registration, payment of poll tax, or other act requisite to voting in such election." 52 U.S.C. § 20701 (ADD-32). Failure to comply with this duty exposed a clerk to not more than one year in prison, and a fine of not more than $1,000. *Id.* Colorado law also requires the designated election official to preserve election records for at least 25 months. C.R.C. §1-7-802 (ADD-32).

In addition, Colorado law adopts the Voting Systems Standards promulgated by the Federal Election Commission (now the Election Assistance Commission) in 2002 to govern the mechanics of elections in the State. C.R.S. §1-5-601.5. *See* Federal Election Comm'n, VOTING SYSTEMS STANDARDS, VOLUME I – PERFORMANCE STANDARDS (2002)("VOTING SYSTEMS STANDARDS"). The VOTING SYSTEMS STANDARDS define "voting system" to include "the software required to program, control, and support the equipment that is used to define ballots, to cast and count votes, to report and/or display election results, and to maintain and

produce all audit trail information." V.S.S. 1.5.1. The VOTING SYSTEMS STANDARDS direct that, "[t]o ensure system integrity, all systems shall … (m)aintain a permanent record of all original audit data that cannot be overridden but may be augmented by designated officials in order to adjust for errors or omissions." V.S.S. 2.2.4.1(h). The VOTING SYSTEMS STANDARDS require that "all audit trail information … shall be retained in its original format, whether that be real-time logs generated by the system, or manual logs maintained by election personnel." V.S.S. 2.2.11. The VOTING SYSTEMS STANDARDS underscore the importance of the preservation of auditable election records:

> Election audit trails provide the supporting documentation for verifying the correctness of reported election results. They present a concrete, indestructible archival record of all system activity related to the vote tally, and are essential for public confidence in the accuracy of the tally, for recounts, and for evidence in the event of criminal or civil litigation.

V.S.S. 2.2.5.1.

2. On April 30, 2021, Colorado Secretary of State Griswold's office issued a directive requiring local election officials to participate in installing the "Trusted Build upgrade" in their election management system ("EMS"). JA52[1]. While this directive required local election officials to back-up "election project" records, which Ms. Peters did, "election project" records did not include all the electronic

[1] "Trusted Build" is defined in the Election Rules promulgated by the Secretary of State at 8 CCR 1505-1.1.59, which describes "write-once installation disk or disks for software and firmware" in a county's computerized voting system server.

information that was essential for a post-election audit such as audit logs, access logs, and an image of the hard drive of the County's EMS server. JA52; JA544; JA576-77; JA570-71. The directive insisted that only state, county election, and the vendor's staff be present for the installation. If anyone else was present, the Trusted Build team would move on, and the county's election equipment would be shipped to Denver, where the upgrade would be installed without any scrutiny beyond that of Dominion Voting Systems, Inc., the vendor of the County's EMS, and Griswold's staff. JA53.

That month, David Stahl from Dominion advised Ms. Peters that Trusted Build would make it impossible to read the digital election records used in the 2020 general election in Mesa County and the 2021 municipal election in Grand Junction, a fact subsequently confirmed to Ms. Peters by Secretary Griswold's staff. JA543.

3. Alarmed that the Trusted Build upgrade would effectively destroy election records in violation of federal and state law, in April, 2021, Ms. Peters requested that the County make a copy of the Mesa County EMS hard drive, but her request was denied. Ms. Peters was then confronted by the dilemma of (i) the erasing of election records by Trusted Build, (ii) its installation under tightly closed circumstances beyond any public scrutiny, and (iii) no official technical staff available to her to preserve the records as required by law. To fulfill her federal and

state duties to preserve election records in these circumstances, Ms. Peters engaged a consultant, Conan Hayes, to make a forensic image of the EMS hard drive, which does not modify any data, contain voter choices, or cause any harm to the voting system. JA544 ("[A] forensic image is a bit-by-bit, unalterable (read only) copy of all elections records stored in the election management system.").

The County's EMS was in a secure room governed by Election Rule 20, "County Security Procedures." 8 C.C.R. §1505-1. *See* JA465 (photograph of room containing Mesa County's EMS server, tabulation workstations, and location of adjudication). Under Election Rule 20.5.3(a) access to this room was limited to county employees who had passed a criminal background check. However, Election Rule 20.5.3(b) also provided that "[e]xcept for emergency personnel, no other individuals may be present in these locations *unless supervised by one or more employees with authorized access*." (Emphasis added.) Mr. Hayes was not a county employee, but was accompanied and supervised by Ms. Peters each time he was in the EMS room.

Ms. Peters also arranged for Mr. Hayes to use the access badge of another consultant, Gerald Wood. Access badges were used to allow vendors to enter secure areas to perform various services, and were often labeled simply "Temp 1," "Temp 2," and so on, with no other identifying information. JA545. They

functioned very much like electronic hotel room keys, not official identification cards.

Mr. Hayes made the first forensic image on May 23, 2021, thereby preserving election records from the 2020 and 2021 elections. Trusted Build was installed on May 25, 2021. Mr. Hayes was present solely to observe. On the following day, Mr. Hayes made a second forensic image of the EMS hard drive, which captured only the newly installed software. JA545.

4. The forensic images secured by Ms. Peters were examined by experts. Cybersecurity expert Douglas Gould concluded that Trusted Build erased election records of the November 2020 election and the 2021 municipal election, overwriting records that were required to be preserved for future audits. JA567. Another expert, Walter Daugherity, concluded that the forensic images revealed an unusual phenomenon: after some of the ballots were recorded in a database, no further ballot data was recorded in it even though ballot processing was not complete. Rather, data from processing additional ballots was entered into a separate, newly created database. Some, but not all, of the data from the first database were copied into the new database, and hidden from election official in violation of federal auditability requirements. JA485-87.

5. In August 2021, Ms. Peters participated in a Cyber Symposium where she began to voice her concerns publicly about the integrity of the County's computerized voting system.

Ms. Peters' associates also presented her concerns at a September 1, 2021, meeting in County offices attended in person or virtually by representatives of U.S. Attorney General Garland, Mr. Rubinstein and members of his staff, personnel from Secretary Griswold's office, representatives of the State Attorney General, officers of Dominion, an FBI Special Agent, and members of the County Board of County Commissioners (the "Board"), among others. JA579-80. Nothing came of the meeting.

On September 17, 2021, Ms. Peters submitted to the Board the first of what was to be three reports from the experts who had analyzed the forensic images Ms. Peters had commissioned. In her cover letter, Ms. Peters explained:

> Enclosed is the first report from the cybersecurity experts who have analyzed thoroughly the two forensic images of the drive of the DVS Democracy Suite Election Management System in my office which we used for the management of the 2020 election. Because the report documents a substantial amount of data destruction during the May 25 "Trusted Build" conducted by the Secretary of State's office and the vendor, I wanted to get this in your hands immediately.
>
> … As you know, the legal duty to preserve election records falls solely to me and my office. "Extensive" amounts of data required to be preserved were instead destroyed, and done in a way that was totally beyond my control or knowledge. Among other things, these deletions would preclude a forensic audit of the last election. Thanks to the pre-Trusted Build image I had commissioned in May, these data have been

> preserved, in full compliance with my obligations under federal and state law, preserving the integrity of our county's election record archive and permitting a forensic audit if one were conducted.
>
> According to this report, the forensic examination has determined that this system and procedures "cannot meet the certification requirements of the State of Colorado and should not have been certified for use in the state." Obviously, this is highly relevant to any decision whether to continue to use these systems in our county.

JA67.

The full *Mesa County Colorado Voting Systems Report #1 with Forensic Examination and Analysis* can be found at JA68-JA149. In sum, Report #1 advised the Board:

> Forensic examination found that election records, including data described in th Federal Election Commission's 2002 Voting System Standards (VSS) mandated by Colorado law as certification requirements for Colorado voting systems, have been destroyed on Mesa County's voting system, by the system vendor and the Colorado Secretary of State's office. … The extent and manner of destruction of the data comprising these election records is consequential, precluding the possibility of any comprehensive forensic audit of the conduct of any involved election. This documented destruction also undermines the conclusion that these Colorado voting systems and accompanying vendor and Colorado Secretary of State-issued procedures could meet the requirements of Colorado and Federal law, and consequently vitiates the premise of the Colorado Secretary of State certification of these systems for use in Colorado.

JA71.

On March 1, 2022, Ms. Peters submitted to the Board *Mesa County Colorado Voting System Report #2: Forensic Examination and Analysis Report*. JA191-JA335. In her submission, Ms. Peters alerted the Board:

> As you know, I had these images taken to preserve election records and help determine whether the county should continue to utilize the equipment from this vendor. Because the enclosed report reveals shocking vulnerabilities and defects in the current system, placing my office and other county clerks in legal jeopardy, I am forwarding this to the county attorney and to you so that the county may assess its legal position appropriately. Then, the public must know that its voting systems are fundamentally flawed, illegal, and inherently unreliable.
>
> From my initial review of the report, it appears that our county's voting system was illegally certified and illegally configured in such a way that "vote totals can be easily changed." We have been assured for years that external intrusions are impossible because these systems are "air gapped," contain no modems, and cannot be accessed over the internet. It turns out that these assurances were false. In fact, the Mesa County voting system alone was found to contain thirty-six (36) wireless devices, and the system was configured to allow "any computer in the world" to connect to our EMS server. For this and other reasons—for example, the experts found uncertified software that had been illegally installed on the EMS server—our system violates the federal Voting System Standards that are mandated by Colorado law.

JA190. *See also* JA557-569(Gould Declaration discussing reports).

The Board took no action.

On April 23, 2022, a third report analyzing the forensic images, prepared by Dr. Daugherity and another computer expert, Jeffrey O'Donnell, was submitted to Mr. Rubinstein. JA484-487; JA336-JA422. Again, the report notes that election records from the November 2020 General Election and April 2021 Grand Junction

City Council Election "were improperly deleted by the so-called 'Trusted Build."

JA485. In addition, this report identified "an unusual phenomenon:"

> After some of the ballots were processed and their information recorded in a set of Microsoft SQL database tables for the respective election ("Set 1"), no further data were entered in Set 1 even though ballot processing was not complete. Rather, data from processing additional ballots were entered into a separate, newly created set of tables ("Set 2"). Further, some but not all of the data from Set 1 was copied into Set 2. Accordingly, neither Set 1 nor Set 2 contained all the data from counting all the ballots.
>
> … Because the creation of Set 2 hid Set 1 from election workers, breaking the chain of custody and violating federal auditability requirements, election officials had no way to examine or review the ballots in Set 1 which were not copied to Set 2. This calls into question the integrity of the vote counting process and the validity of the election results.

JA486-487.

Mr. Rubinstein and his investigator, Michael Struwe, neither of whom have any expertise in cyber security matters, submitted a response to the Board purporting to challenge the analysis of the Daugherity/O'Donnell report. JA459-482; JA711-712. Dr. Daugherity's declaration replies to the Rubinstein/Struwe claims. JA487-489. At bottom, the Rubinstein/Struwe response failed to acknowledge, much less explain, the fact that in two consecutive elections, the Mesa County voting system created an extra database that masked the actual election results.

B. The Campaign to Discredit and Punish Ms. Peters

1. Rather than seriously engage the substantive concerns raised by Ms. Peters and her experts in their presentations to the Board and her public discussion of their findings, Mr. Rubinstein participated in an *ad hominem* campaign with Secretary Griswold to suppress public knowledge of those concerns by personally discrediting Ms. Peters as at best an irresponsible, conspiratorial nut, at worst a corrupt partisan saboteur. That campaign ruthlessly employed the instrumentalities of law enforcement to harass Ms. Peters, Sherronna Bishop, and other associates of Ms. Peters. The execution of the search warrant at Ms. Bishop's residence in which Mr. Rubinstein's office actively participated was conducted with such excessive force and unnecessary destruction of property that it had the effect of discouraging individuals from associating with Ms. Peters and Mr. Bishop. JA580-582. The investigation culminated in an utterly baseless indictment on charges bizarrely disconnected from Ms. Peters' conduct.

A hallmark of this campaign was the astounding use in sworn, or otherwise supposedly trustworthy, legal documents of the bald lie that Ms. Peters acted unlawfully in making the forensic image of the County's EMS server. Thus the indictment of Ms. Peters, in its "Summary of Relevant Facts," speaks of the "unlawfully downloaded/imaged software from Mesa County's election management server's hard drive." JA526. Investigator James Cannon, in his

Affidavit in Support of Arrest Warrant for Ms. Peters, states, "It was later determined that someone unlawfully took a digital image of the entire Dominion hard drive on this date (05-23-21) for the specific purpose of analyzing the software and data. PETERS later publicly admitted to this act and this motive." JA513.

Again, these statements that the forensic images were made unlawfully are lies. Deputy Secretary of State Beall admitted under oath in other court proceedings that making the forensic images was not unlawful. JA556. Indeed, if having the forensic images made was unlawful, one would expect that Ms. Peters would have been charged with that "offense." Tellingly, not one count in the indictment against her concerns making such forensic images, or in any other way violating some law safeguarding the security of the machinery of elections. Ms. Peters violated no law in having the forensic images made.

2. Mr. Rubinstein never investigated, much less prosecuted, Secretary Griswold for her destruction of election records in violation of federal and state law. Yet, at the urging of Secretary Griswold's Deputy, Mr. Rubinstein launched an investigation of Ms. Peters in August 2021. Silencing and discrediting Ms. Peters' expression was the target of Mr. Rubinstein's and Secretary Griswold's maneuvers. In Election Order 2022-01, Secretary Griswold set out, like a bill of particulars, Ms. Peters' public statements expressing her concerns about election integrity,

JA174-175; demanded that she repudiate those concerns; and sought to impose a detailed regimen on Ms. Peters' conduct to control her future expression. When Ms. Peters refused, Secretary Griswold sued to replace Ms. Peters as Mesa County's designated election official, portraying her efforts to silence Ms. Peters as "security protocols," JA836, and describing Ms. Peters' simple compliance with federal and state election record retention laws in an over-the-top falsehood as "the first insider threats … [that] risked the integrity of the election system in an effort to prove unfounded conspiracy theories." JA836.

Ms. Peters was indicted 22 days after she announced her candidacy for Colorado Secretary of State, making her Secretary Griswold's direct competitor. JA548. Ms. Peters was arrested as if she were a violent criminal, and initially held on a $500,000 bond. While she was incarcerated, her father passed away. JA549. When she was finally released on a $25,000 bond after 30 hours in jail, Mr. Rubinstein insisted on bond conditions that effectively removed Ms. Peters from office, prohibiting her from contacting her employees or even entering her offices. *Id*. The day after the bond hearing, Mr. Rubinstein's investigator made harassing telephone calls to Ms. Peters' 93 year old mother, her daughter, and her sisters. *Id*. When Ms. Peters continued to speak publicly, Mr. Rubinstein moved to revoke her bond. *Id*. Although Ms. Peters never failed to appear in court, Mr. Rubinstein advised the court that she was a "flight risk" when Ms. Peters asked court

permission to use her passport to obtain TSA pre-check flight status for domestic travel. JA550.

Mr. Rubinstein's war on Ms. Peters' expression and compliance with federal and state law was never clearer than in his opposition to her request to attend an out-of-state event at which a movie advocating election transparency, in which she appeared, was premiering. In his opposition, Mr. Rubinstein describes the film as "the story of Tina Peters … who made a backup of her counties (sic) [EMS] server, only to stumble across evidence of manipulation." JA553. Ms. Peters, Mr. Rubinstein concludes, "is seeking permission to leave the state so that she can be celebrated as a hero for the conduct that a grand jury has indicted her for." JA554. Mr. Rubinstein's argument not only relies on the falsehood that Ms. Peters was indicted for making the forensic images, but drips with contempt for Ms. Peters' expressive rights and for the federal and state laws she was trying to uphold.

3. The indictment of Ms. Peters on March 8, 2022 in *People v. Peters*, Case No. 22CR371, strains to accuse her of a concatenation of alleged offenses, but includes no charge that she acted illegally in making the forensic images.

• Counts 1, 2 and 5 charge violations of C.R.S. §18-8-306 (making an attempt to influence any public official by "deceit … with the intent thereby to alter or affect the public servant's decision, vote, opinion, or action" a Class 4 felony) with respect to two of Secretary Griswold's employees, and a Mesa County

IT employee. JA523, JA524. These counts do not allege any specific "decision, vote, opinion or action" within the meaning of the statute – *i.e.*, some "formal exercise of government power," *McDonnell v. United States*, 579 U.S. 550, 578 (2016) – that Ms. Peters was supposedly trying to influence, nor do they allege facts showing that Ms. Peters acted with "deceit," that is, to "obtain money or property by false or fraudulent pretenses, representations or promises." *United States v. Kalu*, 791 F.3d 1194, 1204 (10th Cir. 2015). *See also People v. Janousek*, 871 P.2d 1189, 1196 (Colo. 1994)("Deceit" means a false representation used to defraud.). Ms. Peters' actions sought no money or property, but to preserve election records pursuant to federal and state law for public scrutiny in the face of obstacles improperly created by state officials desperately trying to remove any trace of them.

- Counts 4, 6, and 7 charge Ms. Peters with criminal impersonation and a conspiracy to commit criminal impersonation in violation of C.R.S. §§18-5-113(1)(B)(1) and 18-2-201. JA524-525. Again, these counts fail to give the minimally required detail to describe what the charge really is. *See United States v. Hathaway*, 318 F.3d 1001, 1009 (10th Cir. 2003); *People v. Buckallew*, 848 P.2d 904, 909 (Colo. 1993). They appear to focus on Mr. Hayes' use of Mr. Wood's access badge, but fail to allege how this amounted to "impersonation" legally,

instead cloaking their allegations in incendiary characterizations, such as the defendants' supposed "criminal scheme." JA527.

Colorado law recognizes that "there are lawful uses of assumed fictitious identities" and they are proscribed only when "undertaken to accomplish *unlawful* purposes." *People v. Gonzales*, 534 P.2d 626, 628 (Colo. 1975)(emphasis in original). *See also People v. Brown*, 562 P.2d 754, 756 (Colo. 1977)(Criminal impersonation requires assuming a false identity "to unlawfully gain a benefit or injure or defraud another."); *People v. Johnson*, 30 P.3d 718, 723 (Colo. App. 2000)(giving a false name to an arresting officer did not constitute criminal impersonation when there was no evidence "that the use of the false name would result in a benefit to the defendant.").

These counts allege no facts suggesting that Ms. Peters acted to secure some unlawful benefit or to injure or defraud.

• Count 8 arises from the use of Mr. Wood's access badge and a "Yubikey," charging Ms. Peters with "identity theft" in violation of C.R.S. §18-5-902(1)(A), which makes it a crime to use the "personal identifying information, financial identifying information or financial device of another without permission or lawful authority with the intent to obtain cash, credit, property, services, or any other thing of value or to make a financial payment." JA525. *See also* C.R.S. §18-1-901 ("'Thing of value' includes real property, tangible and intangible personal property,

contract rights, choses in action, services, confidential information, medical records information, and any rights of use or enjoyment connected therewith."). No allegation suggests that Ms. Peters acted to acquire cash or anything else of value. Indeed, no "personal identifying information" was involved in making the forensic images. The Yubikey is like a thumb drive, and was not used by anyone. And the access cards are not identification cards of the bearer, but temporary permission slips to enter certain facilities. JA545.

- Count 9 charges Ms. Peters with official misconduct in violation of C.R.S. §18-8-404(1), which makes it an offense for an official to knowingly engage in conduct relating to his office, to refuse to perform a duty required by his office, or to violate any law relating to his office "with intent to obtain a benefit for the public servant or another or maliciously to cause harm to another." JA525. *See People v. Dilger,* 585 P.2d 918, 919-20 (Colo. 1978); B. Covington, *State Official Misconduct Statutes and Anticorruption Federalism After Kelly v. United States*, 121 COLUM.L.REV.F. 273, 283 & n. 63 (2021)(Acting in good faith for the public benefit, but mistakenly, is a valid defense."). Allegations that Ms. Peters acted from any of the required corrupt motives are absent, which is not surprising, as there is no evidence that Peters had the forensic image of the election records made for any reason other than to comply with federal and Colorado law.

• Count 10 charges a violation of C.R.S. §1-13-107(1), alleging that Ms. Peters was an official "who … violated, neglected, or failed to perform [a] duty [imposed by the Colorado Code] or is guilty of corrupt conduct in the discharge of the same." JA525.The indictment does not specify what "duty" is at issue, much less whether Ms. Peters "violated, neglected, or failed to perform" it, or actually did discharge the unidentified duty, but engaged in unnamed "corrupt conduct" in doing so. Since making the forensic image was not unlawful, and Ms. Peters accompanied the consultant whenever he was in a secure area, *see* Rule 20.5.3(b), 8 CCR 1505-1, there was no basis for considering Ms. Peters' effort to stymie the illegal destruction of election records "corrupt."

• Finally, Count 11 charges a violation of C.R.S. §1-13-114, alleging that Ms. Peters interfered or refused to comply with the Secretary of State's rules. JA525. The indictment does not specify the rules Ms. Peters refused to obey, but no allegation challenges the fact that all of Ms. Peters' acts were directed at ensuring election records were preserved as required by statutes that are superior to the Secretary's rules. *See Hanlen v. Gessler*, 333 P.3d 41, 49 (Colo. 2014) ("[T]he Secretary lacks authority to promulgate rules that conflict with statutory provisions."); C.R.S. §24-2-103(8)(a) ("Any rule … which conflicts with a statute shall be void."). Any rule arguably violated by Ms. Peters was void as applied.

II. Procedural Background

Ms. Peters filed her Complaint for Declaratory and Injunctive Relief on November 14, 2023 (ECF No. 1), and her Motion for Preliminary Injunction on November 27, 2023 (ECF No. 8). On December 13, 2023, Mr. Rubinstein filed his Motion to Dismiss for Lack of Jurisdiction (ECF No. 23), to which Ms. Peters filed her Opposition on December 15, 2023 (ECF No. 30). On December 22, 2024, Ms. Peters filed her First Amended Complaint for Declaratory and Injunctive Relief (ECF No. 33). Also on December 22, 2024, the District Court granted Ms. Peters' Unopposed Motion for Leave to File Amended Opposition to Motion to Dismiss, which construed the Motion to Dismiss as directed at the First Amended Complaint (ECF No. 35). Mr. Rubinstein filed his Reply to Ms. Peters' Opposition on December 28, 2023 (ECF No. 38). On January 8, 2024, the District Court entered its Order on Motion to Dismiss, concluding that "abstention is appropriate," and so granting Mr. Rubinstein's Motion without prejudice, ADD-1-20, entering Final Judgment as to Defendant Daniel P. Rubinstein, and denying Ms. Peters' Motion for Preliminary Injunction as moot. ADD-21-22. The district court's sole grounds for the dismissal is that Ms. Peters "failed to establish an exception to the *Younger* doctrine of abstention." ADD-1.

Ms. Peters filed her Notice of Appeal to this Court on January 10, 2024 (ECF No. 41). After Peters filed her Docketing Statement with the Clerk of this

Court, the issue raised *sua sponte* by this Court regarding the District Court's compliance with FED.R.CIV.P. 54(b) was addressed by the District Court by entering an Amended Final Judgment (ECF No. 56), as previously described in the Jurisdictional Statement. That jurisdictional issue has been reserved for consideration on the merits by the panel to which the appeal has been assigned.

On January 19, 2024, Ms. Peters filed an Emergency Motion for Injunction and for Expedited Review. Mr. Rubinstein's Response was filed on January 29, 2024. Ms. Peters filed her Reply on February 2, 2024. An Order was entered on February 5, 2024, by Judges Hartz and Matheson denying Ms. Peters' Emergency Motion.

STANDARD OF REVIEW

A district court's decision to abstain under the *Younger* doctrine is reviewed *de novo*. *Courthouse News Serv. v. New Mexico Admin. Off. of Cts*, 53 F.4th 1245, 1254 (10th Cir. 2022).

SUMMARY OF ARGUMENT

This case arose from the "Trusted Build upgrade" to Mesa County's EMS server directed by Secretary of State Griswold. Ms. Peters, serving as County Clerk and chief election official, reasonably determined that this upgrade would overwrite and delete election records in violation of her duties under the record-retention requirements mandated by federal and state law. The County having

denied her request to make a copy of the server, Ms. Peters arranged to have a consultant make a forensic image of the EMS server both before and after the installation of the upgrade. Those images were given to three cybersecurity experts for analysis. They produced detailed technical reports which, among other things, confirmed that election records deleted by the Trusted Build installation and concluded that uncertified software on the EMS server enabled the creation of a separate database of ballots that was hidden from election officials' scrutiny. Ms. Peters submitted these reports to the County Board, asking the Board to terminate the use of this computerized voting system because of its vulnerabilities, and attempted to inform the public through various forums of the flaws in the integrity of the County's computerized voting system that the analyses of these forensic images exposed.

Rather than substantively and professionally addressing the concerns raised by these analyses, Mr. Rubinstein and Secretary Griswold launched a campaign to discredit and harass Ms. Peters and her colleagues, and so suppress the information concerning the vulnerabilities of the County's voting system. Mr. Rubinstein falsely accused Ms. Peters of violating the law by having the forensic images made, and launched a criminal investigation executing searches of the homes of Ms. Peters and her associates with excessive force and destruction of property. The investigation culminated in a baseless indictment.

Ms. Peters brought this action to enjoin that state prosecution on two grounds. First, Ms. Peters contends that the only purpose of the conduct that forms the basis of the state indictment was to comply with federal requirements concerning the retention of election records. As a result, she is entitled to immunity from the state prosecution under the Supremacy Clause of the U.S. Constitution and the Privileges and Immunities Clause of the Fourteenth Amendment. This immunity applies irrespective of the merits of the state prosecution. Second, the state prosecution should be enjoined because its purpose is to retaliate against her for her exercise of First Amendment rights in speaking out about violations of federal and state statutes by Colorado officials and the vulnerabilities in the County's computerized voting system, association with others to advance shared objectives, in petitioning the Board of County Commissioners to terminate its use of a computerized voting system because of its vulnerabilities.

The district court dismissed the case on the ground that abstention was appropriate under the doctrine of *Younger v. Harris.* Ms. Peters contends that since the state court has no subject-matter jurisdiction in light of Ms. Peters' immunity under the Supremacy Clause, abstention was inapposite; the district court was abstaining in favor of no legitimate state proceeding. In addition, the district court's abstention was an abuse of the court's discretion in light of the exception to

Younger abstention designed to protect First Amendment expression in the face of bad faith state prosecutions like that launched against Ms. Peters.

The district court's order dismissing this case should be reversed and (1) the matter either remanded to the district court to address the issue of Ms. Peters' immunity under the Supremacy Clause and the Privileges or Immunities Clause of the Fourteenth Amendment, or enter an order granting Ms. Peters immunity pursuant to those constitutional provisions; and (2) an injunction granted to Ms. Peters to prohibit her prosecution by Rubinstein based on her First Amendment retaliation claim.

ARGUMENT

I. The District Court Could Not Abstain From This Case Because Ms. Peters' Efforts to Comply With Federal Election Law Were Immune From State Prosecution Under the Supremacy Clause.

A. Supremacy Clause Immunity Deprives a State Court of Jurisdiction Over a State Prosecution Arising from Conduct Undertaken Pursuant to Federal Law Regardless of the Merits of That Prosecution.

The Supremacy Clause provides:

> This Constitution, and the Laws of the United States … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. As a result, "the states have *no power* … to retard, impede, burden, or in any manner control" the execution of federal law. *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819) (emphasis added). The immunity that Ms.

Peters claims is "rooted" in the Supremacy Clause. *Wyoming v. Livingston*, 443 F.3d 1211, 1217 (10th Cir. 2006). At bottom,

> The Constitution implicitly reserves to the federal government the power not only to enforce its laws but also to "execute its functions"; that power is inherent in the federal government qua government, and does not depend on congressional authorization. Supremacy Clause immunity is simply a reflection of that power.

Seth Waxman & Trevor Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2250 (2003)(internal citations omitted)("*What Kind of Immunity?*").

Supremacy Clause immunity, though not often the subject of litigation, has been recognized for over a century, since the landmark case of *Cunningham v. Neagle,* 135 U.S. 1 (1890), which held a deputy marshal immune from state prosecution for murder when he killed a man he suspected was about to stab Justice Stephen Field. The Court put the principle in no uncertain terms: "[I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under ... [state] law ...." *Id.*, at 75 (emphasis added). Justice Holmes echoed the point in *Johnson v. Maryland*: "[E]ven the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a

marshal of the United States acting under and in pursuance of the laws of the United States." 254 U.S. 51, 56-57 (1920).

Supremacy Clause immunity deprives a state court of subject-matter jurisdiction. Officers "discharging duties under federal authority pursuant to and by virtue of valid federal laws, are not subject to arrest or other liability under the laws of the state in which their duties are performed." *Ohio v. Thomas,* 173 U.S. 276, 283 (1899). "[B]y providing immunity from suit rather than a mere shield against liability, the defense of federal immunity protects federal operations from the chilling effect of state prosecution." *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004). Indeed, the goal of Supremacy Clause immunity "is not only to avoid the possibility of *conviction* of a federal agent, but also to avoid the necessity of undergoing the entire process of the state criminal procedure." *Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988)(emphasis in original). *See also Livingston*, 443 F.3d at 1221("Both qualified immunity and Supremacy Clause immunity reduce the inhibiting effect that a civil suit or prosecution can have on the effective exercise of official duties by enabling government officials to dispose of cases against them at an early stage of litigation."); *Texas v. Kleinert*, 143 F. Supp. 3d 551, 556 (W.D. Tex. 2015), *aff'd,* 855 F.3d 305 (5th Cir. 2017)(When Supremacy Clause immunity applies, "[a] state court is without jurisdiction to prosecute a federal officer."); *Arizona v. Files*, 36 F. Supp. 3d 873, 877 (D. Ariz. 2014)("Once

a Supremacy Clause immunity defense is established, it is not left to a federal or state jury to acquit the defendant of state-law criminal charges, or to a federal or state judge to direct a verdict in the defendant's favor; the federal or state court is instead stripped of any jurisdiction over the defendant.").

Supremacy Clause immunity "extends to any person, including a private citizen like defendant, who acts under the direction and control of federal authorities or pursuant to federal law or court order." *Connecticut v. Marra*, 528 F. Supp. 381, 385 (D. Conn. 1981). Supremacy Clause immunity has protected a railroad clerk selling tickets pursuant to a federal court order which contradicted state law, *Hunter v. Wood*, 209 U.S. 205 (1908), private individuals supporting an FBI undercover operation, *Brown v. Nationsbank Corp.*, 188 F.3d 579 (5th Cir. 1999), members of a posse comitatus called upon to assist a federal marshal, *West Virginia v. Laing,* 133 F. 887 (4th Cir. 1904), and the foreman of a private construction gang building a federally authorized telegraph line, *Ex Parte Conway*, 48 F. 77 (C.C.D.S.C.1891).

The Supremacy Clause operates to "secure federal rights by according them priority *whenever* they come in conflict with state law." *Chapman v. Hous. Welfare Rights Org.,* 441 U.S. 600, 613 (1979)(emphasis added). It "precludes the use of state prosecutorial power to frustrate the legitimate and reasonable exercise of federal authority," *Livingston,* 443 F.3d at 1213, blocking interference "with the

operation of the federal government in ways much subtler than passing inconsistent laws." *Idaho v. Horiuchi*, 253 F.3d 359, 364–65 (9th Cir.), *vacated as moot,* 266 F.3d 979 (9th Cir. 2001)(citing cases). Supremacy Clause immunity is triggered *by definition* when state authorities claim that federal law is being enforced by "illegal means" under state law.

In *Livingston,* for example, federal officials were held immune from prosecution for their violations of state trespass and littering laws to install monitoring devices on wolves. *Livingston,* 443 F.3d at 1213-15. And, as Justice Holmes in *Johnson v. Maryland* pointed out, Supremacy Clause immunity can shield a federal actor even when state law involves life-and-death interests. In *Petition of McShane,* 235 F.Supp. 262 (N.D.Miss. 1964), Supremacy Clause immunity protected federal marshals from state prosecution when they violated state laws concerning breach of the peace and the unlawful use of force by provoking a riot in which people were killed in their efforts to secure James Meredith's entrance into the University of Mississippi. In *Clifton v. Cox,* 549 F.2d 722 (9th Cir.1977), a federal agent, mistakenly believing that one of his team had been shot, fatally shot the subject of an arrest warrant in the back as he tried to run away. *Id.,* at 724. The Ninth Circuit held that the agent was entitled to Supremacy Clause immunity from state prosecution for second-degree murder and involuntary manslaughter. *Id.*, at 728. "In short, a federal officer's entitlement to immunity

from state criminal prosecution does not depend on an assessment of his conduct under state law." *What Kind of Immunity?* at 2234. Rather, "entitlement to Supremacy Clause immunity is to be ascertained by looking only at federal law." *Id.,* at 2233.

B. Ms. Peters Is Entitled to Supremacy Clause Immunity From Any State Prosecution Arising Out of Her Efforts to Comply With Federal Election Law.

1. A claim that Ms. Peters is entitled to Supremacy Clause immunity is a foundation of this lawsuit. As both the original Complaint and the First Amended Complaint announced at the outset: "This action is grounded on the elementary proposition of law that a command of a state officer, in whatever form, which as applied would compel a county official to violate a federal or state statute has no standing as a legitimate, legally binding command, and so has no force or effect." JA10, JA691. They went on to allege:

> Pursuant to the Privileges and Immunities Clause in the Fourteenth Amendment and the Supremacy Clause in Article VI of the United States Constitution, a citizen of the United States, including a state or local official like Peters, is immune from prosecution for alleged violations of state law when that law is applied to prevent that citizen from complying with the requirements of a federal statute.

JA44, JA725.

Ms. Peters also argued that Supremacy Clause immunity shielded her from state prosecution in her Motion for a Preliminary Injunction, at 15-17 (filed Nov. 27, 2023)(ECF No. 8), though she did not raise it again in her opposition to Mr.

Rubinstein's Motion to Dismiss for Lack of Jurisdiction (filed Dec. 13, 2023)(ECF No. 23).

The district court did not even mention Supremacy Clause immunity in its opinion granting the Motion to Dismiss, notwithstanding the central role it plays in Ms. Peters' case. This is a curious omission, as the district court made a point of justifying its consideration of "evidence outside the four corners of the operative pleading," ADD-11, including taking "judicial notice of the court filings of its own docket." ADD-12.

Most striking is the fact that the district court acknowledged that Ms. Peters "contends that her actions related to the trusted build were efforts to protect the integrity of the election process and to comply with federal law to maintain election records." ADD-4. The district court went on to expressly note that Ms. Peters' Complaint "alleges that Defendants Griswold and Rubinstein … have undertaken an investigation and prosecution of Ms. Peters in violation of federal law, namely, in retaliation for Ms. Peters' exercise of her above-delineated First Amendment rights and her efforts to comply with federal law with respect to the maintenance of voting records, in violation of her privileges and immunities as a citizen under the Fourteenth Amendment." ADD-5. Nevertheless, the district court never addressed these issues which so clearly impact any application of abstention doctrine.

While it was error for the district court not to address the Supremacy Clause immunity claim, that claim is jurisdictional and cannot be waived or ignored. *Sheldon v. Golden Bell Retreat*, 2023 WL 8539442, at *2 (10th Cir. Dec. 11, 2023). That is, if Supremacy Clause immunity applies – as we contend it clearly does – the state court has no subject-matter jurisdiction to adjudicate the prosecution of Ms. Peters, and so the district court had no state proceeding in favor of which it could abstain.

2. Supremacy Clause immunity applies to the conduct of (a) a federal official taken within his federal authority (b) that "he reasonably believed … were necessary and proper in the performance of his duties." *United States v. Moll,* 2023 WL 2042244, at *7 (D. Colo. Feb. 16, 2023)(quoting *Hawaii v. Broughton,* 2013 WL 328881, at 5 (D. Haw. June 28, 2013).

The first "question is not whether federal law expressly authorizes violation of state law, but whether the federal official's conduct was reasonably necessary to the performance of his duties." *Livingston,* 443 F.3d at 1227-28. Ms. Peters, serving as her County's designated election official, had an undisputable federal duty under 52 U.S.C. §20701's command that "every officer of election shall retain and preserve" election records for 22 months after an election. She acted as a federal official executing federal law.

Second, the officer must have had "an objectively reasonable and well-founded basis to believe that his actions were necessary to fulfill his duties." *Livingston,* 443 F.3d at 1222. Importantly, "Supremacy Clause immunity cases require courts to evaluate the circumstances as they appear to federal officers at the time of the act in question, rather than the more subtle and detailed facts later presented to a court." *Id.,* 1229. With less than a month's notice of the installation of the Trusted Build upgrade, the County having denied her request to copy the EMS hard drive, and the Secretary of State's Office imposing severe conditions to ensure the lack of public scrutiny of the upgrade, Ms. Peters fulfilled her federal duty without disrupting the upgrade. Ms. Peters discretely engaged a consultant who made forensic images of the EMS hard drive while under her supervision, all fully consistent with applicable security procedures. No evidence suggests that Ms. Peters acted for reasons other than to fulfill her federal duty; no evidence indicates she acted for private gain or out of maliciousness. Ms. Peters' conduct was a measured response to the dilemma confronting her as she fairly understood it, fitting comfortably within the bounds of Supremacy Clause immunity. *See Long,* 837 F.2d at 745 ("immunity applies where the defendant 'had no motive other than to discharge his duty under the circumstances as they appeared to him and that he

had an honest and reasonable belief' that his actions were necessary and proper," even if "his belief was mistaken or his judgment poor.").[2]

II. The District Court Abused Its Discretion in Abstaining Because the State Prosecution Was Brought to Punish Ms. Peters for Her Constitutionally Protected Speech Concerning the Vulnerabilities of Mesa County's Election System and to Suppress Public Consideration of the Evidence of Those Vulnerabilities, and Because the State Judge Had Excluded Those Issues From Those Proceedings.

"Because of the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them, the Supreme Court has repeatedly cautioned that [a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Courthouse News,* 53 F.4th at 1255 (internal quotations omitted). Abstention under *Younger v. Harris,* 401 U.S. 37 (1971), requires a federal court to refrain from hearing an action that would interfere with on-going state court proceedings. *Joseph A. ex rel. Corrine Wolfe v. Ingram*, 275 F.3d 1253, 1267 (10th Cir. 2002). However, *Younger* abstention does not apply when the state court proceedings are corrupted by bad faith, commonly in retaliation for the defendant's exercise of

[2] The dynamic of the Supremacy Clause is reflected in the Fourteenth Amendment's Privileges or Immunities Clause, which, even within its narrow scope, protects "the right of the citizen of this country…to engage in administering [the national government's] functions." *Slaughter-House Cases,* 83 U.S. 36, 79 (1872). *See also In re Quarles,* 158 U.S. 532, 535 (1895). Peters' efforts to comply with federal law surely qualify for protection as such a privilege and immunity, especially in the context of combating the potential corruption of federal elections. *Cf. United States v. Classic,* 313 U.S. 299, 316 (1941); *The Ku-Klux Klan Cases,* 110 U.S. 651, 666-67 (1884).

constitutional rights, *Phelps v. Hamilton*, 59 F.3d 1058, 1065 (10th Cir. 1995), or when they will not afford an adequate opportunity to raise federal claims. *Joseph A.*, 275 F.3d at 1267. Both of these attributes barring *Younger* abstention are evident here.

A. The State Prosecution of Ms. Peters Was Brought in Bad Faith to Punish Her Exercise of Her First Amendment Rights.

It is a well-established "constitutional precept that a prosecution motivated by a desire to discourage expression protected by the First Amendment is barred and must be enjoined or dismissed, irrespective of whether the challenged action could possibly be found to be unlawful." *United States v. P.H.E., Inc.*, 965 F.2d 848, 853 (10th Cir. 1992). *See also Cullen v. Fliegner,* 18 F.3d 96, 103–04 (2d Cir.1994)("[A] refusal to abstain is also justified [even when there is a reasonable expectation of a successful prosecution] where a prosecution ... has been brought to retaliate for or to deter constitutionally protected conduct."); *Fitzgerald v. Peek,* 636 F.2d 943, 945 (5th Cir. 1981)("A [showing of retaliation] will justify an injunction regardless of whether valid convictions could conceivably be obtained.").

In *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965), the Court recognized "the sensitive nature of constitutionally protected expression" to be "of transcendent value to all society." Consequently,

> we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, *unaffected by the prospects of its success or failure*.

Id., at 487 (emphasis added). As this Court put it, "the actual act of going to trial under a pretextual prosecution has a chilling effect on protected expression." *P.H.E.*, 965 F.2d at 856. *See also Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S.Ct. 63, 67 (2020)("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") Thus the First Amendment entails a "right not to be tried." *P.H.E.*, 965 F.2d at 856.

The investigation and prosecution of Ms. Peters is part of an unmistakable, no-holds-barred campaign to discredit and punish Peters for exercising her right (and duty) to comply with federal law to preserve election records and to speak truthfully to the public and to County decision-makers about the election integrity problems those records exposed.

As discussed above, sworn declarations and uncontroverted documentary evidence demonstrate that Mr. Rubinstein brought the prosecution to retaliate against Ms. Peters for her exercise of her First Amendment rights, specifically (1) for making the forensic images of the County's EMS server (an activity protected by the First Amendment, *see Irizarry v. Yehia,* 38 F.4th 1282, 1289-92 (10th Cir. 2022)); and (2) for speaking publicly about the deletion of election records and the

uncertified software on the EMS server those images revealed. The plainly apparent deficiencies in each of the counts of the indictment demonstrate the bad faith of Mr. Rubinstein in prosecuting Ms. Peters.

Whether or not there is probable cause for the charges in the indictment does not somehow inoculate it from the baleful effects of Mr. Rubinstein's bad faith and improper motivation. As this Court has put it:

> [I]f prosecutions are brought for the purpose of chilling or preventing a defendant from exercising his or her constitutional rights, this may constitute a harassing and/or bad faith prosecution, *even though the charges are predicated on probable cause*.

Phelps, 59 F.3d at 1064 n.12 (emphasis added); *see also P.H.E.,* 965 F.2d at 853; *Cullen,* 18 F.3d at 103-04; *Fitzgerald,* 636 F.2d at 945. The *Dombrowski* Court put it plainly. That the state courts might conclude that the prosecution was justified was "irrelevant" because it "would merely mean that that appellants might ultimately prevail in the state courts" and "would not alter the impropriety of the prosecution brought in bad faith to harass the appellants." 380 U.S. at 485.

Younger itself acknowledged the irreparable injury that justified a federal court's intervention when state prosecutions were brought to harass the exercise of "freedoms of expression." 401 U.S. at 47-48. The relevant injury is not a potential state court error, the possible withholding of exculpatory evidence from Ms. Peters, the improper custody of Ms. Peters, the cost, anxiety, and inconvenience of defending against the prosecution, denial of a preemptory challenge, an improperly

constituted jury, denial of the right to counsel, or any injury other than the violation of Peters' First Amendment rights. It is not the general grab-bag of constitutional rights – important as they are – that is at stake here. Rather, this retaliatory prosecution threatens Ms. Peters' rights of expression guaranteed by the First Amendment, rights of "transcendent value to all society." *Dombrowski,* 380 U.S. at 486.

B. The State Judge Has Foreclosed Consideration of Ms. Peters' Federal Constitutional Claims in the State Proceedings.

In her criminal case, Ms. Peters' argument for her subpoenas for the EMS hard drives of a neighboring county underscored the importance to her defense of her compliance with federal election-record-retention statutes and the unlawful deletion of records and the creation of unauthorized databases. JA811-112, JA819, JA820-821, JA827. "The certification of the trusted build, the presence of non-certified software, additional election databases, and the subsequent destruction of election records will be key issues at trial." JA823. She pointed out that the subpoenaed hard drives would provide admissible evidence to rebut Rubinstein's claims about his investigation, going "to the heart of the case.". JA826.

The judge granted the motion to quash, tersely foreclosing any consideration of the critical matters Peters had outlined:

> [T]he issue of election equipment is collateral. The jury will not be asked to address any questions regarding the functioning of election equipment. The issues in this case are whether Defendant attempted to

> deceive public servants, engaged in criminal impersonation, and the like. As such, any report regarding the verity of the election equipment made by her experts, or any computer expert, is entirely irrelevant. These reports make no issue of material fact in this case more or less likely. This criminal case is not the forum for these matters.

JA541.

The district court agreed, citing this Court's opinion in *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n,* 319 F.3d 1211 (10th Cir. 2003) for the proposition that "a plaintiff has an adequate opportunity to raise federal constitutional claims in state court unless state law clearly bars their interposition." ADD-13. The district court then used this formulation to avoid the significance of the state judge's ruling by concluding that Ms. Peters failed to show that *state law* barred her from raising her constitutional claims. *Id.* But *Crown Point* does not support the district court's formulation.

What this Court actually said in *Crown Point* was: "*Typically,* a plaintiff has an adequate opportunity to raise federal claims in state court 'unless state law clearly bars the interposition of the [federal statutory] and constitutional claims.'" 319 F.3d at 1215 (emphasis added, internal citation omitted). In *Crown Point* Colorado law did not bar the plaintiff's federal claims. *Id.* But like the state judge in *People v. Peters*, the state judge in *Crown Point* made a ruling that precluded consideration of the plaintiff's federal claims. As the *Crown Point* Court explained:

> However, because the state court found that plaintiff was collaterally estopped from raising its due process claims due to the federal court's

> dismissal on the merits, it did not have an opportunity to raise its federal claims in the state court proceedings prior to the state court's grant of immediate possession to Intermountain.

Id. As a result, the Court went on, "[t]he unique posture of the case leads us to the conclusion that this is not one of the rare circumstances in which *Younger* abstention is applicable." *Id.,* at 1216. The same "unique posture" is evident here, leading to the same conclusion that *Younger* abstention is not applicable here.

The district court went so far as to wrongly contend that the adjudication of the motion to quash *was* the opportunity for Ms. Peters' constitutional claims to be heard. ADD-4-15. The district court ignored the fact that the state judge never considered the merits of Ms. Peters' federal constitutional claim. To the contrary, he simply concluded that those merits would not be adjudicated in the prosecution of Ms. Peters. Plainly, Ms. Peters' federal constitutional claims have been ruled out-of-bounds in the state prosecution, and her "right not to be tried" will be brushed aside. According to the district court's reasoning, the best Ms. Peters can hope for is success somewhere up the appellate chain, the very protracted process that *Dombrowski* and its progeny consider an irreparable injury to her First Amendment rights.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of this case, and

A. (i) remand the case to the district court to adjudicate Ms. Peters' claim to immunity from state prosecution and for an injunction of any further proceedings in *People v. Peters*, or (ii) enter judgment that Ms. Peters is immune from state prosecution and enjoin any further proceedings in *People v. Peters*;

B. enter a permanent injunction that prohibits Mr. Rubinstein from continuing to use the state criminal process to punish her for exercising her First Amendment rights and to deter her from pursuing her efforts to speak out about the need for reform of the election system, to associate with others for that purpose, and to petition her government to end its use of a computerized voting system; and

C. enter a declaratory judgment that Mr. Rubinstein's attempts to prosecute her for exercising her rights of free expression and of association with others who share her commitment, and to petition her government for the redress of grievances constituted a violation of the First Amendment to the United States Constitution.

Respectfully submitted,

/s/ *Patrick M. McSweeney*

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STATEMENT REGARDING ORAL ARGUMENT

Ms. Peters respectfully requests oral argument. This appeal asks the Court to address important, and not often litigated, issues concerning the immunity of those complying with federal law from state prosecution for their conduct and the protection of rights guaranteed by the First Amendment from harassment by the manipulation of the machinery of state law enforcement. Oral argument is likely to assist the Court in adjudicating these weighty and complicated issues.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 9,821 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

Dated: March 12, 2024

Respectfully submitted,

/s/ Patrick M. McSweeney
Patrick M. McSweeney

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Webroot Endpoint Protection v.9.0.31.86, March 12, 2024, and according to the program are free of viruses.

/s/ Patrick M. McSweeney

Patrick M. McSweeney

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2024 I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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ADDENDUM

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Nina Y. Wang

Civil Action No. 23-cv-03014-NYW-SKC

TINA PETERS,

Plaintiff,

v.

UNITED STATES OF AMERICA,
MERRICK B. GARLAND, in his official capacity as Attorney General of the United States,
JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and
DANIEL P. RUBINSTEIN, in his official capacity as District Attorney for the Twenty-First Judicial District,

Defendants.

ORDER ON MOTION TO DISMISS

In this action, Plaintiff Tina Peters asks this Court to intervene to prevent the State of Colorado from prosecuting her for various criminal charges brought pursuant to a grand jury indictment. *See* [Doc. 8; Doc. 33 at 39–43]. Defendant Daniel P. Rubenstein moved to dismiss Plaintiff's claims for declaratory and injunctive relief brought against him in his official capacity, arguing that this Court must abstain from interfering with the ongoing state prosecution. Based on the record before it, this Court concludes that Ms. Peters has failed to establish an exception to *the Younger* doctrine of abstention and accordingly, abstention is appropriate.

BACKGROUND

The court draws the following facts from the First Amended Complaint for Declaratory and Injunctive Relief (the "First Amended Complaint"),[1] [Doc. 33], and the docket for the United States District Court for the District of Colorado.[2] Plaintiff Tina Peters ("Plaintiff" or "Ms. Peters") is the former Clerk and Recorder for Mesa County, Colorado. [*Id.* at ¶ 5]. On March 8, 2022, a grand jury for Mesa County, Colorado, returned an Indictment against Ms. Peters (the "Indictment" or "Mesa County Indictment"), charging her with 10 criminal counts arising from the Colorado Secretary of State's trusted build election management software update (the "trusted build") that was scheduled to begin in Mesa County on May 25, 2021. [Doc. 1-28].

The Mesa County Indictment alleges that on April 16, 2021, Jessi Romero ("Mr. Romero"), the Voting Systems Manager with the Colorado Secretary of State, informed Mesa County's election staff that only required personnel from Dominion, the Secretary of State, and Mesa County would be permitted to observe the trusted build, but that the

[1] Ms. Peters filed her initial Complaint for Declaratory and Injunctive Relief, [Doc. 1], on November 14, 2023. On December 22, 2023, Ms. Peters filed the First Amended Complaint as a matter of right, within 21 days of the filing of Defendant Rubinstein's Motion to Dismiss on December 13, 2023. [Doc. 33]; *see also* Fed. R. Civ. P. 15(a)(1)(B).

[2] Courts may take judicial notice of and consider documents on their own dockets on a motion to dismiss without converting it into a motion for summary judgment. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006). Ms. Peters has also engaged in motions practice and made certain representations about her state criminal prosecution in *Coomer v. Lindell*, Case No. 22-cv-01129-NYW-SKC (D. Colo.). This Court takes judicial notice of that docket and to the extent it relies on certain documents from that docket, uses the convention of *Coomer*, Case No. 22-cv-1129, ECF No. ___. In addition, this Court may take judicial notice of the state court docket in *People v. Peters*, No. 22CR371. *See St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979) (observing that, whether requested by the parties or not, "federal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue").

trusted build would occur under camera, and members of the public could review the footage afterward. [Doc. 1-28 at 9–10]. On April 26, 2021, the Indictment alleges, Mr. Romero informed Ms. Peters and other clerks across Colorado that if unauthorized individuals were onsite during the trusted build, the Secretary of State would "move on to the next county." [*Id.* at 10]. According to the Indictment, by the end of the day on May 17, 2021, the security cameras in the trusted build area had been turned off and remained non-operational through the entire installation process, and on the day of the trusted build, Ms. Peters introduced a person named "Gerald Wood," who participated in the trusted build process. [*Id.* at 11–12]. The actual Gerald Wood later denied accessing the Mesa County Clerk and Recorder's Office, either on the date of the trusted build or on other dates that a key card assigned to him was utilized. [*Id.* at 12]. In August 2021, Secretary of State employees learned that images of the Mesa County election management systems and related passwords were available on the internet and issued Election Order 2021-01, directing Ms. Peters and the Mesa County Clerk and Recorder's Office to provide certain information, documentation, communications, and images related to the May 2021 trusted build. [*Id.*].

Plaintiff is charged with three counts of Attempt to Influence a Public Servant, in violation of Colo. Rev. Stat. § 18-8-306; two counts of Conspiracy to Commit Criminal Impersonation, in violation of Colo. Rev. Stat. §§ 18-5-113(1)(B)(I), 18-2-201; one count of Criminal Impersonation, in violation of § 18-5-113(1)(B)(I); one count of Identity Theft, in violation of Colo. Rev. Stat. § 18-5-902(1); one count of First Degree Official Misconduct, in violation of Colo. Rev. Stat. § 18-8-404; one count of Violation of Duty, in violation of Colo. Rev. Stat. § 1-13-107(1); and one count of Failure to Comply with

Requirements of Secretary of State, in violation of Colo. Rev. Stat. § 1-13-114. [Doc. 28-1 at 1–2]. Ms. Peters's trial has been continued twice upon her request, first from March 2023 to August 2023, [*Coomer*, Case No. 22-cv-1129, ECF No. 111-1 at ¶ 3], and now to February 24, 2024. [Doc. 20 at 2]. Ms. Peters disputes these factual allegations and criminal charges. She contends that her actions related to the trusted build were efforts to protect the integrity of the election process and to comply with federal law to maintain election records. *See generally* [Doc. 33].

Believing that the state prosecution and associated state and federal investigations of her election-related activities were in retaliation for her public challenges to the validity of the 2020 presidential election and the reliability of the electronic voting system used by Mesa County as well as her criticism of the trusted build, Ms. Peters initiated this action on November 14, 2023, against the United States of America; Defendant Merrick B. Garland, in his official capacity as Attorney General of the United States ("Defendant Garland" or "Attorney General Garland");[3] Defendant Jena Griswold, in her official capacity as Colorado Secretary of State ("Defendant Griswold" or "Secretary of State Griswold"); and Defendant Daniel P. Rubinstein, in his official capacity as District Attorney for Mesa County, Colorado, ("Defendant Rubinstein" or "District Attorney Rubinstein"), invoking this Court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1346(a)(2). [Doc. 1].

[3] This Court notes that while Ms. Peters separately names as defendants the United States and Attorney General Garland in his official capacity, "[w]hen an action is one against named individual defendants, but the acts complained of consist of actions taken by defendants in their official capacity as agents of the United States, the action is in fact one against the United States." *Atkinson v. O'Neill*, 867 F.2d 589, 590 (10th Cir. 1989).

Specifically, Count I alleges that the United States and Attorney General Garland retaliated against Ms. Peters for her exercise of her First Amendment rights of free speech, free association, and petition for redress by investigating her election-related conduct. [Doc. 33 at ¶¶ 147–53]. Count II alleges that Defendants Griswold and Rubinstein similarly have undertaken an investigation and prosecution of Ms. Peters in violation of federal law, namely, in retaliation for Ms. Peters's exercise of her above-delineated First Amendment rights and her efforts to comply with federal law with respect to the maintenance of voting records, in violation of her privileges and immunities as a citizen under the Fourteenth Amendment of the United States Constitution. [*Id.* at ¶¶ 154–58]. Ms. Peters seeks declaratory and injunctive relief with respect to both counts. [*Id.* at 42–43].

On November 27, 2023, Ms. Peters moved for a preliminary injunction, seeking to enjoin District Attorney Rubinstein from pursuing conducting, continuing, or participating in any way in proceedings in *People v. Peters*, or any other criminal proceedings against or investigation of Ms. Peters (the "Motion for Preliminary Injunction").[4] [Doc. 8 at 6]. The following day, Ms. Peters filed the return of Service for Defendant Rubinstein, reflecting service that same day. [Doc. 17]. On December 6, 2023, Ms. Peters filed the return of service for the United States,[5] reflecting service on the United States Attorney's Office for

[4] The filing of the Motion for Preliminary Injunction caused the case, which had originally been assigned to the Honorable S. Kato Crews, to be drawn to a District Judge. [Doc. 12]. Ultimately, the action was assigned to the undersigned on November 28, 2023. [Doc. 15].

[5] Because Attorney General Garland is sued in his official capacity, Ms. Peters was required to serve the United States. Fed. R. Civ. P. 4(i)(2).

the District of Colorado. [Doc. 18]. To date, Ms. Peters has not filed a return of service for Defendant Griswold.

On December 11, 2023, Ms. Peters moved to expedite the proceedings on her Motion for Preliminary Injunction, given that her state criminal trial was set to begin on February 24, 2024. [Doc. 20]. That same day, counsel for District Attorney Rubinstein first entered his appearance. [Doc. 21]. The Court then ordered Defendant Rubinstein to respond to the Motion to Expedite no later than December 13, 2023. [Doc. 22]. On December 13, 2023, Defendant Rubinstein filed (1) the instant Motion to Dismiss Plaintiff's Complaint [ECF No. 1] Pursuant to Fed. R. Civ. P. 12 (the "Motion to Dismiss"), [Doc. 23]; (2) a Motion to Stay Briefing and Scheduling of Hearing on Motion for Preliminary Injunction (the "Motion to Stay"), [Doc. 24]; and (3) an Opposition to Motion to Expedite Proceedings ("Defendant Rubinstein's Opposition"), [Doc. 25]. Because the Motion to Dismiss raised a significant question as to whether this Court should abstain from reaching the merits of Count II as asserted against Defendant Rubinstein under *Younger v. Harris*, 401 U.S. 37 (1971)—and thus, any request for preliminary injunction—this Court denied Plaintiff's request to expedite the preliminary injunction proceedings and ordered her to file a response to the Motion to Stay on or before December 28, 2023. [Doc. 27]. The following day, Ms. Peters filed (1) a Motion for Reconsideration of the Court's Minute Order [ECF No. 27] Denying Plaintiff's Motion for Expedited Proceedings on Motion for Preliminary Injunction (the "Motion for Reconsideration"), [Doc. 28]; (2) her Response to Defendant Rubinstein's Motion to Stay Briefing and Scheduling of Hearing on Motion for Preliminary Injunction [ECF No. 24] and Opposition to Motion to Expedite Proceedings [ECF No. 25] ("Plaintiff's Response"), [Doc. 29]; and (3) her Opposition to

Defendant Rubinstein's Motion to Dismiss (the "Opposition to Motion to Dismiss"), [Doc. 30].

On December 20, 2023, the Court denied the Motion for Reconsideration; granted the Motion to Stay, staying the briefing on the Motion for Preliminary Injunction pending the Court's resolution of the Motion to Dismiss; and ordered Defendant Rubinstein to file any Reply to the Motion to Dismiss no later than December 29, 2023. [Doc. 32]. Mindful of Ms. Peters's concerns regarding her upcoming February 24 trial date, this Court also ordered Defendant Rubinstein to respond to the Motion for Preliminary Injunction within three days of any ruling on the Motion to Dismiss, if the case was not dismissed. [Doc. 36]. Defendant Rubinstein filed his Reply to Plaintiff's Opposition to Defendant Rubinstein's Motion to Dismiss ("Reply") on December 28, 2023.[6] [Doc. 38]. Neither Party sought an evidentiary hearing or identified any evidence to be presented beyond documents already on the Court's docket with respect to the instant Motion. *See* [Doc. 23; Doc. 28; Doc. 37]. The Motion to Dismiss is now ripe for review, and this Court concludes, based on its review of the record, that oral argument will not materially contribute to the resolution of the issues before it.

[6] On December 22, 2023, Ms. Peters filed the operative First Amended Complaint, [Doc. 33], as a matter of right pursuant to Rule 15(a)(1) of the Federal Rules of Civil Procedure; a Notice of Filing First Amended Complaint, [Doc. 34]; and an Unopposed Motion for Leave to File Amended Opposition to Defendant Rubinstein's Motion to Dismiss (the "Motion to Amend Opposition"), [Doc. 35]. While ordinarily the filing of an amended pleading moots any pending motion to dismiss directed at the prior pleading, *see Gotfredson v. Larsen LP*, 432 F. Supp. 2d 1163, 1172 (D. Colo. 2006) (explaining that an amended pleading moots any motions to dismiss aimed at an inoperative pleading), this Court construed the filing of Plaintiff's Motion to Amend Opposition as the Parties' assent that the instant Motion to Dismiss could be construed as directed at the First Amended Complaint. [Doc. 36]. Ms. Peters's Amended Opposition to Defendant Rubinstein's Motion to Dismiss (the "Amended Opposition to Motion to Dismiss" or "Amended Opposition"), [Doc. 37], was docketed that same day.

LEGAL STANDARDS

As identified above, the central issue presented by Defendant Rubinstein's Motion to Dismiss is whether this Court should abstain from reaching the merits of Count II, and in turn, Plaintiff's Motion for Preliminary Injunction, based on the *Younger* abstention doctrine.

I. *Younger* Abstention Doctrine

While federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given to them, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), the *Younger* abstention doctrine dictates that "a federal court must abstain from deciding a case otherwise within the scope of its jurisdiction in certain instances in which the prospect of undue interference with state proceedings counsels against federal relief," *Graff v. Aberdeen Enters., II, Inc*., 65 F.4th 500, 522 (10th Cir. 2023) (cleaned up). Generally, pursuant to the *Younger* abstention doctrine, federal courts must refrain from enjoining pending, parallel state criminal proceedings, *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013), where the state proceedings are (1) ongoing, (2) implicate important state interests, and (3) afford an adequate opportunity to present the federal constitutional challenges, *Murphy v. El Paso Co. (CO) Dist. 4 Dist. Att'y*, No. 23-1188, 2023 WL 5423509, at *2 (10th Cir. Aug. 23, 2023) (citing *Phelps v. Hamilton* (*Phelps II*), 122 F.3d 885, 889 (10th Cir. 1997)).

But exceptions to *Younger* abstention exist; federal courts are permitted to enjoin a pending state criminal prosecution provided that the prosecution was (1) commenced in bad faith or to harass; (2) based on a flagrantly and patently unconstitutional statute; or (3) related to any other such extraordinary circumstance creating a threat of irreparable

injury both great and immediate. *See Phelps v. Hamilton* (*Phelps I*), 59 F.3d 1058, 1064 (10th Cir. 1995). According to the Tenth Circuit, however, the "twin rationales of respecting prosecutorial discretion and federalism" dictate that "the exceptions to *Younger* only provide for a 'very narrow gate for federal intervention.'" *Id.* (quoting *Arkebauer v. Kiley*, 985 F.2d 1351, 1358 (7th Cir. 1993)).

II. Proper Framework

While noting the ambiguities, Defendant Rubinstein proceeds pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. [Doc. 23 at 2–4]. In her Amended Opposition, Ms. Peters is silent as to whether Rule 12(b)(1) is the proper vehicle for raising the issue of abstention. *See generally* [Doc. 37].

In *Graff*, the United States Court of Appeals for the Tenth Circuit (the "Tenth Circuit") observed that it was unclear whether *Younger* abstention implicates a federal court's subject matter jurisdiction—and thus, whether the framework of Rule 12(b)(1) applies—in this Circuit. *See Graff*, 65 F.4th at 523 n.32 (comparing *D.L. v. Unified School District No. 497*, 392 F.3d 1223, 1228 (10th Cir. 2004) ("*Younger* abstention is jurisdictional"), with *Elna Sefcovic, LLC v. TEP Rocky Mountain, LLC*, 953 F.3d 660, 666 (10th Cir. 2020) ("[W]hen cases present circumstances implicating [abstention] doctrines, no question is raised as to the court's subject matter jurisdiction."). Though the Tenth Circuit did not revolve the issue in *Graff* and has not spoken to it since, district courts within the Tenth Circuit continue to treat *Younger* abstention as jurisdictional, or akin to jurisdictional. *See, e.g.*, *Halliburton v. Eades*, No. 5:23-cv-970-F, 2023 WL 9007299, at *2 n.4 (W.D. Okla. Dec. 28, 2023) ("Younger abstention is jurisdictional." (citing *D.L*, 392 F.3d at 1232)); *Balderama v. Bulman*, No. 1:21-cv-1037-JB-JFR, 2023 WL 2728148, at

*12 (D.N.M. Mar. 31, 2023) (describing abstention as "akin to jurisdictional" (quotation omitted)); *El-Bey v. Lambdin*, No. 22-cv-00682-DDD-MDB, 2023 WL 2187478, at *4 n.4 (D. Colo. Feb. 23, 2023) (observing that "[a]lthough the *Younger* abstention doctrine is often referred to as a 'jurisdictional' issue, technically speaking, '*Younger* is a doctrine of abstention'" (quoting *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1230 n.8 (10th Cir. 2013)).

While mindful of the distinction between a court's subject matter jurisdiction to entertain a matter versus whether a court is required to refrain from exercising jurisdiction, *see, e.g.*, *El-Bey*, 2023 WL 2187478, at *4 n.4, definitive resolution of this issue is beyond the scope of this Court's determination here and ultimately, immaterial. First, the Parties have not placed the issue precisely before the Court. *Cf. Graff*, 65 F.4th at 523 n.32 (observing that "no party has addressed, let alone suggested, that the jurisdictional/non-jurisdictional nature of the *Younger* doctrine affects how this Court should address the issues on appeal"). Second, this Court is unaware of any Supreme Court or en banc decision of the Tenth Circuit that expressly overrules *D.L.*, and thus, this court is bound by it. *See Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir. 1996) ("A published decision of one panel of [the Tenth Circuit] constitutes binding circuit precedent constraining subsequent panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court."); *United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990) ("A district court must follow the precedent of this circuit . . . ."). Third, regardless of the procedural framework, a district court must resolve any question of *Younger* abstention before it proceeds to the merits, as a conclusion that *Younger* abstention applies "ends the matter." *Goings v. Sumner Cty. Dist. Attn'y's Office*, 571 F.

App'x 634, 639 (10th Cir. 2014) (quotation and emphasis omitted). Fourth, dismissals based on lack of subject matter jurisdiction or based on abstention principles are both without prejudice. *See id.* at 639; *see also Graff*, 65 F.4th at 523 n.32 ("Given that dismissal without prejudice is the proper result whether or not *Younger* abstention affects a federal court's subject matter jurisdiction, this court does not further consider the doctrine's jurisdictional pedigree." (citation omitted)).

With respect to the proper record, the Court may consider evidence outside the four corners of the operative pleading whether or not the instant Motion to Dismiss is considered a factual attack upon this Court's subject matter jurisdiction over Count II. *See United States v. Rodriquez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001) ("In addressing a factual attack, the court does not presume the truthfulness of the complaint's factual allegations, but has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." (quotation omitted)); *Stein v. Legal Advert. Comm. of Disciplinary Bd.*, 272 F. Supp. 2d 1260, 1264 n.3 (D.N.M. 2003) (observing that "[i]t is proper to consider matters outside the pleadings for purposes of deciding a motion to dismiss that is based on abstention"). In addition, this Court may also consider documents that are attached to or incorporated in the pleading[7] and are central to the First Amended Complaint, without converting the instant Motion to Dismiss to one for summary judgment. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997). Finally, as previously

[7] Ms. Peters did not re-attach exhibits to her First Amended Complaint, but that operative pleading references the same exhibits filed with the original Complaint. *See* [Doc. 33]. Accordingly, this Court considers [Doc. 1-3] through [Doc. 1-29] incorporated into the First Amended Complaint.

noted, this Court may take judicial notice of the court filings of its own docket and those of the state court. *See supra* n.2.

ANALYSIS

As discussed above, before a federal court can abstain under the *Younger* doctrine, it must determine that "(1) the state proceedings are ongoing; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to present the federal constitutional challenges." *Phelps II*, 122 F.3d at 889. It is clear that *People v. Peters* is still ongoing. [Doc. 20 at 2]. There is also little doubt that *People v. Peters* implicates important state interests, as "state criminal proceedings are viewed as a traditional area of state concern." *Winn v. Cook*, 945 F.3d 1253, 1258 (10th Cir. 2019) (internal quotations omitted); *see also Bruce v. Clementi*, No. 15-cv-01653-REB, 2016 WL 660120, at *11 (D. Colo. Feb. 17, 2016) (citations omitted) (recognizing the important state interests in the administration of its judicial system and enforcement of its criminal laws). And Ms. Peters's own allegations underscore the important state interest in election integrity identified by District Attorney Rubinstein.[8] *See* [Doc. 33 at ¶ 135]; *see also* [Doc. 23 at 9–10]. Thus, this Court's analysis focuses upon Ms. Peters's contention that the Mesa County District Court will not afford her an adequate

[8] Although Ms. Peters argues that Colorado's interests pale in comparison to her constitutional rights, [Doc. 37 at 3], *Younger* and its progeny do not command this Court to weigh the state's interests against Ms. Peters's. Rather, *Younger* stands for the proposition that, even in the face of alleged threats to the constitutional rights of individuals, there are certain exceptional circumstances where the principles of equity, comity, and federalism require federal courts to abstain from reviewing such claims so as to "permit state courts to try state cases free from [federal] interference." *See* 401 U.S. at 43–44. Ms. Peters has not presented any authority otherwise, or that contradicts the Tenth Circuit's holding in *Winn*. *See* [Doc. 37 at 3].

opportunity to present her constitutional challenges arising under the First Amendment or the Privileges and Immunities Clause of the Fourteenth Amendment. [*Id.* at 4–5].

I. State Proceedings Afford an Adequate Opportunity to Present Federal Constitutional Challenges

The Supreme Court has recognized that "ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Kugler v. Helfant*, 421 U.S. 117, 124 (1975). To that end, the Tenth Circuit explained that a plaintiff has an adequate opportunity to raise federal constitutional claims in state court unless state law clearly bars their interposition. *See Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1215 (10th Cir. 2003). Ms. Peters insists that the Mesa County District Court is an inadequate forum to raise her federal constitutional claims, but has presented no authority that state law prohibits her from doing so.

With respect to the purported violation of her First Amendment rights, Ms. Peters makes a single statement: "The Mesa County District Court will not provide Peters with an adequate opportunity to litigate the federal constitutional issues essential to prevailing on her First Amendment claim." [Doc. 37 at 4]. But neither *Younger* nor *Dombrowski v. Pfister*, 380 U.S. 479 (1965)—the only two cases that Ms. Peters cites—stands for the proposition that a Colorado state court prosecution does not afford Ms. Peters a fair and sufficient opportunity for vindication of her First Amendment rights or that Colorado law bars her from raising such an argument in Mesa County District Court.[9]

[9] To the extent that Ms. Peters contends she was subject to malicious prosecution and prosecutorial misconduct for exercising her rights to free speech, freedom of association and petitioning for the redress of grievance under the First Amendment, *see, e.g.*, [Doc. 33 at ¶ 118–34], this Court notes that Colorado state district courts may dismiss an indictment for prosecutorial misconduct that arises during grand jury proceedings. *See*

Ms. Peters also argues the June 5, 2022, Order by the Honorable Matthew D. Barrett, [Doc. 1-29; Doc. 23-4][10]—in which Judge Barrett concluded that Ms. Peters had failed to show that she was entitled to a choice of evils defense—deprived her of the ability to vindicate her rights under the Fourteenth Amendment Privileges and Immunities clause. *See* [Doc. 37 at 4–6]. But again, Plaintiff cites no authority that state law clearly barred her from raising her Fourteenth Amendment Privileges and Immunities arguments within the context of her criminal prosecution. *See generally* [*id.*]. Nor does she demonstrate that she was prevented by the Mesa County District Court from framing her argument to Judge Barrett as a constitutional issue under the Fourteenth Amendment. *See* [*id.* at 5–6]; *see also Wilson v. Morrissey*, 527 F. App'x 742, 744 (10th Cir. 2013) (citing *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987) ("[W]hen a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.")). In addition, it is undisputed that she did, in fact, raise her desire to present evidence that she engaged in the conduct at issue in order to expose issues with election equipment before Judge Barrett. [Doc. 1-29 at 3, 4]. Thus,

People v. Bergen, 883 P.2d 532, 543 (Colo. App. 1994) ("Prosecutorial misconduct during grand jury proceedings can result in dismissal if actual prejudice accrues to the defendant or the misconduct compromises the structural integrity of the grand jury proceedings to such a degree as to allow for the presumption of prejudice."). In addition, Ms. Peters sought and received a probable cause review of the grand jury proceedings and indictment from the Mesa County District Court. [Doc. 23-3].

[10] Ms. Peters cites "Ex. 16 at 3" for Judge Barrett's June 5, 2022, Order. [Doc. 37 at 4]. Ms. Peters did not attach any exhibits to her original or Amended Opposition to the Motion to Dismiss. [Doc. 30; Doc. 37]. Elsewhere in the Amended Opposition, the June 5, 2022, Order is cited as "Ex. D to the Motion." [Doc. 37 at 6]. It appears that the June 5, 2022, Order is attached as Exhibit 16 to Plaintiff's Motion for Preliminary Injunction. [Doc. 10-2]. In referring to the June 5, 2022, Order, this Court cites to [Doc. 1-29], as it has the only legible markings from the CM/ECF system.

the June 5, 2022, evidentiary ruling does not persuade this Court that Ms. Peters was deprived of an adequate *opportunity* to raise her constitutional claims. *Younger* requires only the availability of an adequate state-court forum, not a favorable result in that forum. *See Winn*, 945 F.3d at 1258.

Accordingly, this Court concludes that the three requirements of *Younger* are met here.

II. Bad Faith Exception to *Younger* Abstention

Even where these requirements are met, federal abstention can be overcome in cases of "proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction."[11] *Perez v. Ledesma*, 401 U.S. 82, 85 (1971). In determining whether a prosecution was commenced in bad faith or to harass, courts consider whether it was (1) "frivolous or undertaken with no reasonably objective hope of success"; (2) "motivated by the defendant's suspect class or in retaliation for the defendant's exercise of constitutional rights"; and (3) "conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions." *Phelps I*, 59 F.3d at 1065.

Importantly, it is a federal plaintiff's "heavy burden" to overcome the bar of *Younger* abstention by setting forth more than mere allegations of bad faith or harassment. *See*

[11] *Younger* also authorizes federal courts to enjoin a state criminal prosecution where it was "based on a flagrantly and patently unconstitutional statute," or was "related to any other such extraordinary circumstance creating a threat of irreparable injury both great and immediate." *Phelps I*, 59 F.3d at 1063–64. As Ms. Peters has not alleged that her prosecution was based on an unconstitutional statute or that "this case fits into the catch-all but ill-defined category of 'extraordinary circumstances,'" this Court need only consider whether Ms. Peters's prosecution was brought in bad faith or to harass. *Id.* at 1064; *see also* [Doc. 37 at 6–11 (arguing only that Plaintiff's prosecution was undertaken in bad faith or to harass)].

Amanatullah v. Colo. Bd. of Med. Exam'rs, 187 F.3d 1160, 1165 (10th Cir. 1999). To warrant federal court intervention, a plaintiff must offer sufficient evidence to demonstrate that the prosecution was substantially motivated by a bad faith motive or was brought to harass. *Phelps I*, 59 F.3d at 1068.

Ms. Peters has not met her burden here. First, as the *Phelps I* court recognized, a bad faith prosecution will not ordinarily be predicated upon probable cause. 59 F.3d at 1064 n.12. Ms. Peters's criminal charges arise from a thirteen-count Indictment issued by a grand jury for Mesa County, Colorado. [Doc. 1-28]. Ms. Peters sought a probable cause review of the grand jury proceedings and indictment, and, in a thorough and well-reasoned order, Judge Barrett concluded that each of the charges asserted against Ms. Peters was supported by probable cause. [Doc. 23-3 at 5]. Without more evidence, in light of the probable cause finding, Ms. Peters fails to carry her heavy burden of establishing that her prosecution was frivolous or undertaken with no reasonably objective hope of success. *See Carrillo v. Wilson*, No. 12-cv-03007-BNB, 2013 WL 1129428, at *5 (D. Colo. Mar. 18, 2013) ("Because the state district court determined that 24 of the 25 charges in the superseding indictment were supported by probable cause, the Court finds that the state criminal charges are not frivolous or undertaken with no reasonably objective hope of success."); *Wrenn v. Pruitt*, No. 5:21-cv-00059-JD, 2021 WL 1845968, at *4 (W.D. Okla. May 7, 2021) (finding that the plaintiff could not "show that the prosecution was 'undertaken with no reasonably objective hope of success' given that the state court made a finding of probable cause").

Next, the Court considers whether Ms. Peters has made a prima facie *evidentiary* showing that her prosecution was brought in retaliation for the exercise of her

constitutionally-protected rights[12] or was otherwise motivated by bad faith or for purposes of harassment. *See Phelps I*, 59 F.3d at 1066; *Phelps II*, 122 F.3d at 890. Fundamentally, Ms. Peters's reliance on allegations from her First Amended Complaint, [Doc. 37 at 6–11; *id.* at 8–11 ¶¶ 3, 5, 7–9, 12, 14–16], which are not otherwise supported by evidence, is insufficient to carry her heavy burden.[13] *Amanatullah*, 187 F.3d at 1165 (rejecting the plaintiff's claim "that Younger *abstention* [wa]s not appropriate because the district court erred in failing to consider his amended complaint," which, the plaintiff argued, "demonstrated the [defendant's] bad faith"). For example, Ms. Peters alleges that District Attorney Rubinstein "instructed a lawyer representing [Ms.] Peters and her husband not to communicate with [Ms.] Peters because she was under investigation in connection with her exercise of a power of attorney she had been given." [Doc. 37 at 8 ¶ 5 (citing [Doc. 1 at ¶ 133])]; *see also* [Doc. 33 at ¶ 131].[14] But neither as part of the First Amended Complaint, nor in support of her Amended Response to the Motion to Dismiss, does Ms. Peters proffer an affidavit by the unnamed lawyer to support the allegation.[15]

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[12] In order to prevail on such a retaliation claim, Ms. Peters must prove that "retaliation was a major motivating factor and played a dominant role in the decision to prosecute." *Phelps I*, 59 F.3d at 1066.

[13] Some of Ms. Peters's citations to her First Amended Complaint are otherwise inapposite because the cited allegations relate only to the conduct of other Defendants, not Mr. Rubinstein, or to the investigation of other individuals. *See, e.g.*, [Doc. 37 at 8 ¶ 1 (citing allegations regarding Defendant Griswold); *id.* at 8 ¶ 2 (citing allegations related to "the Department of Justice, including the FBI"); *id.* at 10 ¶ 13 (citing allegations regarding the execution of a search warrant at the residence of Sherronna Bishop)].

[14] Although Ms. Peters appears to cite to her original Complaint, [Doc. 1], throughout her Amended Opposition to the Motion to Dismiss, the Court construes these citations as related to the corresponding factual allegations made in her operative First Amended Complaint, [Doc. 33].

[15] This Court further notes that Ms. Peters's characterization of Mr. Rubinstein's alleged contact with this attorney is materially different between the First Amended Complaint and

Plaintiff's reliance upon certain exhibits to her Motion for Preliminary Injunction to demonstrate her prosecution was undertaken in retaliation for her exercise of her First or Fourteenth Amendment rights or commenced in bad faith or for the purpose of harassment is equally unavailing. Some of the documents do not even address the factual allegations for which they are cited. For instance, Ms. Peters cites Exhibit 22 to the Motion for Preliminary Injunction for the proposition that District Attorney Rubinstein intentionally and knowingly submitted a report to the Board of County Commissioners without expert assistance in order to undermine the credibility of Ms. Peters's experts. [Doc. 37 at 8 ¶ 4]. But Exhibit 22 to the Motion for Preliminary Injunction, [Doc. 10-10], is simply an e-mail from District Attorney Rubinstein to an outside media source discussing FBI involvement in Ms. Peters's investigation, and entirely fails to address the factual issue for which it is cited.[16] In any case, Ms. Peters points to no authority for a

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her Amended Opposition to the Motion to Dismiss. In Paragraph 131 of the First Amended Complaint, Ms. Peters alleges

> [a] lawyer representing [Ms.] Peters and her husband in November 2021 in connection with domestic matters emailed [Ms.] Peters to advise her that a member of the District Attorney's office had left a voicemail on the lawyer's telephone notifying the lawyer that [Ms.] Peters was the subject of a potential investigation into her actions as an agent under a power of attorney. The voicemail prompted the lawyer to advise [Ms.] Peters that he had a conflict of interest and could no longer represent her and her husband.

[Doc. 1 at ¶ 133; Doc. 33 at ¶ 131]. The allegation that the voicemail then prompted the lawyer to advise Ms. Peters that he could no longer represent her is materially different than the allegation that Mr. Rubinstein *instructed* the lawyer not to communicate with Ms. Peters.

[16] This Court "cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record," *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005), particularly when Ms. Peters has been represented by counsel throughout this action, *United States v. Davis*, 622 F. App'x 758, 759 (10th Cir. 2015) ("[I]t is not this court's duty, after all, to make arguments for a litigant that he has not made for himself."); *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 800 n.10

constitutional requirement that District Attorney Rubinstein retain a computer expert before submitting a report to the Board of County Commissioners. *Cf. Jaffery v. Atl. Cty. Prosecutor's Office,* 695 F. App'x. 38, 41 (3d Cir. June 19, 2017) (rejecting the plaintiff's argument that the bad faith exception applied based, in part, on the plaintiff's failure to point to any constitutional requirement that police or prosecutors obtain a medical expert prior to prosecuting a doctor for allegedly criminal actions that occured in the course of medical treatment). Other documents do not support the factual allegation for which they are cited. For example, Ms. Peters asserts that District Attorney Rubinstein coordinated retaliatory efforts against Ms. Peters with Defendant Griswold, the Colorado Attorney General, and the Department of Justice. [Doc. 37 at 11 ¶ 17]. But the document to which Ms. Peters cites, Exhibit 2 to the Motion for Preliminary Injunction, [Doc. 9], is her own Declaration. These unsupported, conclusory allegations are insufficient to establish unlawful motivations on the part of District Attorney Rubinstein. *Carrillo*, 2013 WL 1129428, at *6.

Having found that all three factors of *Younger* abstention have been met, and no exceptions apply, abstention by this Court with respect to the claims against Defendant Daniel P. Rubinstein,[17] is mandatory. *See Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253, 1267 (10th Cir. 2002) ("Once a court finds that the required conditions are present, abstention is mandatory.").

(10th Cir. 2001) (observing that the court has no obligation to make arguments or perform research on behalf of litigants).

[17] Defendant Rubinstein seeks dismissal of "the Complaint" or "the case and all claims without prejudice." [Doc. 23 at 15; Doc. 38 at 9]. *Younger* abstention does not apply to claims against the United States, and Defendant Griswold has not appeared. Accordingly, this Court may only properly dismiss Count II as it relates to Defendant Rubinstein.

CONCLUSION

For the reasons set forth herein, **IT IS ORDERED** that:

(1) Defendant Daniel P. Rubinstein's Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12 [Doc. 23] is **GRANTED**;

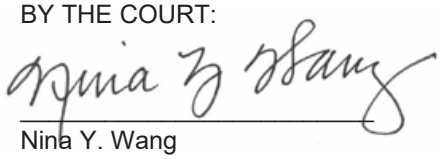
(2) Plaintiff's claims for declaratory and injunctive relief against Defendant Daniel P. Rubinstein in his official capacity are **DISMISSED WITHOUT PREJUDICE**;

(3) Plaintiff's Motion for a Preliminary Injunction [Doc. 8] is **DENIED as moot**; and

(4) Defendant Daniel P. Rubinstein is entitled to his costs pursuant to Federal Rule of Civil Procedure 54(d) and D.C.COLO.LCivR 54.1.

DATED: January 8, 2024

BY THE COURT:



Nina Y. Wang
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-03014-NYW-SKC

TINA PETERS,

Plaintiff,

v.

UNITED STATES OF AMERICA,
MERRICK B. GARLAND, in his official capacity as Attorney General of the United States,
JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and
DANIEL P. RUBINSTEIN, in his official capacity as District Attorney for the Twenty-First Judicial District,

Defendants.

FINAL JUDGMENT AS TO DEFENDANT DANIEL P. RUBINSTEIN

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 54(b) and 58, the following Final Judgment as to Defendant Daniel P. Rubinstein is hereby entered.

Pursuant to the Order [Docket No. 39] of United States District Judge Nina Y. Wang, entered on January 8, 2024, it is

ORDERED that Defendant Daniel P. Rubinstein's Motion to Dismiss [Docket No. 23] is GRANTED. It is

ORDERED that Plaintiff's claims for declaratory and injunctive relief against Defendant Daniel P. Rubinstein in his official capacity are DISMISSED without prejudice. It is

ORDERED that Plaintiff's Motion for a Preliminary Injunction [Doc. 8] is DENIED as moot. It is

ORDERED that judgment is hereby entered in favor of Defendant Daniel P. Rubinstein and against Plaintiff, in light of the Court's determination that there is no just reason for delay. *See* Fed. R. Civ. P. 54(b). It is

ORDERED that Defendant Daniel P. Rubinstein is awarded his costs, to be taxed by the Clerk of the Court, pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

Dated at Denver, Colorado this 8th day of January, 2024.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/M. Smotts
M. Smotts, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Nina Y. Wang

Civil Action No. 23-cv-03014-NYW-JPO

TINA PETERS,

Plaintiff,

v.

UNITED STATES OF AMERICA,
MERRICK B. GARLAND, in his official capacity as Attorney General of the United States, and
DANIEL P. RUBINSTEIN, in his official capacity as District Attorney for the Twenty-First Judicial District,

Defendants.

ORDER

Before this Court is Plaintiff's Motion for Rule 54(b) Certification (the "Motion" or "Rule 54(b) Motion"), [Doc. 46], in which Plaintiff Tina Peters ("Plaintiff" or "Ms. Peters") asks this Court to certify its January 8, 2024, Order on Motion to Dismiss, [Doc. 39], for appellate review pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and, in doing so, to set forth sufficient findings to support its certification.[1, 2] Given Defendant

[1] In light of its adjudication of the Motion to Dismiss, this Court entered a partial final judgment in Defendant Daniel P. Rubinstein's ("Defendant Rubinstein") favor. *See* [Doc. 40]. In reviewing Ms. Peters's docketing statement on appeal, however, the Tenth Circuit observed that this Court's "Rule 54(b) certification appear[ed] insufficient to confer jurisdiction on [the appellate court]" because this Court had not made "the two express determinations Required by Rule 54(b)." [Doc. 47 at 1–2].

[2] Although Ms. Peters has noted that she has a right to appeal this Court's denial of her Motion for a Preliminary Injunction, [Doc. 8], pursuant to 28 U.S.C. § 1292(a)(1), *see* [Doc. 52 at 2], she nevertheless has moved this Court for certification pursuant to Rule 54(b), *see* [Doc. 46]. Accordingly, the Court addresses her request.

Rubinstein's objection to the Rule 54(b) Motion, *see* [Doc. 46 at 4–5], and in light of the apparently overlapping factual and legal issues present in Plaintiff's remaining claims against Defendant Jena Griswold ("Defendant Griswold"), who had yet to be served by Plaintiff, the Court ordered the Parties to file additional briefing on the questions of whether the Court (1) properly entered partial final judgment as to Defendant Rubinstein and (2) could properly certify its Order on Motion to Dismiss for appellate review under Rule 54(b), [Doc. 50]. *See, e.g.*, *Kristina Consulting Grp. v. Debt Pay Gateway, Inc.*, No. 21-5022, 2022 WL 881575, at *3 (10th Cir. Mar. 25, 2022) (observing that a district "court's designation of an order is not dispositive on the issue of finality"). In response, Ms. Peters voluntarily dismissed her claims against Defendant Griswold without prejudice pursuant to Rule 41(a)(1)(A)(i), *see* [Doc. 51; Doc. 52; Doc. 53], and now asserts that "there are no 'unresolved claims' against Defendant Griswold that could call into question a final judgment in favor of Defendant Rubinstein," [Doc. 52 at 2].

When, as here, "more than one claim for relief is presented in an action . . . or when multiple parties are involved," Rule 54(b) permits a district court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." *Stockman's Water Co. v. Vaca Partners, L.P.*, 425 F.3d 1263, 1265 (10th Cir. 2005) (quotation omitted); *see also* Fed. R. Civ. P. 54(b). As the Tenth Circuit has explained, "courts entering a Rule 54(b) certification should clearly articulate their reasons and make careful statements based on the record supporting their determination of 'finality' and 'no just reason for delay,'" to permit the appellate court to "review a 54(b) order more intelligently and thus avoid jurisdictional remands."

Stockman's Water Co., 425 F.3d at 1265 (cleaned up). In making these determinations, the Tenth Circuit has said, "the district court should act as a dispatcher weighing Rule 54(b)'s policy of preventing piecemeal appeals against the inequities that could result from delaying an appeal." *Id.* (quotation omitted).

The Court finds that both of Rule 54(b)'s requirements are met here. First, now that Ms. Peters has dismissed Defendant Griswold from the action, *see* [Doc. 51; Doc. 53], the Court finds that its January 8, 2024, Order is a final judgment for purposes of Rule 54(b) because the claims of which it disposes are "distinct and separable from the claims left unresolved in this action."[3] *Okla. Tpk. Auth. v. Bruner*, 259 F.3d 1236, 1243

[3] Although the Court is not convinced that, as Defendant Rubinstein asserts, Defendant Griswold is a required party under Rule 19 of the Federal Rules of Civil Procedure, *see United States v. Water Supply & Storage Co.*, No. 23-cv-00533-CNS-NRN, 2023 WL 7924736, at *3–4 (explaining that the party arguing that an absent party must be joined under Rule 19 must demonstrate that in the person's absence, complete relief cannot be accorded among the existing parties, that "the absent party has an interest relating to the subject of the action[,] and . . . that their ability to protect that interest will be impaired or impeded by the disposition of the suit in its absence" (quotation omitted)), the Court also observes that Defendant Rubinstein provides no authority for the proposition that the dismissal of an arguably required party under Rule 19 defeats the finality of a judgment dismissing all claims against a remaining defendant under Rule 54(b), nor has this Court identified any, *see* [Doc. 54 at 11–12].

This fact pattern, if anything, appears to implicate the question of whether Ms. Peters has attempted to manufacture finality by voluntarily dismissing Defendant Griswold. *See* [*id.* at 1–2, 7 n.6, 10 (gesturing at the manufactured dismissal argument)]. The Court finds, however, that because Defendant Griswold had neither been served nor entered an appearance in this action, Plaintiff's dismissal appears to fall within the exception to the general rule that a party "cannot 'manufacture finality by obtaining a voluntary dismissal without prejudice of some claims so that others may be appealed,'" *Parks v. Taylor*, No. 21-6014, 2022 WL 1789119, at *2 (10th Cir. June 2, 2022) (quoting *Spring Creek Expl. & Prod. Co. v. Hess Bakken Inv. II, LLC*, 887 F.3d 1003, 1015 (10th Cir. 2018)), for the dismissal of "unresolved claims against unserved defendants," which do not "prevent a prior decision from being final . . . unless 'the district court's expectation of further proceedings against unserved defendants means its dismissal of served defendants is not final,'" *id.* (quoting *Adams v. C3 Pipeline Constr. Inc.*, 30 F.4th 943, 958 n.4 (10th Cir. 2021)). *See also Blanco v. Fed. Express Corp.*, 741 F. App'x 587, 589 (10th Cir. 2018) ("Because Mr. Wainer was never served, he is not a party to this case and his

(10th Cir. 2001); *see also Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980) (explaining that Rule 54(b) requires a "judgment," meaning "a decision upon a cognizable claim for relief," and that the judgment be "'final' in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action" (quotation omitted)). Only Plaintiff's claims against the federal Defendants remain in this action, which arise from a federal investigation into Ms. Peters's election-related conduct separate from Defendant Rubinstein's investigation and subsequent prosecution of Ms. Peters. *See* [Doc. 33 at ¶¶ 99–117; 147–53]. To be sure, there is some factual overlap between Plaintiff's claims against Defendant Rubinstein and the federal Defendants, *see* [Doc. 54 at 5–7], but they are not "so intertwined . . . as to be inseparable," *Okla. Tpk. Auth.*, 259 F.3d at 1243; *see also Gas-A-Car, Inc. v. Am. Petrofina, Inc.*, 484 F.2d 1102, 1103–05 (10th Cir. 1973) (finding that claims were separable for Rule 54(b) purposes even though "[a]dmittedly many of the same facts will be used to prove both counts" and the counts sought "[i]dentical damages"). Indeed, the relief Plaintiff seeks against Defendant Rubinstein and the federal Defendants is specific to their respective investigations—and as to Defendant Rubinstein, prosecution—of Ms. Peters. *Compare* [Doc. 33 at ¶¶ 147–53 (seeking declaratory and prospective injunctive relief related to

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dismissal without prejudice does not defeat finality."); *Raiser v. Utah Cty.*, 409 F.3d 1243, 1245 n.2 (10th Cir. 2005) ("The as-yet-unnamed deputy has never been served with process in this action. Consequently, he is not a party to the case, and the district court's granting judgment only to Utah County does not prevent its order from being final and appealable."); *Lucas v. Turn Key Health Clinics, LLC*, 58 F.4th 1127, 1136 (10th Cir. 2023) (finding district court's judgment was final even though the court had not entered an order dismissing an unserved defendant where the court had removed the unserved defendant "from the caption in its separately issued judgment," thereby "suggesting that the court did not expect further proceedings against her and substantively intended a final judgment").

federal Defendants' efforts to investigate and prosecute Ms. Peters)], *and* [Doc. 8 (requesting preliminary injunctive relief against Defendant Rubinstein alone)], *with* [Doc. 33 at ¶¶ 154–58 (seeking declaratory and prospective injunctive relief with respect to state Defendants' investigation and prosecution of Ms. Peters)]; *see also Okla. Tpk. Auth.*, 259 F.3d at 1243 (explaining that, in determining whether a judgment is final, courts should consider "whether the claims disposed of seek separate relief"). Finally, the legal issues presented by Ms. Peters's claims against Defendant Rubinstein, namely the *Younger* abstention doctrine's applicability, are not implicated by her claims against the federal Defendants. *Cf. Okla. Tpk. Auth.*, 259 F.3d at 1243 (explaining that because a certain defense was applicable to all the plaintiff's claims, the district court needed to "adjudicate all the claims, not just certain selected claims, before an appeal [could] be taken").

Second, after accounting for "judicial administrative interests as well as the equities involved," the Court finds that there is no just reason to delay Ms. Peters's appeal. *Curtiss-Wright Corp.*, 446 U.S. at 8. First, given the pendency of Ms. Peters's criminal trial in state court, which she states is set to begin on February 9, 2024, *see* [Doc. 46 at ¶¶ 3, 5], and the fact that resolution of the *Younger* abstention question may either permit that trial to proceed without federal court intervention or require this Court to determine whether the injunctive relief requested by Ms. Peters, *see* [Doc. 8], is warranted, the Court finds that Ms. Peters has a "substantial interest in pursuing an immediate appeal" here. *Atwell v. Gabow*, No. 06-cv-02262-CMA-MJW, 2009 WL 112492, at *5 (D. Colo. Jan. 15, 2009) (finding no just reason to delay). And because the *Younger* abstention question is not implicated by Ms. Peters's claims against the federal Defendants, the Tenth Circuit

will only have to decide the *Younger* issue once, even if subsequent appeals are taken in this case. *Stockman's Water Co.*, 425 F.3d at 1264 (quoting *Curtiss-Wright Corp.*, 466 U.S. at 8) (explaining that district courts should consider "whether the claims under review are separable from the others remaining to be adjudicated and whether the nature of the claims already determined are such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." (alterations omitted)).

For the foregoing reasons, the Court certifies that its January 8, 2024, Order granting Defendant Rubinstein's Motion to Dismiss is a final judgment for purposes of Rule 54(b), and that there is no just reason for delaying an appeal. Accordingly, the Court **GRANTS** Plaintiff's Motion for Rule 54(b) Certification.

CONCLUSION

For the reasons set forth herein, **IT IS ORDERED** that:

(1) Plaintiff's Motion for Rule 54(b) Certification [Doc. 46] is **GRANTED**;

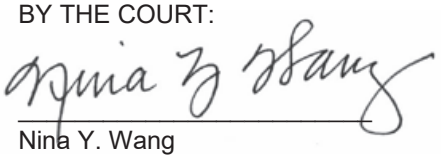
(2) The Court hereby **CERTIFIES** that its January 8, 2024, Order on Motion to Dismiss [Doc. 39] is a final judgment for purposes of Rule 54(b) of the Federal Rules of Civil Procedure, and there is no just reason for delaying an appeal; and

(3) The Clerk of Court is directed to enter an Amended Final Judgment as to Defendant Daniel P. Rubinstein pursuant to the Court's Rule 54(b) certification.[4]

[4] An Amended Final Judgment appears to be appropriate here because the initial Final Judgment as to Defendant Daniel P. Rubinstein, entered on January 8, 2024, *see* [Doc.

DATED: January 30, 2024

BY THE COURT:



Nina Y. Wang
United States District Judge

40], was entered pursuant to a defective Rule 54(b) certification, *see* [Doc. 47 ("[T]he district court's Rule 54(b) certification appears insufficient to confer jurisdiction on this court.")]. *See, e.g.*, *Beus Gilbert PLLC v. Brigham Young Univ.*, No. 2:12-cv-00970-RJS, 2020 WL 8455099, at *9 n.72 (D. Utah May 18, 2020) ("An Amended Judgment also seems appropriate, where the initial Judgment was entered on February 13, 2019 based on the court's erroneous observation that there were no live claims in the case.").

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-03014-NYW-JPO

TINA PETERS,

Plaintiff,

v.

UNITED STATES OF AMERICA,
MERRICK B. GARLAND, in his official capacity as Attorney General of the United States, and
DANIEL P. RUBINSTEIN, in his official capacity as District Attorney for the Twenty-First Judicial District,

Defendants.

AMENDED FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 54(b), the following Amended Final Judgment is hereby entered.

Pursuant to the Order of United States District Judge Nina Y. Wang entered on January 30, 2024 [Doc. 55], it is

ORDERED that Plaintiff's Motion for Rule 54(b) Certification [Doc. 46] is GRANTED. It is

FURTHER ORDERED that the Court hereby CERTIFIES that its January 8, 2024, Order on Motion to Dismiss [Doc. 39] is a final judgment for purposes of Rule 54(b) of the Federal Rules of Civil Procedure, and there is no just reason for delaying an appeal. It is

FURTHER ORDERED that an amended final judgment is hereby entered in favor of Defendant Daniel P. Rubinstein and against Plaintiff Tina Peters pursuant to the Court's Rule 54(b) certification. It is

FURTHER ORDERED that Defendant Daniel P. Rubinstein shall have his costs by the filing of a Bill of Costs with the Clerk of this Court within fourteen days of the entry of judgment, pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

Dated at Denver, Colorado this 30th day of January, 2024.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/Emily Buchanan
Emily Buchanan, Deputy Clerk

52 U.S.C. § 20701

Retention and preservation of records and papers by officers of elections; deposit with custodian; penalty for violation

Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

C.R.S. § 1-7-802

Preservation of election records

The designated election official shall be responsible for the preservation of any election records for a period of at least twenty-five months after the election or until time has expired for which the record would be needed in any contest proceedings, whichever is later. Unused ballots may be destroyed after the time for a challenge to the election has passed. If a federal candidate was on the ballot, the voted ballots and any other required election materials shall be kept for at least twenty-five months after the election.

Appellate Case: 24-1013 Document: 010111042377 Date Filed: 05/02/2024 Page: 1

Case No. 24-1013

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

TINA PETERS,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA; MERRICK B. GARLAND, in his official capacity as Attorney General of the United States; JENA GRISWOLD, in her official capacity as Colorado Secretary of State,

Defendants,

—and—

DANIEL P. RUBINSTEIN, in his official capacity as District Attorney for the Twenty-First Judicial District,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HONORABLE NINA WANG
D.C. NO. 1:23-CV-03014-NYW-SKC

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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May 2, 2024

ORAL ARGUMENT REQUESTED

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PRELIMINARY STATEMENT

Mr. Rubinstein's Response Brief advances misleading arguments that ignore principles of Supremacy Clause immunity, or conflates them with the protections guaranteed by the First Amendment for disfavored expression, to fit Mr. Rubinstein's flawed theory of abstention under *Younger v. Harris,* 401 U.S. 37 (1971). What Mr. Rubinstein seems unable to grasp is that the immunity mandated by the Supremacy Clause means that a person acting pursuant to federal law "cannot be guilty of a crime under … [state] law." *Cunningham v. Neagle,* 135 U.S. 1, 75 (1890). Mr. Rubinstein betrays an unwillingness to constrain his rhetoric by elementary principles of constitutional law when he characterizes Ms. Peters' case as a claim "to special authority to act outside the law." Resp.Br. 6. Compliance with federal law is not acting "outside the law." It is acting in compliance with the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

Mr. Rubinstein's application of *Younger* abstention is wrong *ab initio* for it rests on the assertion that it is "undisputed" that "there is an on-going state criminal prosecution against Plaintiff," Resp.Br. 1, so that this case boils down to the question of whether Ms. Peters can get a fair shake in those proceedings. To the contrary, Supremacy Clause immunity means that that prosecution is unlawful as a matter of constitutional law. Ms. Peters "cannot be guilty" of any crime alleged in that constitutionally illicit indictment. *Cunningham,* 135 U.S. at 75. Put another

way, there was no lawful state court proceeding in this case for the district court to abstain from.

Moreover, it is well-recognized that this claim that the state court lacks subject-matter jurisdiction is unwaivable, contrary to Mr. Rubinstein's extended discussion of waiver.[1] *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *Sheldon v. Golden Bell Retreat*, No. 22-1428, 2023 WL 8539442, at *2 (10th Cir. Dec. 11, 2023); *Green Sol. Retail, Inc. v. United States*, 855 F.3d 1111, 1114 n.2 (10th Cir. 2017).

Even worse, the Response Brief grossly misrepresents the facts in the record. In a stunning prevarication, Mr. Rubinstein recites what he tells this Court is Ms. Peters' "admitted criminal conduct after she made the initial backup copy." Resp.Br. 33(emphasis in original). Mr. Rubinstein lists as Ms. Peters' "admitted criminal conduct" the following: "making additional copies of software and data after the Trusted Build had already occurred; providing confidential election passwords, records, and software to third parties and the public; disabling security cameras; interfering with elections, etc." *Id.*

[1] Mr. Rubinstein's waiver argument also rests on creating a misleading impression that Ms. Peters has been utterly silent concerning her immunity claim throughout the litigation below. This is simply not true. *See* Opening Br. 30-32.

Ms. Peters has not engaged in any "criminal conduct,"[2] and certainly has not admitted to engaging in any of the criminal conduct recited by Mr. Rubinstein, including whatever Mr. Rubinstein wants to shoehorn into "etc." Even a cursory examination of Mr. Rubinstein's citations in support exposes this outrageous claim as baseless, another exercise in unbridled, malicious rhetoric.

Mr. Rubinstein cites as support for his list: "*See* App. Vol. 3 at 628-40 (Indictment), 697-700; Opening Brief at 9-12." *Id.,* 33-34. The first citation, "App. Vol. 3 at 628-40 (Indictment)," is to the Indictment, which is not a record of Ms. Peters' supposed admissions, but of the as-yet untested allegations against her. "Innocent until proven guilty" still has some significance in our criminal procedure. While the Indictment's allegations fall fatally short of the specificity needed to pass muster under due process principles, Opening Br. 16-20, they do not include criminal charges for making copies of software, providing "confidential election passwords, records, and software" to third parties, or the over-the-top allegation of "interfering with elections." Consistent with the

[2] Mr. Rubinstein's characterization of Ms. Peters' "core argument" as "she was required to undertake criminal actions to fulfill her purported state and federal duties," Resp.Br. 3, is a tendentious reframing by Mr. Rubinstein to suit his arguments. Ms. Peters does not claim she took any criminal actions. Mr. Rubinstein's representation that he "accepts Plaintiff's factual allegations in her First Amended Complaint as true solely for purposes of this appeal" is clearly meaningless. *Id.,*1 n.1.

vagueness that is a hallmark of the Indictment, who is to say what allegations are captured by Mr. Rubinstein's casual reference to "etc."?

The second source cited by Mr. Rubinstein is App. Vol. 3 at 697-700. These are pages from Ms. Peters' First Amended Complaint. They describe Ms. Peters' having had the forensic images of the Mesa County election management system hard drive made, conduct that the Deputy Secretary of State has admitted under oath was not illegal. Opening Br. 14. These pages also describe Ms. Peters providing the forensic images for analysis to computer experts, who identified the creation of multiple database tables by the election machinery that created different compilations of ballots hidden from official election workers. This source cited by Mr. Rubinstein not only provides no admission of criminal conduct by Ms. Peters, but its very citation exposes the mindset animating the Peters' Indictment, a mindset hostile to what this Court has recognized as bedrock First Amendment principles that "protect the free discussion of governmental affairs," including the "[f]ilming of the police and other public officials as they perform their official duties [which] acts as 'a watchdog of government activity.'" *Izarry v. Yehia,* 38 F.4th 1282, 1289 (10th Cir. 2022) (quoting *Leathers v. Medlock,* 499 U.S. 439, 447 (1991)).

This same dynamic is amplified in the third source cited by Mr. Rubinstein, pages from Ms. Peters' Opening Brief. Those pages describe Ms. Peters'

submission to the Board of County Commissioners of reports from the cybersecurity experts who analyzed the forensic images she had made. Those pages show a responsible public official, having complied with the duties imposed on her by federal law, bringing to the attention of the proper officials above her evidence of serious problems of election integrity involving the machinery by which the votes of Coloradans are cast and tabulated. The notion that Ms. Peters' efforts to marshall expert analyses and submit reports to responsible public officials on a serious matter of public concern amounts to an admission of criminal conduct is worse than laughable. It marks a chilling, brave new world in which the legal system is reduced to another tool to punish political adversaries.

ARGUMENT

I. Ms. Peters' Claim to Immunity Cannot be Adjudicated Under a *Younger* Abstention Analysis.

In defense of the District Court's abstention, Mr. Rubinstein contends that there is a lawful "on-going state criminal prosecution" against Ms. Peters, Resp.Br. 1, and that those proceedings can satisfactorily address Ms. Peters' "constitutional defenses." *Id.,*3. That contention is wrong because it rests on characterizations of Supremacy Clause immunity that are unequivocally legally incorrect. Mr. Rubinstein asserts, without any authority in support, that "the issues Plaintiff raises amount to defenses to criminal liability for the state law charges." *Id.,*16. *See also id.,*16 n.5 ("Plaintiff's claims are just defenses to criminal charges."). Similarly,

Mr. Rubinstein categorizes Ms. Peters' claim to Supremacy Clause immunity, again without support, as an "alleged violation of plaintiff's rights," *id.*,17, or as one of undifferentiated "constitutional claims," *id.*,20, or as a generic claim that a state court lacks jurisdiction. *Id.,*20 n.9. All of these characterizations are wrong.

Supremacy Clause immunity is not, strictly speaking, a personal right of anyone, unlike those set out in the Bill of Rights that are commonly raised as defenses to a criminal prosecution, such as the Fourth Amendment's protection against unreasonable searches. A state or federal trial court can adjudicate defenses grounded on such constitutional rights, and appellate courts can provide the additional protection for those rights by their review of the adjudication below. Nothing about the forum in which such constitutional defenses are adjudicated are inherently implicated in those defenses.

Supremacy Clause immunity is wholly different because it does not arise from rights guaranteed to individuals, but from the Constitution's allocation of powers between the federal government and the states, specifically, as this Court put it, from the "mutual checking function" this structure created. *Wyoming v. Livingston,* 443 F.3d 1211, 1217 (10th Cir. 2006). Supremacy Clause immunity is designed to prevent the "evil" that can occur when that "checking" goes too far, that is, when "states would impede or frustrate the legitimate execution of federal law." *Id.* The immunity claimed by Ms. Peters is "rooted in the Supremacy Clause," *id.,* and

operates as a prophylactic for that evil as a means to "secure *federal rights* by according them priority whenever they come in conflict with state law." *City of Hugo v. Nichols (Two Cases)*, 656 F.3d 1251, 1256 (10th Cir. 2011) (quoting *Chapman v. Hous. Welfare Rights Org.,* 441 U.S. 600, 613 (1979))(emphasis added). As one court explained:

> The reason for distinguishing between constitutional challenges based on the Supremacy Clause and challenges based on other constitutional provisions lies in the purpose of the Supremacy Clause. The Supremacy Clause mandates that "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S.Const., Art. VI, cl. 2. This provision forbids state regulation which conflicts with federal law. It establishes a structure of government which defines the relative powers of states and the federal government. The Supremacy Clause does not confer a "right" on any individual, but it does impose a general limitation on state power.
>
> Other constitutional provisions, unlike the Supremacy Clause, do confer fundamental rights on individual citizens.…. These are not structural limitations on government power in the Supremacy Clause sense, but they are rights given to individual citizens which limit governmental power generally.

San Diego Unified Port Dist. v. Gianturco, 457 F. Supp. 283, 290 (S.D. Cal. 1978), *aff'd,* 651 F.2d 1306 (9th Cir. 1981). *See also Clifton v. Cox,* 549 F.2d 722, 730 (9th Cir. 1977)("One of the basic tenets in the application of the Supremacy Clause is that the states have no power to determine the extent of federal authority.").

As a result, where Supremacy Clause immunity applies, persons acting pursuant to federal law "are not subject to arrest or other liability under the laws of

the state in which their duties are performed." *Ohio v. Thomas,* 173 U.S. 276, 283 (1899). Supremacy Clause immunity does not simply provide a defense to liability but strips the state court of any jurisdiction over a defendant and his alleged state crimes. *See* Opening Br. 27-28. Thus Supremacy Clause immunity forecloses any purported application of *Younger* abstention. As the Ninth Circuit explained:

> In the Younger line of cases a petitioner seeks to avoid prosecution under a state criminal statute by challenging the constitutionality of the statute in federal court under 28 U.S.C. s 2241(c)(3).[3] The reason for denying habeas corpus relief in those cases is that the petitioner can assert his constitutional claim as a defense in the state court prosecution and, if convicted, appeal to the United States Supreme Court.
>
> In a situation like the instant case, however, the Supreme Court has determined that when a petitioner is held by the state "to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do. . .and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the (s)tate. . . ." When this is true the prosecution has no factual basis upon which to prosecute and *the entire proceeding is a nullity*.

Clifton, 549 F. 2d at 730 (internal quotations omitted; emphasis added). At bottom, Supremacy Clause immunity creates one of a special category of rights – a "right not merely not to be convicted, but *not to be tried at all*." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800 (1989)(emphasis in original).

[3] The plaintiff in *Clifton* was in state custody, so his Supremacy Clause immunity claim was raised in the context of a petition for *habeas corpus.*

In sum, if Supremacy Clause immunity applies, the criminal proceedings against Ms. Peters are a nullity. There is no lawful on-going state criminal prosecution against Ms. Peters that could trigger *Younger* abstention. What we have here is not a question of whether the state court is an adequate forum to adjudicate the state criminal charges against Ms. Peters or her claims. The Constitution in the Supremacy Clause has already answered that question with an unambiguous "No."

II. Ms. Peters Is Immune from State Prosecution Under the Supremacy Clause and the Fourteenth Amendment's Privileges or Immunities Clause.

A. Ms. Peters is entitled to immunity under the Supremacy Clause.

1. Mr. Rubinstein argues that only federal employees, or persons supervised and directed by federal employees, or persons acting pursuant to a federal court order, are entitled to Supremacy Clause immunity. *See, e.g.,* Resp.Br. 6, 28-30. But "the defense of federal immunity protects federal operations from the chilling effect of state prosecution." *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004). It prevents states from "imped[ing] or frustrat[ing] the legitimate execution of federal law." *Livingston,* 443 F.3d at 1217.

Thus Supremacy Clause immunity does not depend on who is executing federal law. As the Supremacy Clause commands so clearly, federal law is "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary

notwithstanding." U.S.CONST. art. VI, cl.2. The priority of federal law mandated by the Supremacy Clause is not in principle dependent on who is executing federal law. As the Fifth Circuit put it, "State law cannot operate to impede individuals who have [federal] government authority and act as is necessary and proper within that authority." *Brown v. Nationsbank Corp.*, 188 F.3d 579, 589 (5th Cir. 1999). *See also State of Conn. v. Marra*, 528 F. Supp. 381, 385 (D. Conn. 1981)("[F]ederal immunity from state prosecution is not limited to a particular class of federal officers or to paid employees of the federal government. Rather, it extends to any person, including a private citizen like defendant, who acts under the direction and control of federal authorities or *pursuant to federal law* or court order.")(emphasis added).

Mr. Rubinstein does not offer any precedent that undermines our point. He simply discounts the cases we did cite because they did not happen to involve a county official. Resp.Br. 29. Mr. Rubinstein offers no legal authority supporting what appears to be his position---that a private citizen cannot claim Supremacy Clause immunity, Resp.Br. 28---nor any argument justifying the necessary premise of that position that the operation of the Supremacy Clause, and therefore the availability of Supremacy Clause immunity, depends on who is enforcing federal law. Tellingly, Ms. Peters was acting as the chief election official for the county, *see* Opening Br. 3-4, not as a private citizen.

Mr. Rubinstein goes on to make two puzzling statements. First, he says that "Plaintiff concedes that a private citizen seeking to invoke immunity must be acting "under the direction or control of federal authorities or *pursuant to federal law* or court order." *Id.* (emphasis added). That's not a "concession." Our whole point is that Ms. Peters is entitled to immunity because she was acting pursuant to federal law.

Mr. Rubinstein's second statement is even more baffling: "Plaintiff seems to suggest that she was attempting to comply with federal election records retention law and this somehow satisfies the notion of acting 'pursuant to federal law.'" We don't simply "suggest" this. This is a centerpiece of Ms. Peters' claim to Supremacy Clause immunity. Mr. Rubinstein's tone of skepticism cannot substitute for the absence of any reasoned argument how Ms. Peters' efforts to secure forensic images of the hard drive of Mesa County's election management system ("EMS") was not undertaken pursuant to a federal law providing, in pertinent part:

> Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election.

ADD-32.

Mr. Rubinstein tries to distinguish one of the cases we cited, *Ex parte Conway*, 48 F. 77 (C.C.D.S.C. 1891), by claiming that the federal statute in that case "explicitly authorized" a private contractor to construct telegraph lines. Resp.Br. 29. But that statute simply provided that "any telegraph company…shall have the right to construct, maintain and operate lines of telegraph…over…the public domain of the United States,…along any of the military or post roads of the United States…and…across the navigable…waters of the United States." Post Roads Act of 1866, ch. 230, 14 Stat. 221, sec.1. If such statutory language can make an employee of a private telegraph company a "federal officer" for Supremacy Clause purposes, an "Officer of election" like Ms. Peters complying with the federal election-records-retention statute must equally be such a federal officer.

Indeed, the Post Roads Act gave Conway's company the right to build a telegraph line, but did not direct how that line was to be built. Conway was the foreman of a construction "gang" and in that capacity made the kind of "unilateral, self-determined efforts" to actually build the telegraph line authorized by federal law Mr. Rubinstein finds so objectionable in Ms. Peters' conduct. Resp.Br. 6. *See also id.,* 28 (criticizing Ms. Peters for "acting on her own"). Conway was arrested by a county "trial justice" for obstructing a public road. *Conway,* 48 F. at 77. According to the *Conway* Court, the governing legal rule was straightforward: "If

[Conway] be held in custody…for an act done…in pursuance of a law of the United States, he must be discharged." *Id.* And the court so ordered. *Id.,*78.

Mr. Rubinstein is right that compliance with federal law is "an obligation generally imposed upon all citizens." Resp.Br. 6. When complying with federal law, a citizen has acted as a *de facto* "federal officer," and if charged with a state criminal offense for doing so, Supremacy Clause immunity might shield that citizen from that criminal liability.

As county clerk, Ms. Peters was the chief election official for the county and responsible for all elections, including federal elections, in that jurisdiction. Federal law imposed a web of requirements on her. Opening Br. 3-5. One of those federal requirements was the election records-retention statute. Even Mr. Rubinstein appears to recognize that Ms. Peters acted "to comply with federal law." Resp.Br. 6.

At bottom, it is inescapable that Ms. Peters acted to comply with the federal election records retention statute and, in so doing, acted as a federal officer.

2. Mr. Rubinstein contends that Ms. Peters had no federal authority to justify her conduct because "there is no language in any of the statutes upon which Plaintiff relies that vests her with federal authority." Resp.Br. 31. In so doing, Mr. Rubinstein simply fashions a standard---offering no authority in support---that is

foreign to established precedent governing the application of Supremacy Clause immunity.

To the contrary, as this Court has pointed out, the Supreme Court gives "grants of federal authority generous sway." *Livingston,* 443 F.3d at 1219. "The question is not whether federal law expressly authorizes violation of state law, but whether the federal official's conduct was reasonably necessary to the performance of his duties." *Id.,* at 1227-28. "The necessary authority" can be "derived from the general scope of the officer's duties." *Sowders v. Damron,* 457 F.2d 1182, 1183 (10th Cir. 1972) (acts authorized if related to matters committed to officer even without express statutory provision). Even though an officer's "acts may have exceeded his express authority, this did not necessarily strip [him] of his lawful authority to act under the laws of the United States." *Clifton,* 549 F.2d at 728.

As an "officer of election," Ms. Peters had the duty to preserve election records by express command of a federal statute, ADD-32, contrary to Mr. Rubinstein's claim of an absence of statutory "language." Resp.Br. 31. Mr. Rubinstein has offered no persuasive argument faithful to the law or logic that she took these actions to preserve election records for any reason other than to fulfill her undeniable duty under federal law.

3a. In this Circuit, a "federal officer" is entitled to Supremacy Clause immunity when "in the course of performing an act which he is authorized to do

under federal law, the agent had an objectively reasonable and well-founded basis to believe that his actions were necessary to fulfill his duties." *Livingston,* 443 F.3d at 1222. However, in evaluating whether the conduct of the federal actor was motivated by an objectively reasonable and well-founded basis, "Supremacy Clause immunity cases require courts to evaluate the circumstances as they appear to federal officers at the time of the act in question, rather than the more subtle and detailed facts later presented to a court." *Id.,* at 1229.

The issue of the necessity and appropriateness of the federal actor's decisions and actions is reserved to a federal court. *See Tanella,* 374 F.3d at 147; *Venezia v. Robinson,* 16 F.3d 209, 212 (7th Cir. 1994).

Mr. Rubinstein claims that *Livingston* advises that, in undertaking this evaluation, a court can consider "whether the actions were concealed from or disclosed to supervisors." Resp.Br. 33. This is untrue. Nothing even approximating such a statement appears in *Livingston.* Whether an individual concealed his actions from his supervisor by itself says nothing about whether he reasonably believed those actions were necessary to comply with federal law. Indeed, if his supervisor was the perpetrator of the very violation of federal law he was trying to prevent, it would be an objectively reasonable judgment that concealing his actions from that supervisor was necessary to ensure compliance with federal law. That is precisely the dilemma in which Ms. Peters found herself. Opening Br. 5-8, 33-34.

b. The mandate of federal law that animated Ms. Peters was the command to preserve for a certain period all records necessary to audit the results of an election. Opening Br. 3-5. A fundamental issue in evaluating Ms. Peters' conduct is whether it was reasonable for her to believe that the Trusted Build upgrade would erase such records in violation of federal law. Mr. Rubinstein says that "the Secretary of State authorized Plaintiff to make a backup copy before Trusted Build," and so claims her actions were unnecessary. Resp.Br. 33. But he carefully avoids saying to this Court what this "backup copy" included. As Mr. Rubinstein's citations reveal, Secretary Griswold only authorized the back up of "election projects." JA637; Opening Br. 5. The experts who analyzed the forensic images secured by Ms. Peters confirmed that "election projects" included only a sliver of information, and that the audit logs, access logs, and hard drive images necessary for a post-election audit to comply with federal law were deleted both by the Trusted Build upgrade and by record retention limitations built into the system. *See* Opening Br. 4-5, 8-12.

As one of those experts explained:

> Logfiles are the records of what occurs within the system, when it occurs, who caused it to occur, and what were the consequences of the occurrence. Logfiles are records of the activity of the system running on the server, in this case the DVS voting system including its operating system and other software used in tallying votes. They are essential for any audit of how the system performed its functions during an election or at any other time.

JA563. Dominion's own manuals for this software "acknowledge that log files should be maintained." *Id.*

These experts' analyses confirmed that the Trusted Build upgrade deleted "695 log and event log files necessary for the determination of election integrity." JA72. *See also* JA485, 567. Mr. Rubinstein has offered no evidence challenging these analyses, or anything else that could support his claim that backing up "election project" records was sufficient to meet federal record-retention requirements. The record confirms Ms. Peters' judgment that action to retain her county's election records was necessary to comply with her duty under federal law in the face of the Trusted Build upgrade.

c. The secretive process imposed by Secretary Griswold on the execution of the Trusted Build upgrade, *see* JA53, strongly suggests that something nefarious was going on that the Secretary did not want exposed to public scrutiny. After all, an upgrade of the EMS would seem to be an exercise in good government for which political leaders would want to take credit.

That concealment by the Secretary was consistent with what Ms. Peters knew (because Dominion's staff and Secretary Griswold's staff told her so) – that Trusted Build would overwrite Mesa County's records of the 2020 general election and the 2021 municipal election. JA543. Mesa County had rebuffed Ms. Peters' request to make a copy of the EMS hard drive. JA14, 695.

So having a forensic image of the EMS hard drive made by some other means was the next logical option for Ms. Peters. No law barred her from doing so, as the testimony of Deputy Secretary of State Beall made clear. JA556. Indeed, Mr. Rubinstein represents to this Court that Ms. Peters has not been charged with any offense "for making the May 23, 2021, forensic image." Resp.Br. 4.[4]

As baseless as the charges in the Indictment are, Opening Br. 16-20, the facts that allegedly give rise to those charges boil down to the conduct by which the forensic images of the EMS hard drive were made. JA633. No reasonable reading of the Indictment can understand it as doing anything other than punishing Ms. Peters for her efforts to make forensic images of the EMS hard drive in compliance with federal election-record-retention requirements.

Ms. Peters' conduct was fundamentally shaped by the cloak of secrecy with which Secretary Griswold's protocols sought to veil Trusted Build. Although the Secretary's protocols restricted who could attend the installation, those protocols did not prevent Peters from allowing a consultant to have access to the room in which the EMS server was located (JA697-98) because his making of the images did not occur during the Trusted Build installation. *Id.* Ms. Peters violated no law

[4] Notwithstanding this record, Mr. Rubinstein suggests that Ms. Peters violated 52 U.S.C. §20702 by stealing or concealing election records, a bizarre suggestion that should be dismissed out-of-hand.

in how these forensic images were made, including shutting down the security cameras. JA543.

Mr. Rubinstein refers to the forensic images Ms. Peters had made as "confidential digital images of Mesa County Dominion Voting Systems equipment." Resp.Br. 2. Likewise the Indictment uses terms such as "confidential digital images," "unauthorized data breach, and "proprietary hard drive." JA633.[5] But Mr. Rubinstein never justifies his use of such loaded terms. There is no record evidence that Peters released passwords or that the records and software are legitimately treated as confidential. The court in *Curling v. Raffensperger,* 493 F.Supp.3d 1264, 1279 n.27 (N.D. Ga. 2020) found that access to the Dominion voting system was limited "to protect the confidentiality of the election system's functioning as well as to protect Dominion's confidential intellectual property pursuant to its contract with the State." Yet, the court gave the plaintiffs' expert access to that system to evaluate how it functioned. *Id.,* at 1279-80.

Whatever proprietary interest Dominion had in the software used by Mesa County, the data on the forensic images Ms. Peters had made captured how the choices of voters were recorded and manipulated (but did not disclose the choices

[5] No election occurred during the period in which Ms. Peters' consultant made the forensic images, which means his actions could not have interfered with the 2020 and 2021 elections, or any other election, as Mr. Rubinstein flippantly states. Resp.Br. 33.

of individual voters). Opening Br. 8-12. That is information of the gravest public interest, and is not subordinate to the private commercial interests of Dominion, as reflected in the *Curling* Court's adjudication. As Judge Totenburg observed in *Curling,* "The insularity of the Defendants' and Dominion's stance here in evaluation and management of the security and vulnerability of the [Dominion] system does not benefit the public or the citizens' confident exercise of the franchise."

Ms. Peters soberly treated the data captured on the forensic images as a weighty matter implicating momentous public concerns. Ms. Peters did not engage in any crass partisan moves, but consistent with the responsibilities of the office with which she had been entrusted by the voters, provided the images to experts to analyze what the data extracted from the forensic images disclosed about the real-world tabulation of votes in Mesa County. That work resulted in three voluminous reports submitted to the Board of County Commissioners. *Id.*

In addressing the undeniably objective fact that Trusted Build was going to eradicate election records in violation of federal law, Ms. Peters sought to preserve those records and inform both the public and her superiors in county government what the data on those records disclosed. She undertook no political grand-standing, brought no news-worthy lawsuits, nor in any other way sought to create

havoc for the Trusted Build upgrade Secretary Griswold wanted to implement. Ms. Peters chose the least disruptive course to fulfill her duty under federal law.

The record before this Court shows that Ms. Peters acted prudently in the face of the circumstances as they appeared to her, and so had an objectively reasonable and well-founded basis to believe that her actions were necessary to fulfill her duties under federal law. *Livingston,* 443 F.3d at 1222. Accordingly, the Supremacy Clause cloaks her in immunity from the state prosecution brought against her.

B. The Privileges or Immunities Clause reinforces the protections of the Supremacy Clause.

Mr. Rubinstein criticizes as "cursory," Resp.Br. 26, our contention that the Privileges or Immunities Clause of the Fourteenth Amendment reinforces Ms. Peters' immunity from state prosecution but offers no substantive argument contesting the proposition that the Clause protects "the right of the citizens of this country…to engage in administering [the national government's] functions." *Slaughter-House Cases,* 83 U.S. 36, 79 (1872). *See also Orr v. Gilman*, 183 U.S. 278, 286 (1902)(The Privileges or Immunities clause protects those "privileges and immunities arising out of the nature and essential character of the national government."); *United States v. Pacelli*, 491 F.2d 1108, 1113 (2d Cir. 1974)("[A] citizen's right to inform federal authorities concerning violations of [federal] laws is secured by the Constitution" and protected from state prosecutions of those

"enforc[ing] the laws of the United States."); William J. Rich, *Taking "Privileges or Immunities" Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153, 199 (2002). Accordingly, the Privileges or Immunities Clause confirms Ms. Peters' immunity from state prosecution because of her efforts to administer the national government's functions by enforcing federal election-records-retention law. *See* Opening Br. 34, n.2.

Numerous scholars have pointed out that the Privileges or Immunities Clause reinforces the Supremacy Clause. *See, e.g.,* Cong. Research Serv., THE CONSTITUTION OF THE UNITED STATES, ANALYSIS AND INTERPRETATION 1569 (J.H. Killian & G. Costello eds., 1996); Corwin, THE CONSTITUTION OF THE UNITED STATES 965 (1953); David Currie, *The Constitution in the Supreme Court: Limitations on State Power 1865-73*, 51 U. CHI. L. REV. 329, 348 (1983); D.O. McGovney, *Privileges or Immunities Clause, Fourteenth Amendment*, 4 IOWA L. BULL. 219, 230-31 (1918); Todd Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike*, 31 VAL. U. L. REV. 893, 917 (1997). For purposes of protecting those who enforce federal law in the face of hostile regimes of state law, the Supremacy Clause and the Privileges or Immunities Clause operate as an integrated constitutional mechanism. These provisions of the Constitution function as a "belt-and-suspenders" to immunize

Ms. Peters from state prosecution for her efforts to fulfill her federal duty to preserve election records.

III. The District Court's Abstention Was Reversible Error in Light of the Bad Faith of the State Prosecution

The discussion in the Response Brief of Ms. Peters' First Amendment retaliation claim begins with the mistaken assertion that 28 U.S.C. §2283 ("the Anti-Injunction Act") prohibits the grant of an injunction in this case. Resp.Br. at 7. That statute does not govern this action, which was brought pursuant to 42 U.S.C. §1983. *Mitchum v. Foster,* 407 U.S. 225, 242-43 (1972) (Section 1983 "falls within the 'expressly authorized' exception to 28 U.S.C. §2283.").

Mr. Rubinstein compounds that mistaken assertion by suggesting that *Younger* addressed the issue of the applicability of 28 U.S.C. §2283 to Ms. Peters' action. Resp.Br. at 7-8. But *Mitchum* noted that the *Younger* Court "expressly disavowed" deciding the issue. 407 U.S. at 230. The *Mitchum* Court then resolved the issue by holding that an exception to the Anti-Injunction Act exists when a federal statute, such as 42 U.S.C. §1983, expressly authorizes an action. *Id.*

Ignoring Ms. Peters' reliance on sworn declarations and record documents, Mr. Rubinstein insists that she makes "only unsupported and conclusory allegations regarding harassment and bad faith…." Resp. Br. at 6. He argues that he did nothing more than prosecute vigorously. *Id.,*3. The evidence that Ms. Peters presented shows that several of his actions were unrelated to the prosecution or

were plainly motivated by an intent to punish her for making the images that established the unlawful deletion of election records and the unauthorized creation of ballots that altered the true vote counts in the 2020 and 2021 elections. JA336.

For example, sworn declarations demonstrated that Mr. Rubinstein's office: harassed her 93-year-old mother and other members of the family (JA543); prosecuted her for actions that she was obligated to take to preserve election records while refusing to prosecute Secretary Griswold for ordering Ms. Peters to install the Trusted Build upgrade that deleted election records and refusing to pursue the issue of an unlawful alterations of vote counts in the 2020 and 2021 elections (JA23); obtained an indictment of Peters just days after she formally petitioned the County Board to discontinue its contract to use a computerized voting system (JA548); interjected himself in a domestic matter involving Ms. Peters' husband who was in an adult care facility (JA547); had her detained in jail under a $500,000 cash bond after the indictment (JA 549); opposed her request to travel to the premier of a movie that featured Ms. Peters because she would be "celebrated as a hero" for actions that were charged in her indictment (JA549); and participated with the Federal Bureau of Investigation in securing and executing a search warrant in an excessive manner at the home of her political associate, Sherronna Bishop, because Ms. Bishop "connect people." JA579, 585-89. Public records established that Mr. Rubinstein's office falsely advised a magistrate who

issued an arrest warrant and members of the grand jury that Ms. Peters had copied the County's EMS server in violation of law. JA513, 526.

Mr. Rubinstein's report to the Mesa County Board of County Commissioners is further evidence of his bad faith. It necessarily acknowledged that there was a substantial question that ballots had been inserted during both the 2020 and 2021 elections in the County. JA549, 336. His report was an attempt to show that the creation of the unauthorized ballots was not the result of uncertified software on the server, as Ms. Peters' expert concluded, but rather due to actions taken by Ms. Peters' employee. He took no steps to alert the public about that apparent election irregularity or to suggest that the Board take appropriate steps to assure that it is not repeated. His only focus was to punish Ms. Peters for uncovering the deletion of election records and the alterations of the vote counts, which efforts were a First Amendment protected activity. *See Irizarry,* 38 F.4th at 1289-90.

These actions were sufficient to establish a bad faith exception to *Younger.*[6]

First Amendment retaliation claims are not limited to circumstances that involve a statute that restricts speech or association. *E.g., Warren v, DeSantis,* 90 F.4th 1115 (11th Cir. 2024) (wrongful suspension of elected state prosecutor in retaliation for public statements on matters of public concern); *Lacey v, Maricopa*

[6] The district court based its decision on a review of "the record before it" and judicial notice of documents in other proceedings, including *People v. Peters,* No. 22CR371 (Mesa County District Court). JA755.

County, 693 F.3d 896 (9th Cir. 2012) (arrests); *Cullen v. Fliegner,* 18 F.3d 96 (2d Cir. 1994) (local school district disciplinary action); *Smith v. Meese,* 821 F.2d 1484 (11th Cir. 1987) (criminal investigations); *Olagues v. Russoniello,* 797 F.2d 1511 (9th Cir. 1986) (voter fraud investigation); *Wilson v. Thompson,* 593 F.2d 1375 (5th Cir. 1979) (prosecution); *Timmerman v. Brown,* 528 F.2d 811 (4th Cir. 1975) (prosecution). Indeed, this Court said in *Worrell v. Henry,* 219 F.3d 1197, 1212 (10th Cir. 2000): "[a]ny form of official retaliation for exercising one's freedom of speech, including prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom."

It is also not a requirement for establishing bad faith that Ms. Peters show that she has been prosecuted by Mr. Rubinstein multiple times. He relies on *Phelps I* and *Utah Animal Rights Coalition v, Beaver County,* No. 2:22-cv-497 (D.Utah 3/24/2023) to support his contention. *Phelps I* did not hold that multiple prosecutions are a necessary element of bad faith but that "typically" that has been shown. 59 F.3d at 1065. First Amendment retaliation cases listed in the immediately preceding paragraph based on actions other than prosecution, including criminal investigations and suspensions from office obviously would have been barred if the rule suggested by Mr. Rubinstein been applied to those actions. Neither this Court nor any other court has adopted the test announced by the district court in *Utah Animal Rights Coalition* "that a plaintiff must

demonstrate both the existence of a substantial number of prosecutions and that a reasonable prosecutor would not have brought such multiple charges under similar circumstances." 2023 U.S. Dist. LEXIS 52168, at *20. To the contrary, most courts that have addressed the issue have concluded that it is sufficient to show that the action claimed to be retaliatory is not an "isolated event." *E.g., Wilson v. Thompson,* 593 F.2d at 1381 (The "stated principle that the *Younger* bad faith exception applies only when there is a threat of multiple prosecutions---simply cannot be sustained."). There are actions other than prosecutions that can provide evidence of a pattern of retaliation. *E.g., Housing Works, Inc. v. City of New York,* 72 F.Supp.2d 402, 426 (S.D.N.Y. 1999).

CONCLUSION

For the foregoing reasons, and those set out in our Opening Brief, this Court should reverse the district court's dismissal of this case, and award the relief requested in our Opening Brief.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,474 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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Dated: May 2, 2024

Respectfully submitted,

/s/ Robert J. Cynkar
Robert J. Cynkar

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Webroot Endpoint Protection v.9.0.31.86, May 2, 2024, and according to the program are free of viruses.

/s/ Robert J. Cynkar

Robert J. Cynkar

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2024 I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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DISTRICT COURT, MESA COUNTY, COLORADO 125 N. Spruce St. Grand Junction CO 81501 (970) 257-3630 **PEOPLE OF THE STATE OF COLORADO** Plaintiff v. **TINA PETERS** Defendant **ATTORNEY FOR DEFENDANT** Attorney for the Defendant Michael Edminister Edminister Law P.O. Box 1827, Carbondale, CO 81623 Phone Number: (970) 963-7201 E-mail: mike.edministerlaw@gmail.com Atty. Reg. #: 49808	**COURT USE ONLY** Case No: 22CR371 Div: 9 JUDGE BARRETT

MOTION TO DISMISS INDICTMENT FOR LACK OF JURISDICTION

Defendant Tina Peters respectfully moves this Court pursuant to COLO. CRIM P. RULE 12 to dismiss the indictment against her because she is immune from this prosecution under the Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, and the Privileges and Immunities Clause of the 14th Amendment to the United States Constitution. U.S. CONST. amend. XIV, § 1, cl. 2, As a result, this Court has no subject-matter jurisdiction over this case, and it must be dismissed.

The grounds for this Motion are set out below.

Governing Law

A. On November 8, 2018, Ms. Peters was elected to a four-year term as County Clerk and Recorder of Mesa County, Colorado, an office created by the Colorado Constitution. COLO. CONST. Art. 14 § 8. Under Colorado law, each county clerk and recorder is the "chief election official for the county," and the "chief designated election official for all coordinated elections." C.R.S. §1-1-110(3).

B. Many of Ms. Peters' legal obligations as Mesa County's chief election official were dictated by federal law because every voting system used in an election of a federal officer must meet federal requirements. 52 U.S.C. § 21081(a). These federal requirements provide that the voting system must "produce a record with an audit capacity for such system." 52 U.S.C. § 21081(a)(2)(A), which includes "a permanent paper record with a manual audit capacity." 52 U.S.C. §21081(a)(2)(B)(i). That record must be "available as an official record for any recount…." 52 U.S.C. § 21081(a)(20)(B)(iii). Most importantly for this case, another federal statute provides that "[e]very officer of election shall retain and preserve" for 22 months after an election for federal office "all records and papers … relating to any application, registration, payment of poll tax, or other act requisite to voting in such election." 52 U.S.C. § 20701. *See also* U.S. Department of Justice, *Federal Law Constraints on Post-Election "Audits,"* 2 (July 28, 2021), *available at* https://www.justice.gov/opa/press-release//file/1417796/download ("The materials covered by Section [20701] extend beyond 'papers' to include other 'records.' Jurisdictions must therefore also retain and preserve records created in digital or electronic form.") Failure to comply with this duty exposes a clerk to not more than one year in prison, and

a fine of not more than $1,000. *Id.* Colorado law also requires the designated election official to preserve election records for at least 25 months. C.R.C. §1-7-802.

C. In addition, Colorado law adopts the Voting Systems Standards promulgated by the Federal Election Commission (now the Election Assistance Commission) in 2002 to govern the mechanics of elections in the State. C.R.S. §1-5-601.5. *See* Federal Election Comm'n, VOTING SYSTEMS STANDARDS, VOLUME I – PERFORMANCE STANDARDS (2002)("VOTING SYSTEMS STANDARDS"). The VOTING SYSTEMS STANDARDS define "voting system" to include "the software required to program, control, and support the equipment that is used to define ballots, to cast and count votes, to report and/or display election results, and to maintain and produce all audit trail information." V.S.S. 1.5.1. The VOTING SYSTEMS STANDARDS direct that, "[t]o ensure system integrity, all systems shall … (m)aintain a permanent record of all original audit data that cannot be overridden but may be augmented by designated officials in order to adjust for errors or omissions." V.S.S. 2.2.4.1(h). The VOTING SYSTEMS STANDARDS require that "all audit trail information … shall be retained in its original format, whether that be real-time logs generated by the system, or manual logs maintained by election personnel." V.S.S. 2.2.11. The VOTING SYSTEMS STANDARDS underscore the importance of the preservation of auditable election records:

> Election audit trails provide the supporting documentation for verifying the correctness of reported election results. They present a concrete, indestructible archival record of all system activity related to the vote tally, and are essential for public confidence in the accuracy of the tally, for recounts, and for evidence in the event of criminal or civil litigation.
>
> V.S.S. 2.2.5.1.

D. Access to the secure room containing Mesa County's election management system ("EMS"), tabulation workstations, and the location of adjudication was governed by Election Rule 20, "County Security Procedures." 8 C.C.R. §1505-1. Under Election Rule 20.5.3(a) access to this room was limited to county employees who had passed a criminal background check. However, Election Rule 20.5.3(b) also provided that "[e]xcept for emergency personnel, no other individuals may be present in these locations *unless supervised by one or more employees with authorized access*." (Emphasis added.)

E(i). The Supremacy Clause provides:

> This Constitution, and the Laws of the United States … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. As a result, "the states have *no power* … to retard, impede, burden, or in any manner control" the execution of federal law. *McCulloch v. Maryland,* 17 U.S. 316, 436 (1819) (emphasis added). The immunity at issue here is "rooted" in the Supremacy Clause. *Wyoming v. Livingston,* 443 F.3d 1211, 1217 (10th Cir. 2006). At bottom,

> [t]he Constitution implicitly reserves to the federal government the power not only to enforce its laws but also to "execute its functions"; that power is inherent in the federal government qua government, and does not depend on congressional authorization. Supremacy Clause immunity is simply a reflection of that power.

Seth Waxman & Trevor Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause,* 112 YALE L.J. 2195, 2250 (2003)(internal citations omitted)("*What Kind of Immunity?*").

Supremacy Clause immunity has been recognized for over a century, since the landmark case of *Cunningham v. Neagle,* 135 U.S. 1 (1890), which held a deputy marshal immune from state prosecution for murder when he killed a man he suspected was about to stab Justice

Stephen Field. The Court put the principle in no uncertain terms: "[I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under ... [state] law ...." *Id.*, at 75 (emphasis added). Justice Holmes echoed the point in *Johnson v. Maryland*: "[E]ven the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States." 254 U.S. 51, 56-57 (1920).

(ii). "Importantly, 'Supremacy Clause immunity does not require that federal law explicitly authorize a violation of state law.'" *United States v. Moll,* Cr. Action No. 22-cr-00266-NYW, 2023 WL 2042244, at *7 (D.Colo. Feb. 16, 2023) (quoting *Livingston,* 443 F.3d at 1227). As Judge Wang explained in *Moll,* "'The question is not whether federal law expressly authorizes violation of state law, but whether the federal official's conduct was reasonably necessary for the performance of his duties.'" *Id.* (quoting *Livingston,* 443 F.3d at 1227-28). Thus "immunity applies where [the federal actor] had no motive other than to discharge his duty under the circumstances *as they appeared to him* and that he had an honest and reasonable belief that his actions were necessary and proper." *New York v. Tanella,* 374 F.3d 141, 151 (2d Cir. 2004) (quoting *Kentucky v. Long,* 837 F.2d 727, 745 (6th Cir. 1988)) (emphasis in original). *See also Livingston,* 443 F.3d at 1229 ("Supremacy Clause immunity cases require courts to evaluate the circumstances as they appear to federal officers at the time of the act in question, rather than the more subtle and detailed facts later presented to a court.").

The Supremacy Clause operates to "secure federal rights by according them priority *whenever* they come in conflict with state law." *Chapman v. Hous. Welfare Rights Org.,* 441 U.S. 600, 613 (1979)(emphasis added). It "precludes the use of state prosecutorial power to frustrate the legitimate and reasonable exercise of federal authority," *Livingston,* 443 F.3d at 1213, blocking interference "with the operation of the federal government in ways much subtler than passing inconsistent laws." *Idaho v. Horiuchi*, 253 F.3d 359, 364–65 (9th Cir.), *vacated as moot,* 266 F.3d 979 (9th Cir. 2001)(citing cases). Supremacy Clause immunity is triggered *by definition* when state authorities claim that federal law is being enforced by "illegal means" under state law.

In *Livingston,* for example, federal officials were held immune from prosecution for their violations of state trespass and littering laws to install monitoring devices on wolves. *Livingston,* 443 F.3d at 1213-15. And, as Justice Holmes in *Johnson v. Maryland* pointed out, Supremacy Clause immunity can shield a federal actor even when state law involves life-and-death interests. In *Petition of McShane*, 235 F.Supp. 262 (N.D.Miss. 1964), Supremacy Clause immunity protected federal marshals from state prosecution when they violated state laws concerning breach of the peace and the unlawful use of force by provoking a riot in which people were killed in their efforts to secure James Meredith's entrance into the University of Mississippi. In *Clifton v. Cox,* 549 F.2d 722 (9th Cir.1977), a federal agent, mistakenly believing that one of his team had been shot, fatally shot the subject of an arrest warrant in the back as he tried to run away. *Id.,* at 724. The Ninth Circuit held that the agent was entitled to Supremacy Clause immunity from state prosecution for second-degree murder and involuntary manslaughter. *Id.,* at 728. "In short, a federal officer's entitlement to immunity from state criminal prosecution does not depend on an

assessment of his conduct under state law." *What Kind of Immunity?* at 2234. Rather, "entitlement to Supremacy Clause immunity is to be ascertained by looking only at federal law." *Id.,* at 2233.

(iii). Supremacy Clause immunity deprives a state court of subject-matter jurisdiction. Officers "discharging duties under federal authority pursuant to and by virtue of valid federal laws, are not subject to arrest or other liability under the laws of the state in which their duties are performed." *Ohio v. Thomas,* 173 U.S. 276, 283 (1899). "[B]y providing immunity from suit rather than a mere shield against liability, the defense of federal immunity protects federal operations from the chilling effect of state prosecution." *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004). Indeed, the goal of Supremacy Clause immunity "is not only to avoid the possibility of *conviction* of a federal agent, but also to avoid the necessity of undergoing the entire process of the state criminal procedure." *Kentucky v. Long*, 837 F.2d 727, 752 (6th Cir. 1988)(emphasis in original). *See also Livingston,* 443 F.3d at 1221("Both qualified immunity and Supremacy Clause immunity reduce the inhibiting effect that a civil suit or prosecution can have on the effective exercise of official duties by enabling government officials to dispose of cases against them at an early stage of litigation."); *Texas v. Kleinert*, 143 F. Supp. 3d 551, 556 (W.D. Tex. 2015), *aff'd,* 855 F.3d 305 (5th Cir. 2017)(When Supremacy Clause immunity applies, "[a] state court is without jurisdiction to prosecute a federal officer."); *Arizona v. Files*, 36 F. Supp. 3d 873, 877 (D. Ariz. 2014)("Once a Supremacy Clause immunity defense is established, it is not left to a federal or state jury to acquit the defendant of state-law criminal charges, or to a federal or state judge to direct a verdict in the defendant's favor; the federal or state court is instead stripped of any jurisdiction over the defendant.").

Supremacy Clause immunity is one of a certain category of rights for which "a constitutional provision *itself* contains a *guarantee* that a trial will not occur," and so gives rise to a "right not to be tried." *United States v. Wampler,* 624 F.3d 1330, 1336 (10th Cir. 2010) (emphasis in original). *See also United States v. Quaintance,* 523 F.3d 1144, 1146 (10th Cir. 2008) ("A right not to be tried rests upon an explicit statutory or constitutional guarantee that trial will not occur."). *Cf. Nixon v. Fitzgerald,* 457 U.S. 731, 742 (1982) (holding that a President's absolute immunity from suit for civil damages arising from actions taken while in office allows "an immediate appeal to vindicate this right to be free from the rigors of trial.").

(iv). Supremacy Clause immunity "extends to any person, including a private citizen …, who acts under the direction and control of federal authorities or pursuant to federal law or court order." *Connecticut v. Marra*, 528 F. Supp. 381, 385 (D. Conn. 1981). Supremacy Clause immunity has protected a railroad clerk selling tickets pursuant to a federal court order which contradicted state law, *Hunter v. Wood*, 209 U.S. 205 (1908), private individuals supporting an FBI undercover operation, *Brown v. Nationsbank Corp.*, 188 F.3d 579 (5th Cir. 1999), members of a posse comitatus called upon to assist a federal marshal, *West Virginia v. Laing,* 133 F. 887 (4th Cir. 1904), and the foreman of a private construction gang building a federally authorized telegraph line, *Ex Parte Conway*, 48 F. 77 (C.C.D.S.C.1891).

(v). The protections of the Supremacy Clause for those executing federal law are also reflected in the Fourteenth Amendment's Privileges and Immunities Clause, which, even within its narrow scope, protects "the right of the citizen of this country…to engage in administering [the national government's] functions." *Slaughter-House Cases,* 83 U.S. 36, 79 (1872). *Cf. In re Quarles,* 158 U.S. 532, 535 (1895).

Factual Background

1. On April 30, 2021, Colorado Secretary of State Griswold's office issued a directive requiring local election officials to participate in installing Trusted Build[1] in their election management system ("EMS"). (Ex. A)[2]. While this directive required local election officials to back-up "election project" records, which Ms. Peters did, "election project" records did not include all the electronic information that was essential for a post-election audit such as audit logs, access logs, and an image of the hard drive of the County's EMS server. Ex. A; Ex. B, ¶13; Ex. C, at 1-2; Ex. D, at 1-2. The directive insisted that only state, county election, and Dominion staff be present for the installation. If anyone else was present, the Trusted Build team would move on, and the county's election equipment would be shipped to Denver, where the upgrade would be installed without any scrutiny beyond that of Dominion Voting Systems, Inc., the vendor of the County's EMS, and Griswold's staff. Ex. A, at 2.

That month, David Stahl from Dominion advised Ms. Peters that Trusted Build would make it impossible to read the digital election records used in the 2020 general election in Mesa County and the 2021 municipal election in Grand Junction, a fact subsequently confirmed to Ms. Peters by Secretary Griswold's staff. Ex. B, ¶¶ 7-8.

2. Alarmed that the Trusted Build upgrade would effectively destroy election records in violation of federal and state law, in April, 2021, Ms.Peters requested that the County make a copy of the Mesa County EMS hard drive, but her request was denied. Ms. Peters was then confronted by the dilemma of (i) the erasing of election records by Trusted Build, (ii) its

[1] "Trusted Build" is defined in the Election Rules promulgated by the Secretary of State at 8 CCR 1505-1.1.59, which describes "write-once installation disk or disks for software and firmware" in a county's computerized voting system server.
[2] Citations to "Ex. __" refer to exhibits to the accompanying Declaration of _____.

installation under tightly closed circumstances beyond any public scrutiny, and (iii) no official technical staff available to her to preserve the records as required by law. To fulfill her federal and state duties to preserve election records in these circumstances, Ms. Peters engaged a consultant, Conan Hayes, to make a forensic image of the EMS hard drive, which does not modify any data, contain voter choices, or cause any harm to the voting system. Ex. B, ¶ 18 ("[A] forensic image is a bit-by-bit, unalterable (read only) copy of all elections records stored in the election management system.").

Mr. Hayes was not a county employee, but was accompanied and supervised by Ms. Peters each time he was in the EMS room. Ms. Peters also arranged for Mr. Hayes to use the access badge of another consultant, Gerald Wood. Access badges were used to allow vendors to enter secure areas to perform various services, and were often labeled simply "Temp 1," "Temp 2," and so on, with no other identifying information. Ex. B, ¶ 27. They functioned very much like electronic hotel room keys, not official identification cards.

Mr. Hayes made the first forensic image on May 23, 2021, thereby preserving election records from the 2020 and 2021 elections. Trusted Build was installed on May 25, 2021. Mr. Hayes was present solely to observe. On the following day, Mr. Hayes made a second forensic image of the EMS hard drive, which captured only the newly installed software. Ex. B, ¶ 26.

3. The forensic images secured by Ms. Peters were examined by experts. Cybersecurity expert Douglas Gould concluded that Trusted Build erased election records of the November 2020 election and the 2021 municipal election, overwriting records that were required to be preserved for future audits. Ex. E, at 11. Another expert, Walter Daugherity, concluded that the forensic images revealed an unusual phenomenon: after some of the ballots were recorded in a

database, no further ballot data was recorded in it even though ballot processing was not complete. Rather, data from processing additional ballots was entered into a separate, newly created database. Some, but not all, of the data from the first database were copied into the new database, and hidden from election official in violation of federal auditability requirements. Ex. F, at 3-5.

4. Ms. Peters' associates also presented her concerns at a September 1, 2021, meeting in County offices attended in person or virtually by representatives of U.S. Attorney General Garland, District Attorney Daniel P. Rubinstein and members of his staff, personnel from Secretary Griswold's office, representatives of the State Attorney General, officers of Dominion, an FBI Special Agent, and members of the County Board of County Commissioners (the "Board"), among others. Ex. G, ¶¶ 11-23. Nothing came of the meeting.

5. On September 17, 2021, Ms. Peters submitted to the Board the first of what was to be three reports from the experts who had analyzed the forensic images Ms. Peters had commissioned. In her cover letter, Ms. Peters explained:

> Enclosed is the first report from the cybersecurity experts who have analyzed thoroughly the two forensic images of the drive of the DVS Democracy Suite Election Management System in my office which we used for the management of the 2020 election. Because the report documents a substantial amount of data destruction during the May 25 "Trusted Build" conducted by the Secretary of State's office and the vendor, I wanted to get this in your hands immediately.
>
> … As you know, the legal duty to preserve election records falls solely to me and my office. "Extensive" amounts of data required to be preserved were instead destroyed, and done in a way that was totally beyond my control or knowledge. Among other things, these deletions would preclude a forensic audit of the last election. Thanks to the pre-Trusted Build image I had commissioned in May, these data have been preserved, in full compliance with my obligations under federal and state law, preserving the integrity of our county's election record archive and permitting a forensic audit if one were conducted.

> According to this report, the forensic examination has determined that this system and procedures "cannot meet the certification requirements of the State of Colorado and should not have been certified for use in the state." Obviously, this is highly relevant to any decision whether to continue to use these systems in our county. County.

Ex. H, at 1.

In sum, the *Mesa County Colorado Voting Systems Report #1 with Forensic Examination and Analysis* (Ex. H, att 2 - 83) advised the Board:

> Forensic examination found that election records, including data described in the Federal Election Commission's 2002 Voting System Standards (VSS) mandated by Colorado law as certification requirements for Colorado voting systems, have been destroyed on Mesa County's voting system, by the system vendor and the Colorado Secretary of State's office. … The extent and manner of destruction of the data comprising these election records is consequential, precluding the possibility of any comprehensive forensic audit of the conduct of any involved election. This documented destruction also undermines the conclusion that these Colorado voting systems and accompanying vendor and Colorado Secretary of State-issued procedures could meet the requirements of Colorado and Federal law, and consequently vitiates the premise of the Colorado Secretary of State certification of these systems for use in Colorado.

Ex. H, at 5.

6. On March 1, 2022, Ms. Peters submitted to the Board *Mesa County Colorado Voting System Report #2: Forensic Examination and Analysis Report*. Ex. I, at 3 - 146. In her submission, Ms. Peters alerted the Board:

> As you know, I had these images taken to preserve election records and help determine whether the county should continue to utilize the equipment from this vendor. Because the enclosed report reveals shocking vulnerabilities and defects in the current system, placing my office and other county clerks in legal jeopardy, I am forwarding this to the county attorney and to you so that the county may assess its legal position appropriately. Then, the public must know that its voting systems are fundamentally flawed, illegal, and inherently unreliable.
>
> From my initial review of the report, it appears that our county's voting system was illegally certified and illegally configured in such a way that "vote totals can be

> easily changed." We have been assured for years that external intrusions are impossible because these systems are "air gapped," contain no modems, and cannot be accessed over the internet. It turns out that these assurances were false. In fact, the Mesa County voting system alone was found to contain thirty-six (36) wireless devices, and the system was configured to allow "any computer in the world" to connect to our EMS server. For this and other reasons—for example, the experts found uncertified software that had been illegally installed on the EMS server—our system violates the federal Voting System Standards that are mandated by Colorado law.

Ex. H, at 1. *See also* Ex. E, at 1 – 13 (Gould Declaration discussing reports).

The Board took no action.

7. On April 23, 2022, a third report analyzing the forensic images, prepared by Dr. Daugherity and another computer expert, Jeffrey O'Donnell, was submitted to Mr. Rubinstein. Ex. F, at 2 - 5; Ex. J, at 1 - 87. Again, the report notes that election records from the November 2020 General Election and April 2021 Grand Junction City Council Election "were improperly deleted by the so-called 'Trusted Build." Ex. F, at ¶ 8. In addition, this report identified "an unusual phenomenon:"

> After some of the ballots were processed and their information recorded in a set of Microsoft SQL database tables for the respective election ("Set 1"), no further data were entered in Set 1 even though ballot processing was not complete. Rather, data from processing additional ballots were entered into a separate, newly created set of tables ("Set 2"). Further, some but not all of the data from Set 1 was copied into Set 2. Accordingly, neither Set 1 nor Set 2 contained all the data from counting all the ballots.
>
> … Because the creation of Set 2 hid Set 1 from election workers, breaking the chain of custody and violating federal auditability requirements, election officials had no way to examine or review the ballots in Set 1 which were not copied to Set 2. This calls into question the integrity of the vote counting process and the validity of the election results.

Ex. F, ¶¶ 15 - 16.[3]

8. Rather than seriously engage the substantive concerns raised by Ms. Peters and her experts in their sober, professional presentations to the Board and her public discussion of their findings, Mr. Rubinstein, among other things, launched an "investigation" of the conduct in which Ms. Peters and her associates engaged to comply with federal election-record-retention law. During the course of that investigation Ms. Peters was initially subjected to false accusations that it was unlawful for her to have had the forensic images of the County's EMS server made. Deputy Secretary of State Beall eventually admitted under oath in other court proceedings that making the forensic images was not unlawful. Ex. L, at 2.

The indictment finally produced included no charge that Ms. Peters acted illegally in having the forensic images made. Rather, it strained to fashion baseless criminal charges out of the conduct by which those images were made.

This Court Has No Jurisdiction Over This Case Because Ms. Peters Is Immune From State Prosecution For the Conduct That Is the Subject of the Indictment Under the Supremacy Clause and the Privileges and Immunities Clause of the United States Constitution.

Supremacy Clause immunity applies to the conduct of (a) a federal official taken within his federal authority (b) that "he reasonably believed … were necessary and proper in the performance of his duties." *Moll,* 2023 WL 2042244, at *7 (quoting *Hawaii v. Broughton*, 2013 WL 328881, at 5 (D. Haw. June 28, 2013)). The text and logic of the Privileges and Immunities Clause buttresses that immunity.

[3] Mr. Rubinstein and his investigator, Michael Struwe, neither of whom have any expertise in cyber security matters, submitted a response to the Board purporting to challenge the analysis of the Daugherity/O'Donnell report. Ex. K. Dr. Daugherity's declaration replies to the Rubinstein/Struwe claims. Ex. F, ¶¶ 18 – 24 . At bottom, the Rubinstein/Struwe response failed to acknowledge, much less explain, the fact that in two consecutive elections, the Mesa County voting system created an extra database that masked the actual election results.

The first "question is not whether federal law expressly authorizes violation of state law, but whether the federal official's conduct was reasonably necessary to the performance of his duties." *Livingston,* 443 F.3d at 1227-28. Ms. Peters, serving as her County's designated election official, had an undisputable federal duty under 52 U.S.C. §20701's command that "every officer of election shall retain and preserve" election records for 22 months after an election. That mandate was underscored by the whole regime of federal Voting Systems Standards adopted by Colorado to ensure the integrity of the voting system by maintaining auditable records of elections. *See* V.S.S. 2.2.4.1(h), 2.2.11, 2.2.5.1. In complying with this body of federal law, Ms. Peters acted as a federal official. Nothing in the indictment, or otherwise alleged by the prosecution (even in the campaign of vilification in which Mr. Rubinstein engaged), remotely offers any basis to contest this proposition.

Second, the officer must have had "an objectively reasonable and well-founded basis to believe that his actions were necessary to fulfill his duties." *Livingston,* 443 F.3d at 1222. Importantly, "Supremacy Clause immunity cases require courts to evaluate the circumstances as they appear to federal officers at the time of the act in question, rather than the more subtle and detailed facts later presented to a court." *Id.,* 1229. With less than a month's notice of the installation of the Trusted Build upgrade, the County having denied her request to copy the EMS hard drive, the Secretary of State's Office imposing severe conditions to ensure the lack of public scrutiny of the upgrade, and with no battery of lawyers at her disposal, Ms. Peters fulfilled her federal duty without disrupting the upgrade. Ms. Peters discretely engaged a consultant who made forensic images of the EMS hard drive while under her supervision, all fully consistent with applicable security procedures. No evidence suggests that Ms. Peters acted for reasons other

than to fulfill her federal duty; no evidence indicates she acted for private gain or out of maliciousness. Ms. Peters' conduct was a measured response to the dilemma confronting her as she fairly understood it, fitting comfortably within the bounds of Supremacy Clause immunity. *See Long*, 837 F.2d at 745 ("immunity applies where the defendant 'had no motive other than to discharge his duty under the circumstances as they appeared to him and that he had an honest and reasonable belief' that his actions were necessary and proper," even if "his belief was mistaken or his judgment poor.").

The immunity enveloping Ms. Peters' conduct here – and depriving this Court of jurisdiction – is not simply a matter of recognizing some personal right conferred on Ms. Peters. What is at work here is the far more fundamental consequence of our Constitution's structure of government. "The Supremacy Clause is the structural fulcrum upon which the American system of federalism balances—the Clause protects structural rights ... by establish[ing] a structure of government which defines the relative powers of states and the federal government." *Texas Voters All. v. Dallas Cnty.*, 495 F. Supp. 3d 441, 464 (E.D. Tex. 2020) (internal quotations omitted). The mandate of federal law under 52 U.S.C. §20701 that "every officer of election" must maintain election records for 22 months, and related federal mandates, "trump[] a contrary state law by operation of the Supremacy Clause." *City of Hugo v. Nichols (Two Cases)*, 656 F.3d 1251, 1256 (10th Cir. 2011). As described above, it does not matter if the compliance with federal law causes a violation of state law; the execution of federal law has priority. *Virginia Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1901 (2019). Thus, this Court's finding of probable cause supporting the indictment is irrelevant. Indeed, even if it were illegal under state law for Ms. Peters to have had the forensic images made – which it was not – that would not prevent Ms.

Peters from being shielded by Supremacy Clause immunity from any criminal liability under state law. Because Ms. Peters was "acting under and in pursuance of the laws of the United States," *Johnson,* 254 U.S. at 57, and "did no more than what was necessary and proper for [her] to do, [she] cannot be guilty of a crime under … [state] law." *Neagle,* 135 U.S. at 75. Thus the Supremacy Clause guarantees that a person acting pursuant to federal law will not be subject to a state prosecution for those actions. Supremacy Clause immunity operates "not only to avoid the possibility of *conviction* of a federal agent, but also to avoid the necessity of undergoing the entire process of the state criminal procedure," *Kentucky v. Long*, 837 F.2d at 752, and so entails a right not to be tried. That is, it asserts a "right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States v. MacDonald,* 435 U.S. 850, 860 (1978). *See also Livingston,* 443 F.3d at 1221 ("Supremacy Clause immunity reduce[s] the inhibiting effect that a civil suit or prosecution can have on the effective exercise of official [federal] duties.").

At bottom then, Ms. Peters is immune from this prosecution, and this case must be dismissed.

Conclusion

For the foregoing reasons, this case should be dismissed with prejudice.

Respectfully submitted,

/S/Michael E. Edminister ARN 49808
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CERTIFICATE OF SERVICE

I certify that on April 1, 2024 I filed and served the foregoing document via ICCES to all counsel of record

s/Michael E. Edminister ARN49808
MICHAEL E. EDMINISTER

DISTRICT COURT, MESA COUNTY, COLORADO Court Address: MESA COUNTY JUSTICE CENTER, 125 NORTH SPRUCE STREET, GRAND JUNCTION, CO, 81501	DATE FILED: May 7, 2024 8:03 PM CASE NUMBER: 2022CR371
THE PEOPLE OF THE STATE OF COLORADO v. **Defendant(s)** TINA MARIE PETERS	⚠ **COURT USE ONLY** ⚠ Case Number: 2022CR371 Division: 9 Courtroom:

Order Denying Motion to Dismiss for Lack of Jurisdiction

The attached motion is DENIED for the reasons stated in the response to the same.

Specifically, in order for Defendant to avail herself of immunity under the Supremacy Clause she must establish that she is a federal officer or is working at the behest of federal authorities. *See Brown v. Nationsbank Corp.*, 188 F.3d 579, 589 (5th Cir. 1999) ("If the private defendants committed what would have been illegal acts under state law at the direction and control of agents acting within their authority, the operation of state law would conflict with federal policy" and the Supremacy Clause might apply); *See Also Texas v Kleinert*, 143 F.Supp.3d 551, 556 (W.D. Tex. 2015) (When Supremacy Clause applies, "[a] state court is without jurisdiction to prosecute a federal officer.")

Because Defendant is not a federal officer nor working at the behest of federal authorities, she is not entitled to immunity under the Supremacy Clause. Merely following federal law similarly provides her with no safe harbor. Her motion is therefore DENIED.

While it is plain she is not entitled to the relief she seeks due to her status as a state actor/private citizen, I nevertheless note that even if she was attempting to follow federal election law such would not entitle her to immunity. Here, Defendant is not charged with crimes related to preserving election data. While she *argues* her *actions* may have been undertaken to comply with federal election laws, such an argument misses the mark when the means employed aren't necessary to meet the end.

If Defendant believed her actions to be lawful then there would have been no need for her to attempt to influence public servants or otherwise engage in the criminal conduct alleged in the indictment. Indeed, all Defendant had to do was allow a copy of the voting machine to be made. This could have been accomplished in a narrow and tailored fashion, without any deception or fraud. Accordingly, and assuming she was working at the behest of federal authorities through the federal election code, the conduct which would have been protected was to maintain the election records, and not the alleged scheme to influence public servants and steal someone else's identity. The allegations in this action are thus separate and distinct from the actions that Defendant might otherwise have been authorized to perform.

Issue Date: 5/7/2024

MATTHEW DAVID BARRETT
District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:23-cv-03014 -SKC

TINA PETERS

Plaintiff,

v.

UNITED STATES OF AMERICA,
MERRICK B. GARLAND, Attorney General of the United States in his official capacity,
JENA GRISWOLD, Colorado Secretary of State, in her official capacity, and
DANIEL P. RUBINSTEIN, District Attorney of the Twenty-First Judicial District, in his official capacity,

Defendants.

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM

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INTRODUCTION

Pursuant to Fed.R.Civ.P. 65(a), Plaintiff Tina Peters moves this Court for an order enjoining, pending the resolution of Peters' claims in this action, Defendant District Attorney Daniel P. Rubinstein ("Rubinstein") from conducting, continuing, or participating in any way in proceedings in *People v. Tina Peters,* Case No. 22CR371 (Dist. Ct. Mesa Co.), or any other criminal proceedings against or harassment of Peters.

The grounds for this Motion, set out in more detail below, are that these criminal proceedings and investigations have been and will continue to be taken by Rubinstein in bad faith to punish Peters, because in 2021 she made a legal forensic image of the Mesa County Election Management System ("EMS") server. The forensic image includes digital election records of the November 2020 election and the Grand Junction municipal election in 2021. If Peters had not made the forensic image, those digital election records would have been irretrievably lost. Federal and state law required Peters to preserve digital election records for specified periods: 52 U.S.C. § 20701 (22 months); CRS 1-7-802 (25 months). The federal statute carries a criminal penalty.

By using a criminal prosecution to retaliate against Peters, Rubinstein has violated, and threatens to continue violating Peters' First Amendment rights to

speak out, to investigate and report official misconduct, to petition the government for the redress of grievances, and to associate with others. Rubinstein's conduct has also violated, and threatens to continue violating Peters' privileges and immunities under the Fourteenth Amendment to comply with federal law and engage in the administration of government functions free from retaliation by state officials, and her Fourteenth Amendment right to due process of law, which shields a U.S. citizen from the weaponizing of state government instrumentalities, including criminal prosecution, to retaliate against that citizen for her exercise of First Amendment rights and for her compliance with federal law.

BACKGROUND

On April 30, 2021, Colorado Secretary of State Jena Griswold (Griswold) sent an email directing Peters to participate in installing a "Trusted Build" upgrade to Mesa County's EMS server. The email is Exhibit 1.

Peters, then Mesa County Clerk and Recorder and its designated election official, had received reports from voters who claimed irregularities in recent elections. In an April 2021 telephone call, David Stahl, an employee of Dominion Voting Systems, Inc. ("Dominion"), advised Peters that the Trusted Build would delete software that allowed the system to read certain ballots. Peters understood that erasure of this information during the Trusted Build installation would make

results of the 2020 and 2021 elections impossible to verify. [Peters Declaration, Ex 2, ¶ 7].

Peters knew that if records of the elections were erased, they would be irretrievably lost, and it would be impossible for her as county clerk to conduct an audit or accurate recount of the most recent elections. As Peters explains in her Declaration, she was forced to choose between (1) violating election records preservation laws or (2) following the law by making a forensic image of the server before the Trusted Build installation took place. Peters chose to follow the law. [*Id* ¶¶ 6-24].

Peters engaged a qualified consultant named Hayes to make a forensic image of the EMS hard drive. A forensic image is a bit-for-bit unalterable (read only) copy of a hard drive. It does not modify any data. It causes no harm to the voting system. [*Id* ¶¶ 17-22].

Griswold's email specified that she would limit access to the Trusted Build installation to employees of Griswold, the county clerk, and Dominion. At the time, no state law or regulation prohibited Peters from having a qualified consultant present to observe the Trusted Build installation [*Id* ¶ 16]. To circumvent Griswold's email, Peters arranged for Hayes to use the access badge of Gerald Wood, another consultant. Wood gave permission for his access badge to

be used by Hayes. Whenever Hayes was in a secure area, he was supervised by an employee with authorized access in compliance with Election Rule 20.5.3(b). [*Id* ¶¶ 25-28].

Peters and Hayes made the first forensic image on May 23, 2021, two days before the Trusted Build installation. The forensic image preserved election records and software from the 2020 and 2021 elections. On May 25, Griswold's agent erased the entire EMS server during the Trusted Build installation. Peters and Hayes made a second forensic image on May 26, immediately after the Trusted Build. The second forensic image captured only the new software installed by Griswold. All prior election records had been erased from the server during the Trusted Build installation. [Declaration of Douglas Gould, Ex. 18 at 11]. If Peters had not made the forensic image on May 23, records of the most recent elections would have been irretrievably lost. [Ex. 2 ¶ 26 and 31].

Qualified cyber and database experts analyzed the forensic images. Cybersecurity expert Douglas Gould concluded that the Trusted Build erased election records of the November 2020 election and the 2021 municipal election (as Peters had rightly anticipated) [Ex. 18 at 11]. Gould also found that normal operation of the voting system during an election overwrote records that were required to be preserved for future audits. [*Id* at 9-10]. Two other experts, Walter

C. Daugherity Ph.D. and Jeffrey O'Donnell, concluded that the Mesa County disk drive images revealed an unusual phenomenon that occurred during both the November 2020 General Election and the April 2021 Grand Junction municipal election: After some of the ballots were processed and their information recorded in a set of Microsoft SQL database tables for the respective election ("Set 1"), no further data were entered in Set 1 even though ballot processing was not complete. Rather, data from processing additional ballots were entered into a separate, newly created set of tables ("Set 2"). Further, some but not all the data from Set 1 was copied into Set 2. Accordingly, neither Set 1 nor Set 2 contained all the data from counting all the ballots. Because the creation of Set 2 hid Set 1 from election workers, breaking the chain of custody and violating federal auditability requirements, election officials had no way to examine or review the ballots in Set 1 which were not copied to Set 2. This unexpected behavior by the software calls into question the integrity of the vote-counting process and the validity of the election results. [Declaration of computer science expert Walter C. Daugherity, Ph.D. Ex 19 ¶ 15].

On August 10-12, 2021, Peters attended a televised symposium in Sioux Falls, South Dakota sponsored by Michael Lindell [Ex 2 ¶33]. Peters made a speech in which she advocated for election transparency and criticized Griswold.

On or about August 2, 2021, Griswold learned of the making of the first forensic image. Even though no statute, rule, or order was violated by creation of the forensic images, Griswold ordered her staff to initiate an investigation of Peters, based on the justification that there had been a "security breach" [Exhibit 20, p. 2]. According to Rubinstein, he received a call on August 9 from Griswold's Deputy, Christopher Beall. Without showing probable cause that a crime had been committed, Beall urged Rubinstein to start a criminal investigation of Peters. [Rubinstein report, Ex. 21 at 2]. Rubinstein immediately began investigating Peters (*Id.).* Rubinstein contacted the FBI and urged the agency, without any proper cause, to participate in investigating Peters. [Rubinstein email, Ex 22].

Rubinstein acted in bad faith because he did not acknowledge or investigate Griswold's unlawful erasure of election records during the Trusted Build installation. Rubinstein was motivated, at least in substantial part, by an unlawful intent to punish Peters for the protected First Amendment acts of making and publishing the forensic image and to deter Peters from publicly asserting that Griswold had violated election records preservation laws.

Rubinstein's investigator signed an affidavit [before the judge presiding over Peters' criminal case], which stated falsely that Peters acted "unlawfully" when she made the forensic image [Ex 14 p. 9]. Griswold's Deputy Secretary of State

Christopher Beall admitted in testimony in another case that making forensic images was not prohibited by law. [Exhibit 15 at 2, L. 14-17]. Rubinstein's investigator misrepresented to the Court that Peters' deputy, Belinda Knisley, had stated during her proffer interview that Peters had told her to lie. [Ex. 14 at 13].

Rubinstein and Griswold have claimed that the directive in the April 30, 2021, email from Griswold's office requiring Peters to "[b]ackup any election projects on your voting system" [Ex. 1] assured the preservation of all records subject to the election records preservation statutes. [Ex. 23 at 3, Rubinstein email to Ed Arnos]. That is not accurate; by design, the Trusted Build upgrade overwrote the entirety of the voting system software and data on the Mesa Country EMS server. Records essential to conducting a post-election audit or recount, which were overwritten by the Trusted Build installation, are not included among election project records. [*Id* at 1-2; Arnos Declaration, Ex. 24 ¶ 8; Ex. 2 ¶ 13]. To conceal her own wrongdoing, Griswold continues to claim that Peters acted unlawfully by making the forensic image [Griswold tweet 11/25/23 Ex. 17].

Every voting system used in an election of a federal officer must meet federal requirements. 52 U.S.C. § 21081(a). Such requirements provide that the voting system must "produce a record with an audit capacity for such system." 52 U.S.C. § 21081(a)(2)(A), which includes "a permanent paper record with a manual

audit capacity." 52 U.S.C. §21081(a)(2)(B)(i). That record must be "available as an official record for any recount…." 52 U.S.C. § 21081(a)(20)(B)(iii). The deletion of the records on the EMS server made an audit of the 2020 and 2021 elections impossible. The purpose of the election records retention statutes is to assure that audits can be conducted. 52 U.S.C. § 21801(b)(1)(D). Election records are also generally subject to public inspection under the Colorado Open Records Act.

A Colorado statute provides that Voting System Standards adopted by the Federal Election Commission (now the Election Assistance Commission) apply to elections in the State. CRS 1-5-601.5. Those standards define "voting system" to include "the software required to program, control, and support the equipment that is used to define ballots, to cast and count votes, to report and/or display election results, and to maintain and produce all audit trail information." VSS 1.5.1. "All audit trail information spelled out in subsection 4.5 of the Standards shall be retained in its original format, whether that be real-time logs generated by the system, or manual logs maintained by election personnel." VSS 2.2.11. The Department of Justice has stated: "Jurisdictions must therefore retain and preserve records created in digital or electronic form." https://www.justice.gov/opa/press-release//file/1417796/download.

III.
PRELIMINARY RELIEF IS WARRANTED.

A request for preliminary injunctive relief must be evaluated under the four-factor test of *Winter v. NRDC,* 555 U.S. 7, 20 (2008). *Planned Parenthood Ass'n of Utah v. Herbert.* 828 F.3d 1245, 1252 (10th Cir. 2016). For Peters to obtain a preliminary injunction, she must establish: (a) that she is likely to succeed on the merits; (b) that she is likely to suffer irreparable injury unless the preliminary injunction is granted; (c) that the balance of equities tips in her favor; and (d) that the grant of an injunction is in the public interest. 828 F.3d at 1252. When defendants are government actors, the last two factors are considered together, *Nken v. Holder,* 556 U.S. 416, 435 (2009).

A. Peters Is Likely to Prevail on the Merits.

It is sufficient to obtain a preliminary injunction for a movant to present a *prima facie* case on the merits. *Planned Parenthood Ass'n of Utah v. Herbert,* 828 F.3d 1245, 1252 (10th Cir. 2016). 11A WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 2948.3 (2014) ("All courts agree that plaintiff must present a prima facie case but need not show a certainty of winning."). In the First Amendment context, this factor is often determinative because of the seminal importance to society of the interests at stake. *Verlo v. Martinez,* 820 F.3d 1113, 1126 (10th Cir. 2016); *see Dombrowski v. Pfister,* 380 U.S. 479, 486 (1965).

In order to obtain a preliminary injunction, plaintiffs must show that they are "substantially likely" to prevail. *Harmon v. City of Norman,* 981 F.3d 1141, 1146 (10th Cir. 2020). The preliminary relief sought by Peters requires that she satisfy a "heavier burden" regarding the likelihood-of-success and balance-of-harms factors because a preliminary injunction would grant her substantially the relief she could obtain after a trial on the merits. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,* 389 F.3d 973, 979 (10th Cir. 2004) (*en banc*) (*per curiam*), *aff'd sub nom. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal,* 546 U.S. 418 (2006). Peters must assert "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issue ripe for litigation and deserving of more deliberate investigation." *RoDa Drilling Co. v. Siegal,* 552 F.3d 1203, 1208 n. 3 (10th Cir. 2009). A grant of Peters' motion, therefore, requires "a strong showing" on each of those two factors. *Westar Energy, Inc. v. Lake,* 352 F.3d 1215, 1224 (10th Cir. 2009). Peters satisfies that heavy burden by her showing of a clear violation of her First Amendment rights and by the overriding importance of protecting free speech. *Dombrowski,* 380 U.S. at 489.

The Complaint asserts two claims. Count 1 applies to the Federal Defendants only and is not at issue in this Motion. Count 2 asserts that agents of the State of Colorado violated 42 U.S.C. § 1983 by acting under Colorado law to

violate Peters' First Amendment and Fourteen Amendment rights. The claim relies on the well-settled rule that "[a]ny form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom." *Worrell v. Henry,* 219 F.2d 1197, 1212 (10th Cir. 2000); *see McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 357 (1995) ("[T]he purpose behind the Bill of Rights, and the First Amendment in particular [is] to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."); *Smith v. Paul,* 258 F.3d 1167, 1176 (10th Cir. 2001); *Phelps v. Hamilton,* 59 F.3d 1058, 1066 (10th Cir.1995); *United States v. P.H.E., Inc.,* 965 F.2d 848, 853 (10th Cir. 1992).

Ex parte Young, 209 U.S. 123 (1908) is "the fountainhead of federal injunctions against state prosecutions." *Dombrowski,* 380 U.S. at 483. The Court in that 1908 decision concluded that federal intervention is justified to protect persons against state criminal proceedings that violate the Constitution. 209 U.S. at 156. In later decisions, the Court limited that holding in the interest of comity to cases in which irreparable injury can be shown. *E.g., Douglas v. City of Jeannette,* 319 U.S. 157 (1943). But in *Dombrowski*, the Court held that *Douglas* does not govern when a First Amendment violation would cause irreparable injury and that any

substantial impairment of the freedom of expression clearly shows irreparable injury. 380 U.S. at 489-90. The party suffering such injury need not await "the state court disposition and ultimate review by this Court of any adverse determination." *Id.,* at 486; *see* WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 4251 (4/23 Update).

1. Peters Has Presented Valid *Prima Facie* Claims of Retaliation under the First and Fourteenth Amendments.

To establish a *prima facie* claim of unconstitutional retaliation for the exercise of a First Amendment right, Peters must offer evidence that (1) she was engaged in constitutionally protected activity, (2) Rubinstein's actions caused her injury that would chill a person of ordinary firmness from continuing that activity, and (3) Rubinstein's actions were substantially motivated as a response to Peters' protected activity. *Worrell,* 821 F2d at 1212. The requested injunctive relief would prohibit Rubinstein from continuing the criminal prosecution that is scheduled for trial in Mesa County District Court on February 24, 2024. Peters meets her burden by showing a "strong likelihood" of prevailing on her retaliation claim. *Id.* at 980. The balance of harms is decidedly in her favor because the protection of First Amendment rights is a societal priority. *Dombrowski,* 380 U.S. at 486 ("For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser.").

a. Constitutionally protected activities

Peters engaged in four constitutionally protected activities: (1) she exercised her right to free expression by speaking publicly about Griswold's violation of the election records preservation statutes and problems with computerized voting systems [Ex 2 ¶¶ 32, 33, 34, 55, 56]; (2) she exercised her right to freedom of association by enlisting and engaging other citizens who shared her views [*Id* ¶¶ 33, 34,]; (3) she exercised her right to make forensic images of public election records and to use the images to investigate government misconduct [*Id* ¶¶ 15-24]; and (4) she petitioned the government for redress of grievances by presenting reports of findings based on the images to the Mesa County Board of County Commissioners ("County Board") [*Id* ¶¶ 38, 48; Peters' petitions to the County Board are Exhibits 4 and 7]. Peters' public statements are protected by the Free Speech Clause of the First Amendment. *See Pickering v. Bd. of Educ.,* 391 U.S. 563, 573 (1988). Making forensic images of the EMS server is entitled to First Amendment protection. *See Irizarry v. Yehia,* 38 F.4th 1282, 1290-96 (10th Cir. 2022) (filming police to preserve evidence of misconduct is protected). Associating with others who share her concerns to advance a message that computerized voting systems are a threat to election integrity is an exercise of the freedom of association. *See Planned Parenthood Ass'n,* 828 F.3d at 1259. Peters' submissions

of expert reports to the County Board with a request to stop using insecure computer voting systems is an exercise of the right to petition for redress of grievances. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

The subject matter of Peters' public statements and other protected activities constitutes an issue of profound public concern. *See Trant v. State of Oklahoma,* 754 F.3d 1158, 1165 (10th Cir. 2014). Misconduct by government officials and the integrity of the election process are also matters of profound public concern. *Durham v. Jones,* 737 F.3d 293, 296 (4th Cir. 2013) (misconduct); *Bass v. Richards,* 308 F.3d 1081, 1089 (10th Cir. 2002) (elections).

"The controversial character of the statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin v. McPherson,* 483 U.S. 378, 387 (1987). Peters' speech is constitutionally protected, even if Rubinstein disagrees with her point of view. *See United States v. Alvarez,* 5667 U.S. 709, 729 (2012) (plurality opinion); *id.,* at 739 (Breyer, J., concurring); *id.,* at 751-52 (Alito, J., dissenting). "[F]alsity alone may not suffice to bring the speech outside the First Amendment." *Id.,* at 719. Moreover, even within its narrow scope, the Privileges and Immunities Clause of the Fourteenth Amendment protects "the right of the citizen of this country…to engage in administering [the national government's] functions." *Slaughter-House Cases,* 83 U.S. 36, 79 (1872). *See also In re Quarles,*

158 U.S. 532, 535 (1895) ("Among the rights and privileges which have been recognized by this court to be secured to citizens of the United States by the constitution are … the right of every judicial or executive officer, or other person engaged in the service … of the United States, in the course of the administration of justice, to be protected from lawless violence."). Peters' efforts to comply with federal law surely qualify for protection as a privilege and immunity within the meaning of the Fourteenth Amendment, especially in the context of combating the potential corruption of elections, including a federal election. *Cf. United States v. Classic,* 313 U.S. 299, 316 (1941) ("That the free choice by the people of representatives in Congress … was one of the great purposes of our Constitutional scheme of government cannot be doubted. We cannot regard it as any the less the constitutional purpose or its words as any the less guaranteeing the integrity of that choice…."); *The Ku-Klux Klan Cases,* 110 U.S. 651, 666-67 (1884) ("In a republican government, like ours, … the temptations to control … elections by violence and by corruption is a constant source of danger…. [N]o lover of his country can shut his eyes to the fear of future danger from both sources.").

The privilege of a county official to faithfully comply with a federal law that is part of a federal regime advancing secure federal elections, and her concomitant immunity from state prosecution punishing that effort, is no novelty. Rather, it is a

proposition fitting comfortably within the long body of precedent of Supremacy Clause immunity that recognizes the immunity of federal officials from prosecution for state law violations caused by their execution of federal law. In *Cunningham v. Neagle,* 135 U.S. 1 (1890), the Supreme Court established that federal officers were immune from state prosecution for acts committed within the reasonable scope of their duties. The Tenth Circuit has likewise recognized that "Supremacy Clause immunity governs the extent to which states may impose civil or criminal liability on federal officials for alleged violations of state law committed in the course of their federal duties." *Wyoming v. Livingston,* 443 F.3d 1211, 1213 (10th Cir. 2006).

These principles apply with equal force to protect conduct by non-federal officials. The rule is that "states may not impede or interfere with the actions of federal executive officials when they are carrying out federal laws." *Id.,* at 1217. The animating principle is fundamental and long recognized in our constitutional law that "the states have no power … to retard, impede, burden, or in any manner control, the operations of the constitutional law enacted by congress to carry into execution the power vested in the general government." *Id.* (quoting *McCullogh v. Maryland,* 17 U.S. 316, 436 (1819)). Thus, it is the effective operation of federal law that is key, not the identity of the person executing it. Here, Peters was

attempting to faithfully assure the operation of the federal election records preservation statute, 52 U.S.C. § 20701, a legitimate enactment of Congress exercising the power vested in it by the Constitution.

"The question is not whether federal law expressly authorizes a violation of state law, but whether the federal official's conduct was reasonably necessary for the performance of his duties." *Wyoming v. Livingston,* 443 F.3d at 1227-28. It is beyond doubt that a federal officer doing what Peters did would be immune from state prosecution for those acts, evaluating the reasonableness of those acts in light of "the circumstances as they appear[ed] to federal officers at the time of the act in question." *Id.*, at 1229. The fact that Peters was a county election official acting to assure compliance with a federal statute that expressly required that "every officer of election" preserve "all records" of the 2020 election compels that result; she is immune from state prosecution for her acts done to comply with federal law.

Finally, it would seem undeniable that a baseless state prosecution as retaliation for Peters' efforts to comply with federal law is an utterly lawless undertaking, offending not only the Supremacy Clause, but also the most basic notions of due process protected by the Fourteenth Amendment. *Cf. Duncan v. Louisiana,* 391 U.S. 145, 149 (1968); *Brown v. Mississippi,* 297 U.S. 278, 285-87 (1936). After all, "The Due Process Clause prevents state activity that is, literally,

lawless." John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1454 (1992).

b. Irreparable injury

The second *Winter* factor requires Peters to show she is likely to suffer irreparable harm if preliminary injunctive relief is not granted. *Benisek v. Lamone.* 138 S. Ct. 1942, 1944 (2018). The violation of a First Amendment right constitutes irreparable injury. *Elrod v. Burns,* 427 U.S. 347, 373 (1976) ("[T]he temporary violation of a constitutional right itself is enough to establish irreparable harm."); *Heideman v. S. Salt Lake City,* 723 F.3d 1114, 1145 (10th Cir. 2013); *Kikumura v. Hurley,* 242 F.3d 950, 963 (10th Cir. 2001) ("When an alleged constitutional right is involved, most courts hold that no further of irreparable injury is necessary.").

To warrant a preliminary injunction, Peters' irreparable injury must be great and immediate. *Moore v. Sims,* 442 U.S. 415, 433 (1979); *Phelps,* 59 F.3d at 1064. The injuries caused and threatened by Rubinstein's ongoing actions to punish Peters for constitutionally protected activity are plainly immediate. *Dombrowski,* 380 U.S. at 489. Because of the societal importance of protecting an individual's free speech rights, the injuries are great. *Id.* at 486.

Whether Defendant's actions would chill a person of ordinary firmness from continuing her First Amendment activities is subject to an objective test. *Irizarry v.*

Yehia, 38 F.4th 1282, 1292 (10th Cir. 2022). It is a test "designed to weed out trivial matters…." *Garcia v. City of Trenton,* 348 F.3d 726, 728 (8th Cir. 2003). The lengths to which Rubinstein has gone constitute an extraordinary and coordinated attempt to deter Peters and her associates from persisting in political speech and the investigation of government misconduct. By any standard, Defendant's actions had a chilling effect on Peters. It is beyond reasonable dispute that being criminally prosecuted would objectively dissuade a person of ordinary firmness from continuing to engage in the activity that provoked the retaliatory prosecution. Rubinstein's prosecution of Peters and involvement of FBI agents deterred Elbert County Clerk Dallas Schroeder and other county clerks from associating with Peters [Ex 6]. Before the FBI raids on the homes of Peters' and her political associate Sherronna Bishop, citizens were eager to associate with them. After the raids, citizens were reluctant to do so [Ex 24 ¶¶ 41-42].

The injury that Peters must show to obtain preliminary injunctive relief need only be "likely." *Chaplaincy of Full Gospel Churches v. England,* 454 F.3d 290, 297 (D.C. Cir. 2006). Peters has shown in her Complaint and her Declaration [Ex2] that there is more than a "subjective chill" of First Amendment rights. Peters will suffer irreparable injury if a preliminary injunction is not granted. *Roman Catholic*

Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020); *Dombrowski,* 380 U.S. at 485-86**.**

c. Retaliatory Motivation

"The First Amendment bars a criminal prosecution where the proceeding is motivated by the improper purpose of interfering with the defendant's constitutionally protected speech." *P.H.E., Inc.,* 965 F.2d at 849. A prosecutor has a "responsibility to refrain from improper methods calculated to produce a wrong conviction as well as to use every legitimate means to bring about a just one." *Harris v. People,* 888 P.2d 259, 263 (Colo. Sup. Ct. 1985) (*en banc*)

Rubinstein began investigating Peters on August 9, 2021, after Griswold's Deputy, Christopher Beall, called and asked him to do so [Ex. 9 at 2]. Since then, Rubinstein has retaliated against Peters in close coordination with Griswold.

Griswold's zeal to punish Peters for exercising First Amendment rights is demonstrated by Election Order 2022-01, in which Griswold demanded that Peters recant public statements about voting system equipment [Ex 26 ¶ 24]. When Peters refused to recant her statements, Griswold carried out her threat to remove Peters from office. Griswold published a press release on January 18, 2022, announcing the filing of a lawsuit to replace Peters as the Mesa County designated election official, stating: "Clerk Peters' actions constituted one of the nation's first insider

threats where an official, elected to uphold free, fair, and secure selections risked the integrity of the election system **in an effort to prove unfounded conspiracy theories.**" [Ex. 27 at 2] (Emphasis added). That statement shows that Griswold's intended purpose was to punish Peters for exercising her First Amendment right to make a copy of the EMS server to document government misconduct. *See Irizarry,* 38 F.4th at 1290-96.

On February 14, 2022, Peters announced her candidacy for Colorado Secretary of State, making her a direct competitor for Griswold's office. [Ex. 2 ¶ 47]. On March 1, 2022, Peters presented her second petition to the County Board, asking them to stop using computer voting systems [Ex. 7]. Seven days later, Rubinstein announced the indictment of Peters [Ex. 8].

Rubinstein never investigated Griswold's destruction of election records during the Trusted Build installation, which shows his bias for Griswold and animus against Peters. While investigating Peters at Griswold's request, Rubinstein advised a lawyer representing Peters and her husband not to communicate with Peters because she was being investigated. [Ex. 2 ¶ 41; attorney email Ex. 5]. Rubinstein then indicted Peters 22 days after she announced her candidacy for Secretary of State, and one week after she presented her second

petition to the County Board. After he indicted Peters, Rubinstein requested an outrageous $500,000 bond [Ex 2 ¶ 52].

When the court set bond at $25,000, Rubinstein insisted on bond conditions that effectively removed Peters from office. She was prohibited from contacting any of her employees. She could not enter her offices. [*Id* ¶ 53; Bond Ex. 9 at 2]. The day after the bond hearing, Rubinstein's investigator made harassing telephone calls to Peters' 93 year old mother, her daughter, and her sisters. [*Id* ¶ 54]. When Peters continued to speak publicly, Rubinstein filed a motion to revoke her bond [*Id* ¶¶ 55-56; Motion Ex. 10]. Peters appeared in a movie advocating election transparency. Rubinstein opposed Peters' request to appear at the premiere, arguing that Peters "is seeking permission to leave the state so that she can be celebrated as a hero for the conduct that a grand jury has indicted her for." [Ex. 2 , ¶ 57; Motion Ex. 11]. Although Peters never failed to appear in court, Rubinstein advised the court that she was a "flight risk" when Peters asked court permission to use her passport to obtain TSA pre-check flight status for domestic travel [Ex. 2 ¶ 58; DA Response Ex. 12]. When Peters sent an email notice to 64 county clerks of her request for a recount of an election, Rubinstein claimed the email violated bond conditions, and persuaded the court to deny her travel requests. [Ex. 2 ¶ 59; Order Ex. 13].

Like Griswold, Rubinstein sought to publicly discredit Peters and computer science experts who agreed with her. Although Rubinstein had no expertise in computer science, he claimed implausibly that Peters' assistant, Sandra Brown, had interrupted ballot tabulation in two consecutive elections and caused the creation of new sets of ballots [See Rubinstein report Ex. 22, attempting to publicly discredit Peters' experts, refuted by Daugherity Declaration Ex. 19].

d. Bad faith

Peters must show an "unusual circumstance" to justify a preliminary injunction prohibiting Rubinstein from continuing to prosecute Peters. *Younger v. Harris,* 401 U.S. at 53. It is well established that one such circumstance is bad faith on the part of a governmental official in pursuing an investigation or prosecution. *Dombrowski,* 380 U.S. at 490; *Phelps,* 59 F.3d at 1066. Prosecutorial bad faith is plainly present here.

In addition to the misrepresentations that Rubinstein's investigators made to the court (see p. 7 above), Rubinstein misinformed the grand jury that Peters' image of the server was "unlawfully downloaded" [Ex. 8 at 6]. As Griswold's Deputy testified, making a forensic image of an EMS server did not violate the law [Ex. 15 at 2 L. 14-17].

Rubinstein acted in bad faith by indicting Peters because he had no reasonable basis for believing he could obtain a valid conviction for the charges. *Kugler v. Helfant,* 421 U.S. 117, 126 n.6 (1975); *Fitzgerald,* 636 F.2d at 945. As a matter of law and fact, the indictment does not set out a *prima facie* case against Peters for the charges specified. Each count falls short of the pleading threshold required for a minimally sufficient indictment. "An indictment is sufficient if it sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to assert a double jeopardy defense." *United States v. Hathaway*, 318 F.3d 1001, 1009 (10th Cir. 2003). As the U.S. Supreme Court has explained, "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *Hamling v. United States*, 418 U.S. 87, 117–18 (1974).

The Colorado Supreme Court has underscored this principle:

> A criminal indictment by a grand jury serves two essential purposes. First, the indictment must give the defendant sufficient notice of the crime that has allegedly been committed so that a defense may be prepared. Second, the indictment must define the acts which constitute the crime with sufficient definiteness so that the defendant may plead the resolution of the indictment as a bar to subsequent proceedings. To accomplish these purposes the indictment must clearly state the essential facts which constitute the offense. Fundamental fairness

> requires no less. These requirements have been codified in Crim.P. 7(a)(2) which states: "Every indictment of the grand jury shall state the crime charged and essential facts which constitute the offense."

People v. Buckallew, 848 P.2d 904, 909 (Colo. 1993). Allegations of essential facts are absent from each count.

• Counts 1, 2 and 5 of the indictment charge violations of CRS § 18-8-306 (making an attempt to influence any public official by "deceit … with the intent thereby to alter or affect the public servant's decision, vote, opinion, or action" a Class 4 felony) with respect to Jess Romero, a voting systems manager from the Secretary of State's Office ("SOS"), David Underwood, a Mesa County IT employee, and Danny Casias, an SOS employee. For each of the three, the indictment recites the text of the statute. [Ex. 8 at 3-4]. For Romero, the indictment simply adds that he established procedures for the Trusted Build upgrade. [*Id* at 3]. For Underwood, the indictment alleges that he was the technician who put together the temporary security identification for Wood. [*Id*] For Casias, it alleges only that he met the consultant Peters identified as Wood. [*Id at 4*]. For none of the individuals does the indictment even try to allege some specific "decision, vote, opinion or action" within the meaning of the statute – i.e., some "formal exercise of government power," *McDonnell v. United States*, 579 U.S. 550, 578 (2016) – that Peters was supposedly trying to influence [*Id* at 3-4, 12].

So, too, the indictment fails to allege facts showing Peters acted with "deceit," which the law does not understand as being satisfied by just any misrepresentation. As the Colorado Supreme Court has explained, the statute does not define "deceit," so the Court derived its meaning from common usage:

> *Black's Law Dictionary* defines deceit as "[a] ***fraudulent*** and deceptive misrepresentation ... used by one or more persons to deceive and trick another, who is ignorant of the true facts, to the prejudice and damage of the party imposed upon." *Id.* at 405. Similarly, in *Webster's Third New International Dictionary* 584 (1986), deceit is defined as "any trick, collusion, contrivance, false representation, or underhand practice used ***to defraud*** another."

People v. Janousek, 871 P.2d 1189, 1196 (Colo. 1994) (emphases added).

The deceit condemned by this statute must have the purpose of ***defrauding*** someone, that is, "obtain[ing] money or property by false or fraudulent pretenses, representations or promises." *United States v. Kalu*, 791 F.3d 1194, 1204 (10th Cir. 2015)(quoting Tenth Circuit Pattern Jury Instruction 2.56). Peters' actions were not intended to deceive, but instead had the practical purpose of avoiding obstacles improperly created by officials who were trying to erase election records while preventing any copy from being preserved. The indictment fails to allege any facts that call into question Peters' good-faith and lawful motive. The indictment does not state that Peters made representations about Wood and Hayes to any "public servant" in order to obtain money or property from them. The necessary element of

§ 18-8-306 that Peters acted with "deceit" directed at accomplishing fraud is completely absent from the allegations against her.

• Counts 4, 6, and 7 charge Peters with criminal impersonation and a conspiracy to commit criminal impersonation in violation of CRS §§ 18-5-113(1)(B)(1) and 18-2-201. These counts also appear to arise from Hayes' use of Wood's access badge, but once again the indictment fails to give the minimally sufficient detail to describe what the charge really is. For example, the indictment claims the defendants used Woods' identification "to further their criminal scheme," [*Id* at 7], but never describes what that scheme was. Count 6 appears to allege that Peters impersonated Wood, [*Id* at 4] but no factual detail is supplied as to how this impersonation occurred. Count 6 claims that Wood is somehow subject to "various forms of liability and criminal exposure" because of Peters' conduct, but never explains what that exposure could be. [*Id*]. As to conspiracy, Count 7 identifies as conspirators ***possibly*** Sandra Brown and ***possibly*** persons ***unknown*** to the Grand Jury and the District Attorney. [*Id* at 4]

The Colorado Supreme Court has been careful to circumscribe the criminal impersonation statute to avoid any constitutional vulnerability for overbreadth. As the Court noted:

> Certainly, there are lawful uses of assumed fictitious identities, as was recognized by the legislature when it drafted the statute and limited the

> proscription to those false impersonations undertaken to accomplish ***unlawful*** purposes. In view of this limitation, the statute cannot be said to sweep unreasonably broadly and proscribe protected conduct, as contended by appellant.

People v. Gonzales, 534 P.2d 626, 628 (Colo. 1975)(emphasis in original).

Thus, this "statute … defines criminal impersonation as assuming a false or fictitious identity or capacity, and in that identity or capacity, doing any act with intent to unlawfully gain a benefit or injure or defraud another." *People v. Brown*, 562 P.2d 754, 756 (Colo. 1977). Impersonation as occurred in this case -- not designed to secure an unlawful benefit or to injure or defraud – does not qualify as a criminal impersonation used to secure some benefit. As one appellate court explained:

> Although some cases addressing criminal impersonation have found that the intent to defraud could be inferred from the surrounding circumstances … those cases cannot be read as standing for the proposition that criminal intent is invariably to be inferred whenever false identifying information is given to police. Indeed, in *People v. Shaw, …* a conviction for criminal impersonation based on the defendant's having given a false name to an arresting officer was reversed because the prosecution had failed to present evidence that the use of the false name would result in a benefit to the defendant.

People v. Johnson, 30 P.3d 718, 723 (Colo. App. 2000).

Finally, Wood agreed to supply his identification to Hayes. [Ex. 2 ¶ 25]. It is not true that "impersonation" of Wood was undertaken without his permission.

• Count 8 also arises from the use of Wood's access badge, charging Peters with "identity theft" in violation of C.R.S. § 18-5-902(1)(A), which makes it a crime to use the "personal identifying information, financial identifying information or financial device of another without permission or lawful authority with the intent to obtain cash, credit, property, services, or any other thing of value or to make a financial payment." *See also* C.R.S. § 18-1-901 ("'Thing of value' includes real property, tangible and intangible personal property, contract rights, choses in action, services, confidential information, medical records information, and any rights of use or enjoyment connected therewith."). It is beyond dispute that Peters did not act with the intent to acquire cash or anything else of value within the meaning of the statute. This charge is so utterly unfounded it demonstrates Rubinstein's bad faith.

The indictment mentions the use of only two items associated with Wood --: a key card access badge and a "Yubikey" -- but it does not explain how either item qualifies as "personal identifying information, financial identifying information or [a] financial device" within the meaning of the statute. *See* C.R.S. § 18-5-901(13) (defining "personal identifying information"); C.R.S. § 18-5-901(7) (defining "financial identifying information"); C.R.S. § 18-5-901(6) (defining "financial device").

The Yubikey is something like a thumb drive, was not used by anyone, and so cannot be the basis for this count. While the access badge did have Wood's name on it, this only identified who the badge was assigned to; it did not make the access card a form of personal identification. Access cards were often issued simply labelled "Temp 1," "Temp 2," and so on, for vendors and others who were not county employees [Ex 2 ¶ 27], so the badge did not represent and was not linked to somebody of detailed identifying information filed somewhere. In truth, the badge functioned more like a modern electronic hotel room key. It is a temporary pass giving the bearer access to certain facilities. It is not the kind of "personal identifying information" that can be stolen within the understanding of § 18-5-902. Even if the access badge does qualify as "personal qualifying information" under § 18-5-902, Wood gave his permission for it to be used by Hayes [Ex. 2 ¶ 25], so no impersonation or "theft" of Wood's identity took place.

• Count 9 charges Peters with first degree official misconduct in violation of C.R.S. § 18-8-404(1). An official violates this statute:

> if, with intent to obtain a benefit for the public servant or another or maliciously to cause harm to another, he or she knowingly:
>
> (a) Commits an act relating to his office but constituting an unauthorized exercise of his official function; or
>
> (b) Refrains from performing a duty imposed upon him by law; or

> (c) Violates any statute or lawfully adopted rule or regulation relating to his office.

The indictment relies exclusively on the text of the statute to make this charge, which is fatally insufficient without more substantiating allegations. Most importantly, this offense must be undertaken to "obtain a benefit" or to "maliciously cause harm to another." The importance of this required specific intent is illustrated by the Colorado Supreme Court's reversal of a county tax collector's conviction for this offense in *People v. Dilger,* 585 P.2d 918 (Colo. 1978). The tax collector had been approaching various commercial taxpayers seeking to collect a penalty for the nonpayment of taxes, when, as it turned out, those taxpayers were actually not delinquent in their tax payments. And these field visits were contrary to the procedures of the tax assessor's office. As the Court explained in reversing the conviction:

> We find that in the present case the requisite element of "intent to obtain a benefit for himself or maliciously to cause harm to another" was not proved beyond a reasonable doubt. Both of the principal witnesses for the prosecution … admitted that the defendant never asked or even implied that they pay him any money. There is therefore no direct evidence that the defendant sought to obtain a monetary or other benefit for himself….
>
> While specific intent may be inferred circumstantially, mere conjecture of intent is not acceptable in lieu of proof beyond a reasonable doubt…. Evidence showing that a tax collector approached nondelinquent taxpayers and requested an unusual means of payment

> does not establish beyond a reasonable doubt intent to obtain personal benefit.

Id., at 919-20. *See also* B. Covington, *State Official Misconduct Statutes and Anticorruption Federalism After Kelly v. United States*, 121 Colum. L. Rev. 273, 283 & n. 63 (2021) (citing *Dilger*) (element of specific intent "provide[s] defendants with a valid defense if they acted in good faith for the public benefit but did so mistakenly.").

Missing here are any factual allegations to support this element of the offense. Peters complied with federal (and state) law when she made a backup copy of election records before they were destroyed by the Trusted Build installation, which erased those records. There is no evidence that Peters acted from any of the corrupt motives required by C.R.S. § 18-8-404(1).

Beyond the issue of specific intent, a fatal lack of specificity permeates this count. The indictment states that Peters acted to benefit someone or to cause harm to someone, but there are no factual allegations to support such a claim. Who was benefited? Who was harmed? Similarly, the indictment alleges she took an act that was an "unauthorized exercise of her official function," but never says what that act was. The indictment sets out various general characterizations of Peters' conduct using "and/or" phrasing, which means Peters cannot know what specifically she is accused of doing. The indictment does not even specify the

statute or regulation Peters supposedly violated – if, of course, the indictment is actually charging that aspect of the offense, which one cannot know from the text of the indictment. The absence of rudimentary factual detail renders Count 9 a nullity as a matter of law.

• Count 10 charges a violation of CRS § 1-13-107(1), alleging that "Tina Peters was a public officer, election official, or other person upon whom any duty is imposed by this code who then violated, neglected, or failed to perform such duty or is guilty of corrupt conduct in the discharge of the same." Yet this Count fails to put Peters on notice of the alleged illegal conduct that forms the basis for her indictment for a "violation of duty." Strikingly, the indictment does not even specify the duty at issue in this charge. And again, the indictment is punctuated by "or," and so the precise wrongdoing at issue is not identified. According to the indictment, Peters *either* violated an unnamed duty, *or* she in some way neglected it, *or* she failed to perform it altogether, *or* she engaged in unspecified "corrupt conduct in the discharge" of that mystery duty.

Earlier on, the indictment cites two rules concerning access to secure areas, Rules 20.5.3(a) and 20.5.5, (Indictment, at 9), but does not expressly link them to this Count or otherwise allege facts establishing a violation of those rules. Importantly, the indictment fails to mention Rule 20.5.3(b), which provides that

"no other individuals may be present in these locations ***unless supervised by one or more employees with authorized access***." (emphasis added). Since there is no allegation that Hayes was unaccompanied by Peters, who had authorized access, no violation of this Rule could have occurred.

• Finally, Count 11 charges a violation of C.R.S. § 1-13-114, alleging that "Tina Peters willfully interfered or willfully refused to comply with the rules of the Secretary of State or the Secretary of State's designated agent in carrying out of the powers and duties proscribed [sic] in section 1-1-107, C.R.S." Absent is a "statement of the facts and circumstances as will inform the accused of the specific offense … with which he is charged." *Hamling,* 418 U.S. at 118. There is no identification of the rules that are at issue here, much less a specific description of facts indicating that Peters interfered or refused to comply with them. Though the indictment claims Peters did not comply with "all" of the requests or directives in an Election Order of the Secretary of State, that simply means that Peters did in fact comply with some, but those she allegedly did not comply with are not disclosed.

However, we do know – and the indictment does not suggest otherwise -- that all of Peters' acts were directed at ensuring election records were preserved as required by federal and Colorado law. 52 U.S.C. § 20701; CRS § 1-7-802. If there

were any rules or administrative directives with which Peters did not comply, those rules and directives were subordinate to Peters' statutory obligations. Peters' compliance with them under the circumstances would have improperly advanced a criminal scheme to destroy election records in violation of the governing statutes. It is an elementary proposition of law that "the Secretary of State does not have authority to promulgate rules that conflict with other provisions of law." *Gessler v. Colorado Common Cause*, 327 P.3d 232, 235 (Colo. 2014). *See also Hanlen v. Gessler*, 333 P.3d 41, 49 (Colo. 2014) ("[T]he Secretary's power to promulgate rules regarding elections is not without limits. Specifically, the Secretary lacks authority to promulgate rules that conflict with statutory provisions."); CRS § 24-4-104(4)(b)(IV) ("No rule shall be adopted unless … [t]he regulation does not conflict with other provisions of law."); C.R.S. § 24-2-103(8)(a) ("Any rule … which conflicts with a statute shall be void."); C.R.S. § 24-4-106(7) (requiring courts to set aside agency actions that are "contrary to law"). Thus, any rules or administrative directives violated by Peters in the context of this case were utterly void and cannot provide a basis for the alleged violation of C.R.S. § 1-13-114.

e. Peters is unlikely to receive a fair trial in state court

Another basis for enjoining a state prosecution is that there will likely be no adequate opportunity for the plaintiff to be heard on her federal constitutional

claims or defenses. *Kugler v. Helfant,* 421 U.S. 117, 124 (1975) ("Only if extraordinary circumstances render the state court incapable of fairly and fully adjudicating the federal issues before it, can there be any relaxation of the deference to be accorded to the state criminal process."); *Younger,* 401 U.S. at 45; *Amalgamated Fed. Emp. Union Local 590 v. Logan Valley Plaza, Inc.,* 391 U.S. 308, 328-29 n. 3 (1068) (Black, J., dissenting); *Dombrowski,* 390 U.S. at 486. In this case, the June 5, 2022, ruling by Judge Matthew D. Barrett on a motion to quash subpoenas *duces tecum* in *People v. Peters,* Case No. 22CR371 effectively precludes reliance by Peters on federal constitutional defenses that she is entitled to assert. Judge Barrett ruled that the records sought by Peters' subpoena were not material to the issues pending in Peters' criminal case and further:

> The jury will not be asked to address any questions regarding the functioning of election equipment.
>
> [A]ny report regarding the verity of the election equipment made by her experts, or any counter expert, is entirely irrelevant. These reports make no issue of material fact in this case more or less likely. This criminal case is not the forum for these matters.
>
> Choice of evil is a statutory defense and is only applicable when the alleged crimes were necessary as an emergency measure to avoid an imminent public or private injury that was about to occur by reason of a situation occasioned or developed through the conduct of the actor and which is of sufficient gravity to outweigh the criminal conduct.

[Ex 16 at 3]. These rulings will preclude Peters from asserting defenses based on the First and Fourteenth Amendments, as well as the Supremacy Clause.

B. Peters Will Suffer Irreparable Injury Without Preliminary Relief

The first two *Winter* factors are the most critical. *Nken,* 556 U.S. at 434. The second factor is that Peters must show that she is likely to suffer irreparable harm if preliminary injunctive relief is not granted. *Benisek v. Lamone.* 138 S. Ct. 1942, Peters has previously described on pages 14-15 the irreparable injury that she will continue to suffer unless her motion for preliminary injunctive relief is granted.

C. The Balance of Equities Favors Peters.

The third *Winter* factor, whether the balance of the equities favors the moving party, is considered together with the fourth factor, whether an award of a motion for preliminary injunction would serve the public interest, when Government is the opposing party. *Nken,* 556 U.S. at 435.

The protection of individual constitutional rights always serves the public interest. *Free the Nipple-Fort Collins v. City of Fort Collins,* 916 F.3d 792, 807 (10th Cir. 2018); *Awad v. Ziriax,* 670 F.3d 1111, 1132 (10th Cir. 2012). Peters' interest in vindicating her rights to free speech, to free association, and to petition the government for the redress of grievances guaranteed by the First Amendment outweighs Defendants' interest in pursuing criminal proceedings against her,

particularly given the absence of justification for investigating and charging Peters based on the statutes they cite. *See Bass,* 365 F.3d at 1089; *Utah Licensed Beverage Ass'n v. Leavitt,* 256 F.3d 1061, 1076 (10th Cir. 2001). The Seventh Circuit has noted: "In First Amendment cases, 'the likelihood of success on the merits will often be the determinative factor.' " *ACLU of Illinois v. Alvarez,* 679 F.3d 588, 589 (7th Cir. 2018).

The public interest would be served by granting preliminary relief in this case. "[T]he public interest…favors plaintiffs' assertion of their First Amendment rights." *Elam Constr., Inc. v. Regional Transp. Dist.,* 129 F.3d 1343, 1347 (10th Cir. 1997)); *see AT&T Co. v. Winbach and Conserve Program, Inc.,* 42 F.3d 1421, 1427 n. 8 (3d Cir. 1994): "As a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff."

CONCLUSION

The Court should enter an Order granting a preliminary injunction prohibiting Defendant Rubinstein from further prosecution, investigation, or harassment of Peters.

Respectfully submitted November 27, 2023

s/*John Case*
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CERTIFICATE OF LENGTH

Undersigned counsel certifies that the foregoing Motion and Memorandum consists of 8825 words, exclusive of caption, signature block, and tables.

s/*John Case*
John Case

CERTIFICATE OF SERVICE

Undersigned counsel certifies that the foregoing Motion and Memorandum will be personally served upon the Defendant Daniel P. Rubinstein with a copy of the Summons and Complaint and all exhibits on November 27, 2023.

s/*John Case*
John Case

DISTRICT COURT, MESA COUNTY, COLORADO 125 N. Spruce Street Grand Junction, CO 81505 **IN RE: THE MESA COUNTY GRAND JURY** **PEOPLE OF THE STATE OF COLORADO** **v.** **TINA PETERS,** **and** **BELINDA KNISLEY,** **Defendants.**	FILED IN COMBINED COURT MAR 08 2022 MESA COUNTY COMBINED COURT MESA COUNTY, COLORADO ▲ **COURT USE ONLY** ▲
DANIEL P. RUBINSTEIN, District Attorney* JANET STANSBERRY DRAKE, Special Deputy District Attorney* ROBERT S. SHAPIRO, Special Deputy District Attorney* P.O. Box 20,000 Grand Junction, CO 81502-5031 Registration Numbers: 27473 (DPR); 27697 (JSD); 26869 (RSS) *Counsel of Record	Grand Jury Case: 21CR100 District Court Case Numbers:

MESA COUNTY GRAND JURY INDICTMENT

COUNT 1: ATTEMPT TO INFLUENCE A PUBLIC SERVANT, C.R.S. 18-8-306 (F4) **24051**

Tina Peters and Belinda Knisley

COUNT 2: ATTEMPT TO INFLUENCE A PUBLIC SERVANT, C.R.S. 18-8-306 (F4) **24051**

Tina Peters and Belinda Knisley

COUNT 3: ATTEMPT TO INFLUENCE A PUBLIC SERVANT, C.R.S. 18-8-306 (F4) **24051**

Belinda Knisley

COUNT 4 CONSPIRACY TO COMMIT CRIMINAL IMPERSONATION, C.R.S. 18-5-113(1)(B)(I) AND 18-2-201 (F6) **1011EC**

Tina Peters and Belinda Knisley

COUNT 5: ATTEMPT TO INFLUENCE A PUBLIC SERVANT, C.R.S. 18-8-306 (F4) **24051**

Tina Peters

COUNT 6 CRIMINAL IMPERSONATION - CAUSE LIABILITY, C.R.S. 18-5-113(1)(B)(I) (F6) **1011E**

Tina Peters

COUNT 7 CONSPIRACY TO COMMIT CRIMINAL IMPERSONATION – CAUSE LIABILITY, C.R.S. 18-5-113(1)(B)(I) AND 18-2-201 (F6) **1011EC**

Tina Peters

COUNT 8 IDENTITY THEFT - USES INFORMATION TO OBTAIN THING OF VALUE, C.R.S. 18-5-902(1) (F4) **1307G**

Tina Peters

COUNT 9: FIRST DEGREE OFFICIAL MISCONDUCT, C.R.S. 18-8-404 (M2) **24101**

Tina Peters

COUNT 10: VIOLATION OF DUTY, C.R.S. 1-13-107(1) (M) **38022**

Tina Peters

COUNT 11: FAILURE TO COMPLY WITH REQUIREMENTS OF SECRETARY OF STATE, C.R.S. 1-13-114 (M) **3802E**

Tina Peters

COUNT 12: VIOLATION OF DUTY, C.R.S. 1-13-107(1) (M) **38022**

Belinda Knisley

COUNT 13: FAILURE TO COMPLY WITH REQUIREMENTS OF SECRETARY OF STATE, C.R.S. 1-13-114 (M) **3802E**

Belinda Knisley

STATE OF COLORADO)
) ss.
MESA COUNTY)

Of the 2021-2022 term of the Mesa County District Court (21st Judicial District) in the year of 2022, the Mesa County Grand Jurors, chosen, selected, and sworn in the name and by the authority of the People of the State of Colorado, upon their oaths, present the following:

COUNT 1

ATTEMPT TO INFLUENCE A PUBLIC SERVANT, C.R.S. 18-8-306 (F4)

On or about April 23 – May 18, 2021, in Mesa County, State of Colorado, **Tina Peters and Belinda Knisley**, unlawfully and feloniously attempted to influence **Jessi Romero** of the Colorado Department of State/Secretary of State's Office, a public servant, by means of deceit, with the intent thereby to alter or affect the public servant's decision, vote, opinion, or action concerning a matter which was to be considered or performed by the public servant or the agency or body of which the public servant was a member; in violation of section 18-8-306, C.R.S.

COUNT 2

ATTEMPT TO INFLUENCE A PUBLIC SERVANT, C.R.S. 18-8-306 (F4)

On or about May 10 – May 19, 2021, in Mesa County, State of Colorado, **Tina Peters and Belinda Knisley**, unlawfully and feloniously attempted to influence **David Underwood** of Mesa County, a public servant, by means of deceit, with the intent thereby to alter or affect the public servant's decision, vote, opinion, or action concerning a matter which was to be considered or performed by the public servant or the agency or body of which the public servant was a member; in violation of section 18-8-306, C.R.S.

COUNT 3

ATTEMPT TO INFLUENCE A PUBLIC SERVANT, C.R.S. 18-8-306 (F4)

On or about May 17, 2021, in Mesa County, State of Colorado, **Belinda Knisley**, unlawfully and feloniously attempted to influence **Stephanie Wenholtz** of the Mesa County Clerk and Recorder's Office, a public servant, by means of deceit, with the intent thereby to alter or affect the public servant's decision, vote, opinion, or action concerning a matter which was to be considered or performed by the public servant or the agency or body of which the public servant was a member; in violation of section 18-8-306, C.R.S.

COUNT 4

CONSPIRACY TO COMMIT CRIMINAL IMPERSONATION - CAUSE LIABILITY, C.R.S. 18-5-113(1)(B)(I) AND 18-2-201 (F6)

On or about April 23 – May 19, 2021, in Mesa County, State of Colorado, **Tina Peters and Belinda Knisley,** with the intent to promote or facilitate the commission of the crime of Criminal Impersonation, unlawfully and feloniously agreed with the other co-defendant named above, Sandra Brown and/or a person or persons to the Grand Jury and District Attorney unknown that one or more of them would engage in conduct which constituted that crime or an attempt to commit that crime, or agreed to aid the other person or persons in the planning or commission or attempted commission of that crime, and an overt act in pursuance of the conspiracy was committed by one or more of the conspirators; in violation of sections 18-5-113(1)(b)(I) and 18-2-201, C.R.S.

COUNT 5

ATTEMPT TO INFLUENCE A PUBLIC SERVANT, C.R.S. 18-8-306 (F4)

On or about May 25, 2021, in Mesa County, State of Colorado, **Tina Peters**, unlawfully and feloniously attempted to influence **Danny Casias** of the Colorado Department of State/Secretary of State's Office, a public servant, by means of deceit, with the intent thereby to alter or affect the public servant's decision, vote, opinion, or action concerning a matter which was to be considered or performed by the public servant or the agency or body of which the public servant was a member; in violation of section 18-8-306, C.R.S.

COUNT 6

CRIMINAL IMPERSONATION - CAUSE LIABILITY, C.R.S. 18-5-113(1)(B)(I) (F6)

On or about May 23 – May 27, 2021, in Mesa County, State of Colorado, **Tina Peters**, unlawfully, feloniously, and knowingly assumed a false or fictitious identity or capacity, legal or other, namely: **Gerald "Jerry" Wood**, and in such identity or capacity performed an act that, if done by the person falsely impersonated, might have subjected such person to an action or special proceeding, civil or criminal, or to liability, charge, forfeiture, or penalty; in violation of section 18-5-113(1)(b)(I), C.R.S.

COUNT 7

CONSPIRACY TO COMMIT CRIMINAL IMPERSONATION – CAUSE LIABILITY, C.R.S. 18-5-113(1)(B)(I) AND 18-2-201 (F6)

On or about May 18 – May 27, 2021, in Mesa County, State of Colorado, **Tina Peters** with the intent to promote or facilitate the commission of the crime of Criminal Impersonation, unlawfully and feloniously agreed with Sandra Brown and/or a person or persons to the Grand Jury and District Attorney unknown that one or more of them would engage in conduct which constituted that crime or an attempt to commit that crime, or agreed to aid the other person or

persons in the planning or commission or attempted commission of that crime, and an overt act in pursuance of the conspiracy was committed by one or more of the conspirators; in violation of sections 18-5-113(1)(b)(I) and 18-2-201, C.R.S.

COUNT 8

IDENTITY THEFT - USES INFORMATION TO OBTAIN THING OF VALUE, C.R.S. 18-5-902(1)(A) (F4)

On or about May 23 – May 25, 2021, in Mesa County, State of Colorado, **Tina Peters**, unlawfully, feloniously, and knowingly used the personal identifying information, financial identifying information, or financial device of **Gerald "Jerry" Wood** without permission or lawful authority with the intent to obtain cash, credit, property, services, or any other thing of value or to make a financial payment; in violation of section 18-5-902(1)(a), C.R.S.

COUNT 9

FIRST DEGREE OFFICIAL MISCONDUCT, C.R.S. 18-8-404 (M2)

On or about April 23, 2021-August 15, 2021, in Mesa County, State of Colorado, **Tina Peters**, a public servant, with intent to obtain a benefit for any person or maliciously cause harm to another, unlawfully and knowingly committed an act relating to her office but constituting an unauthorized exercise of her official function and/or refrained from performing a duty imposed upon her by law and/or violated a statute or lawfully adopted rule or regulation relating to her office; in violation of section 18-8-404, C.R.S.

COUNT 10

VIOLATION OF DUTY, C.R.S. 1-13-107(1) (M)

On or about April 23 – August 15, 2021, in Mesa County, State of Colorado, **Tina Peters**, was a public officer, election official, or other person upon whom any duty is imposed by this code who then violated, neglected, or failed to perform such duty or is guilty of corrupt conduct in the discharge of the same; in violation of section 1-13-107(1), C.R.S.

COUNT 11

FAILURE TO COMPLY WITH REQUIREMENTS OF SECRETARY OF STATE, C.R.S. 1-13-114 (M)

On or about April 23 - August 15, 2021, in Mesa County, State of Colorado, **Tina Peters**, willfully interfered or willfully refused to comply with the rules of the Secretary of State or the Secretary of State's designated agent in carrying out of the powers and duties proscribed in section 1-1-107, C.R.S., in violation of section 1-13-114, C.R.S.

COUNT 12

VIOLATION OF DUTY, C.R.S. 1-13-107(1) (M)

On or about August 9 – August 15, 2021, in Mesa County, State of Colorado, **Belinda Knisley**, was a public officer, election official, or other person upon whom any duty is imposed by this code who then violated, neglected, or failed to perform such duty or is guilty of corrupt conduct in the discharge of the same; in violation of section 1-13-107(1), C.R.S.

COUNT 13

FAILURE TO COMPLY WITH REQUIREMENTS OF SECRETARY OF STATE, C.R.S. 1-13-114 (M)

On or about August 9 - August 15, 2021, in Mesa County, State of Colorado, **Belinda Knisley**, willfully interfered or willfully refused to comply with the rules of the Secretary of State or the Secretary of State's designated agent in carrying out of the powers and duties proscribed in section 1-1-107, C.R.S., in violation of section 1-13-114, C.R.S.

The essential, but non-exclusive, facts presented by the Mesa County Grand Jury in support of Counts 1-13 are as follows:

SUMMARY OF RELEVANT FACTS

During the relevant timeframe, April-August 2021, Tina Peters was the Clerk and Recorder in Mesa County, Grand Junction, Colorado. Belinda Knisley was the Deputy Clerk and Recorder. Sandra Brown, then a key employee, was the back office Elections Manager who had access to the voting system computers and equipment.

As part of the State of Colorado's initial criminal investigation it was learned that in early August 2021, public servants with the Colorado Secretary of State's Office (SOS) became aware that a series of confidential digital images of Mesa County Dominion Voting Systems (DVS) equipment and related passwords had been published on the internet. The public dissemination of this sensitive information constituted an unauthorized data breach. The compromised sensitive data included images depicting a proprietary hard drive with unlawfully downloaded/imaged software from Mesa County's election management server's hard drive. Additionally, unique Basic Input/Basic Output (BIOS) confidential passwords necessary to conduct a "trusted build" systems upgrade were also distributed in violation of SOS rules. A "trusted build" is an in-person upgrade of election management software that supports a county's voting system. Voting system equipment operate on a "closed network." This means that voting system equipment is not connected to the internet.

The Mesa County trusted build occurred on May 25-26, 2021. Personnel associated with any trusted build in Colorado include representatives from the SOS, experts from DVS, and a few designated county elections staff personnel who are designated and undergo a background check in advance of the trusted build.

Beginning in April 2021 and in advance of the May 25-26, 2021, trusted build, Tina Peters and Belinda Knisley, either as principal actors and/or acting as complicators, devised and executed a deceptive scheme which was designed to influence public servants, breach security protocols, exceed permissible access to voting equipment, and set in motion the eventual distribution of confidential information to unauthorized people. Furthermore, these defendants, without permission or lawful authorization, also used the name and personal identifying information of Gerald "Jerry" Wood to further their criminal scheme. This unlawful use of Mr. Wood's identity by Tina Peters and Belinda Knisley also subjected Mr. Wood to various forms of liability and criminal exposure.

APPLICABLE COLORADO ELECTION LAW AND RULES

DEFINITIONS

Rule 1.1.43 from 8 CCR 1505-1 of the Code of Colorado Regulations defines a "**trusted build**" to mean the write-once installation disk or disks for software and firmware for which the Secretary of State has established the chain-of-custody to the building of the disks, which is then used to establish or re-establish the chain-of-custody of any component of a **voting system** that contains firmware or software. The trusted build is the origin of the chain-of-custody for any software and firmware component of the voting system.

Rule 1.1.46 from 8 CCR 1505-1 of the Code of Colorado Regulations defines a "**voting system**" as defined by section 1-1-104(50.8), C.R.S. to mean:

(a) The total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used to:

(1) Define ballots;
(2) Cast and count ballots;
(3) Report or display election results; and
(4) Maintain and produce any audit trail information.

(b) The practices and associated documentation used to:

(1) Identify system components and versions of such components;
(2) Test the system during its development and maintenance;
(3) Maintain records of system errors and defects;
(4) Determine specific system changes to be made to a system after the initial qualification of the system; and
(5) Make available any materials to the voter (such as notices, instructions, forms or paper ballots).

(c) "Voting system" **does not** include any other component of election administration, such as voter registration applications or system, electronic pollbooks, ballot delivery and retrieval systems, signature verification and envelope sorting devices, ballot on demand printers, election night reporting and other election reporting systems, and

other components used throughout the election process that do not capture and tabulate votes.

Rule 1.1.22 from 8 CCR 1505-1 of the Code of Colorado Regulations defines, in relevant part, **"election management system"** to mean the hardware and software applications used to configure, program, and report election results from one or more voting system components, including the ballot definition and the election reporting subsystem.

Rule 1.1.25 from 8 CCR 1505-1 of the Code of Colorado Regulations defines, in relevant part, **"election management software"** to mean the software for election equipment or computers that controls election setup vote recording, vote tabulation, and reporting.

STATUTES

In Colorado, pursuant to state statute, the Colorado Secretary of State and the secretary's office has the duty "[t]o supervise the conduct of …. Statewide ballot issue elections in this state[.]" Section 1-1-107(1)(a), C.R.S. Pursuant to section 1-1-107(2)(a), C.R.S., the Secretary of State has the power to promulgate, publish and distribute … such rules as the secretary of state finds necessary for the proper administration and enforcement of the election laws.

Additionally, it is important to note that in Colorado a County Clerk and Recorder, in rendering decisions and interpretations under Colorado's Election Code, **shall** consult with the Secretary of State and follow rules and orders promulgated by the Secretary of State pursuant to the Election Code. Section 1-1-110(1), C.R.S. Next, pursuant to section 1-5-616(1)(g), C.R.S., the Secretary of State shall adopt rules … that establish minimum standards for electronic and electromagnetic voting systems regarding … security requirements."

Furthermore, "[t]he secretary of state shall by written order" address a voting system that "does not comply with applicable standards or deviates from a certified system[.]" Section 1-5-621(4), C.R.S.

RULES

Building on the above applicable state statutes, in the State of Colorado the SOS has promulgated and adopted rules in the Colorado Code of Regulations which are relevant to this matter. These rules apply to all election officials who have assumed the responsibility and duty of administering elections throughout the state. The applicable rules from 8 CCR 1505.1 which were in effect at the time of the charged criminal offenses are as follows:

1. Rule 11.1 - Voting Systems Access, with associated Rules 11.1.1, 11.1.2 and 11.1.3. These rules focus on the county's designated election official being responsible to securely store election setup records. Only persons with the clerk's written authorization may access the records. Furthermore, in accordance with section 24-72-305.6, C.R.S. all permanent and temporary county staff who have access to the

voting system or any voting or counting equipment must pass a criminal background check.

2. Rule 20.3.2 - County Security Procedures. This rule states, "The county must maintain and document uninterrupted chain-of-custody for each voting device from the installation of the trusted build to the present."

3. Rule 20.5.3(a) - Access to Secure Areas. This rule states, "Access to …the lock… to ballot storage areas, counting room, location of adjudication, or tabulation workstations, is restricted to **employees** who have passed a criminal background check."

4. Rule 20.5.5 – Access to Secure Areas. This rule states, "Access to where election management software is used is limited to authorized election officials and watchers only."

5. Rule 20.6.1(d), (e) and (g) – Internal Controls for the Voting System. These rules state that the county may not connect or allow a connection of any voting system component to the Internet and that if any component of the voting system is equipped with Wi-Fi capability or a wireless device, the county must ensure that the wireless capability or device is disabled before use in an election. The county must also include in its security plan the name, title and date of background checks for each employee with access to any of the areas or equipment set forth in Rule 20.6.1.

6. Rule 20.19.2(a)(2) – Access Logs. The relevant aspect of this rule states that in addition to the audit logs generated by the election management system, the county must maintain access logs that record the following:

   (1) Modifications to the system's hardware, including insertion or removal of removable storage media, or changes to hardware drivers.

CRIMINAL CONDUCT

Beginning in April 2021, the SOS commenced preparations for conducting trusted build election management software upgrades that would occur across Colorado. Mesa County's trusted build was set to begin on May 25, 2021. On April 16, 2021, Jessi Romero, the Voting Systems Manager with the SOS, responded to a request from Mesa County's election staff which sought to have members of the public onsite at the Elections Office in Mesa County during the trusted build. Mr. Romero, as a public servant and employee for the SOS, informed Mesa County's election staff that only required personnel from Dominion Voting Systems, the SOS, and the county will be permitted in the trusted build. Mr. Romero also reminded the Mesa County elections staff that, "The trusted build will be installed under camera, so for those members of the public that are interested in the process, my suggestion is to bring them in (after your install date) and allow them to watch the video." Mr. Romero informed the Grand Jury that it was the SOS' awareness that Mesa County's election staff had historically always kept their various security surveillance cameras on and operating.

On April 19, 2021, Tina Peters reached out to Mesa County's IT staff and started a dialogue that also included Belinda Knisley, amongst others. Tina Peters stated that her office had requested that members of the public be present to watch the trusted build. Ms. Peters then revealed to the county IT staff that the SOS declined this request and that only Mesa County employees could be present. Ms. Peters told a Mesa County IT employee that security cameras would not capture what was exactly being done on the computer monitors, therefore Ms. Peters wanted Mesa County IT staff present to watch the trusted build.

On April 23, 2021, Tina Peters, Belinda Knisley, and others had a discussion regarding supposed vulnerabilities to election management systems. During that meeting, Tina Peters was told it was against the law to open the machines, and there was conversation about bringing in a team who could help her.

On April 26, 2021, Jessi Romero of the SOS emailed Tina Peters and the other clerks across the state explaining that DVS' Democracy Suite 5.13 voting system update had been certified by a federally accredited Voting System Test Laboratory (VSTL) for use in Colorado. As a result of this certification, the state was preparing a trusted build. On April 30, 2021, Jessi Romero notified the state's county clerks, including Ms. Peters, what procedures needed to occur in advance of the trusted builds occurring across the state. The detailed email from the SOS notified Tina Peters and her office that no later than one week prior to Mesa County's scheduled trusted build the county must confirm who would participate on behalf of the clerk's office. The SOS further advised the county clerks, including Tina Peters, that "Only authorized state staff, county election staff and Dominion staff may be present during trusted build." Additionally, the SOS advised the clerks throughout the state that, "The onsite installation of the Trusted Build is not the time for members of the public, representatives from the local parties, or county officials other than the Clerk & Recorder to observe or ask questions about the process or any of the disinformation being pushed about the election." The SOS email dated April 30, 2021, advised, "If when we arrive onsite, or during the process there are others present (beyond Dominion and county election staff that have been authorized, and the Clerk & Recorder) in the area where the Trusted Build will take place, we will move on to the next county."

Finally, the SOS provided preparation instructions to the clerks that they should, "Backup any election projects on your voting system to removeable media before our arrival." Detailed step-by-step instructions on how a county would backup its election projects were made available to the clerks. The backup of election projects and election records does not include anyone imaging the hard drive of the county's DVS election management software. Any county's backed up "election records" and its paper record of those election records are kept separately by the county for a designated period.

On May 13, 2021, notwithstanding the SOS' admonition to the clerks across Colorado, including Ms. Peters and her key staff, which limited county representatives at the Trusted Build to "county election staff," Belinda Knisley initiated communication with Mesa County Human Resources (HR) requesting access permissions and a county email account for an "I.T. person" to support the clerk's upcoming work involving its election equipment. In a follow-up communication on the same day Ms. Knisley emailed HR about a "Temp Employee" needing security badge access and a county email address. Clerk Tina Peters was included on this e-mail. Then, on May 14, 2021, a county IT employee contacted Ms. Knisley regarding the above

referenced request. Initially Ms. Knisley responded by saying that the person needing the email was "not a new hire" and that the person was a "temp person for the Elections Department." Around the same timeframe, Tina Peters told the IT employee (David Underwood) that the person needing the county email was someone from the state and would need an email address like the last time someone from the state came in. Relying on the misrepresentations of Tina Peters and Belinda Knisley, Mr. Underwood, believing he was initiating temporary access for a state employee, began the process of creating a Mesa County computer network login and county email address for Mr. Wood.

On May 17, 2021, Ms. Knisley started the process of getting the security surveillance cameras within the election offices turned off. This included shutting off one or more cameras in the secured rooms where the upcoming trusted build would be conducted. A county IT employee who was assigned to handle the cameras testified that he had no memory of any prior request from the Mesa County Clerk's office to shut off any security surveillance cameras. By the end of the day on May 17, 2021, the security surveillance cameras protecting the secured elections areas were turned off and not operational from that point forward through the entire trusted build install process.

Also on May 17, 2021, Belinda Knisley told the office's front-office elections manager, Stephanie Wenholtz, that Gerald Wood was the new "Admin. Assistant" in the Clerk and Recorder's Office. Stephanie Wenholtz was then excluded from the trusted build and told that Gerald Wood would participate in her place. Relying on the misrepresentations of Belinda Knisley, Stephanie Wenholtz conducted a background check on Gerald Wood.

On May 18, 2021, Sandra Brown, the back-office elections manager, sent an email to SOS employee Jessi Romero stating that Mesa County would adhere to the procedures outlined in the SOS' April 30, 2021, email regarding the trusted build procedures and that Gerald Wood in the capacity of "Administrative Assistant" was going to be the third member of Mesa County staff to be present at the trusted build. Deputy Clerk Belinda Knisley was cc'd on this email to Mr. Romero.

Gerald "Jerry" Wood was served with a subpoena and compelled to testify before the Mesa County Grand Jury. Mr. Wood testified that Tina Peters contacted him by telephone and told him that she may need him to do some contract work that Mesa County IT either could not do or would not do. He was told that the work involved backing up Dominion voting machines. He advised that he had no familiarity with those machines and would discuss the jobs she needed him to do as they came up. Tina Peters later put Mr. Wood in touch with Belinda Knisley who obtained his name and social security number to run a background check. Ms. Knisley then directed Mr. Wood to go to Mesa County HR to obtain his access badge. Mr. Wood obtained his county access badge on Wednesday, May 19, 2021, the same day Ms. Knisley directed Mr. Underwood to help Mr. Wood login to the Mesa County computer network with the use of an assigned Yubikey. A Yubikey is a device that provides authorized users a two-factor authentication security feature for computer and network access. Mr. Wood testified that he never received a Yubikey and the Yubikey Mr. Underwood assigned to Mr. Wood has not been located. After a meeting with Ms. Peters and Ms. Knisley on May 19, 2021, Mr. Wood was required to return the access badge to Ms. Knisley before he left the elections building. Mr.

Wood was never hired by Mesa County in any capacity, he has never done any work for Mesa County, and he has never been employed by the state.

Mesa County records show that on Sunday, May 23, 2021, key card access badges assigned to Tina Peters, Sandra Brown, and Gerald Wood were used to access secured election offices. Security cameras were still disabled due to Belinda Knisley's prior request.

On Tuesday, May 25, 2021, the Mesa County trusted build was set to begin in the morning. DVS employee David Stahl was present and testified that Tina Peters introduced him to a man she referred to as Gerald Wood, who she said was an administrative assistant who was in training and would be involved in the elections process.

Danny Casias, an SOS employee and public servant, who was the only SOS employee to participate in the Mesa County trusted build on May 25-26, 2021, also testified that Tina Peters introduced him to a person she called Gerald Wood. Tina Peters described Gerald Wood as being an employee of the Motor Vehicle Division who was transferring over to Elections.

Mr. Wood testified that he did not go to the Mesa County Clerk and Recorder's Office in Grand Junction on Sunday, May 23, 2021, or Tuesday, May 25, 2021, and did not use the access badge that he had previously turned over to Ms. Knisley on May 19, 2021. The Grand Jury was presented with evidence which corroborated Mr. Wood's sworn testimony regarding his whereabouts on both Sunday, May 23, 2021, and Tuesday, May 25, 2021.

In early August 2021, SOS employees learned that images of the Mesa County election management systems and related passwords were on the internet. On or about August 9, 2021, the SOS issued Election Order 2021-01 which ordered Tina Peters and the Mesa County Clerk and Recorder's Office to provide access to the SOS for an inspection. The SOS also ordered the Mesa Clerk and Recorder to immediately produce to the SOS staff any documentation of written and verbal communications, including but not limited to, emails, texts, messaging programs, social media, direct messaging, voice mails, emails, and call logs by and with the Mesa County Clerk and Recorder or staff or designee regarding DVS machines or the trusted build process. Furthermore, the SOS directed the Mesa Clerk to provide communications that contain or reflect or reference any images, videos, actions, or recordings arising from or related to the trusted build installation conducted on May 25, 2021. The SOS also directed the Clerk to produce documents showing the dates of employment and job descriptions for all representatives of the Mesa County Clerk and Recorder's office who participated in the trusted build on May 25, 2021. Ms. Peters and Ms. Knisley did not comply with all of the requests or directives contained in Election Order 2021-01.

On August 10, 2021, Belinda Knisley stated in an interview that Tina Peters directed her to turn off the cameras in May 2021. Belinda Knisley also said that the Clerk's Office considered hiring Gerald Wood but had decided against hiring him.

On August 12, 2021, the SOS ordered that Mesa County was prohibited from using their elections equipment in future elections. The Order was based in part because the SOS could not confirm that the BIOS settings were not accessed after the trusted build process and could not establish confidence in the integrity or security of the Mesa elections equipment.

DANIEL P. RUBINSTEIN*
District Attorney

JANET STANSBERRY DRAKE, 27697*
Special Deputy District Attorney
ROBERT S. SHAPIRO, 26869*
Special Deputy District Attorney
Attorneys for the People
*Counsel of Record

Subscribed and sworn to before me in the Mesa County, State of Colorado, this 8th day of March 2022.

Notary Public

My commission expires:

April 20, 2022

HALEY GONZALEZ
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID #20184017407
My Commission Expires April 20, 2022

The Mesa County Grand Jury presents the within Indictment, and the same is hereby ORDERED FILED this 9th day of March, 2022.

Arrest Warrants to issue:

BOND SET AT no bond pending advisement FOR TINA PETERS

BOND SET AT no bond pending advisement FOR BELINDA KNISLEY

District Court Judge,
21st Judicial District and Presiding Judge for the Mesa County Grand Jury

THE MESA COUNTY GRAND JURY **Case No. 2021 CR 100**

In Re: Tina Peters and Belinda Knisley

AS TO COUNT 1

A TRUE BILL

[redacted]

FOREPERSON

A NO TRUE BILL

_____

AS TO COUNT 2

A TRUE BILL

[redacted]

FOREPERSON

A NO TRUE BILL

_____

AS TO COUNT 3

A TRUE BILL

[redacted]

FOREPERSON

A NO TRUE BILL

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AS TO COUNT 4

A TRUE BILL

[redacted]

FOREPERSON

A NO TRUE BILL

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AS TO COUNT 5

A TRUE BILL

[redacted]

FOREPERSON

A NO TRUE BILL

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AS TO COUNT 6

A TRUE BILL

[redacted]

FOREPERSON

A NO TRUE BILL

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AS TO COUNT 7

A TRUE BILL

[redacted]

FOREPERSON

A NO TRUE BILL

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AS TO COUNT 8

A TRUE BILL

[redacted]

FOREPERSON

A NO TRUE BILL

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AS TO COUNT 9

A TRUE BILL

[redacted]

FOREPERSON

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AS TO COUNT 10

A TRUE BILL

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FOREPERSON

A NO TRUE BILL

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AS TO COUNT 11

A TRUE BILL

[redacted]

FOREPERSON

A NO TRUE BILL

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AS TO COUNT 12

A TRUE BILL

[redacted]

FOREPERSON

A NO TRUE BILL

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AS TO COUNT 13

A TRUE BILL

[redacted]

FOREPERSON

A NO TRUE BILL

_____

I, [redacted], the Foreperson of the Mesa County Grand Jury, do hereby swear and affirm that each and every True Bill returned in this indictment by the Mesa County Grand Jury was arrived after deliberation and with the assent and agreement to the existence of probable cause by at least nine members of the Mesa County Grand Jury. Furthermore, the Mesa County Grand Jury consents and instructs the District Attorney that this Indictment may be returned on the record in open court before the Presiding Judge with or without the foreperson being present.

[redacted]
Foreperson

Subscribed and sworn to before me in Mesa County, State of Colorado, this 8th day of March 2022.

Haley Gonzalez
Notary Public

My commission expires:

April 20, 2022

HALEY GONZALEZ
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID #20184017407
My Commission Expires April 20, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:23-cv-3014-NYW-SKC

TINA PETERS

Plaintiff,

v.

UNITED STATES OF AMERICA,
MERRICK B. GARLAND, Attorney General of the United States in his official capacity,
JENA GRISWOLD, Colorado Secretary of State, in her official capacity, and
DANIEL P. RUBINSTEIN, District Attorney of the Twenty-First Judicial District, in his official capacity,

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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1. This is an action for declaratory and injunctive relief seeking to prohibit the United States and its agents and agents of the State of Colorado from conducting criminal and other proceedings against Plaintiff, Tina Peters, for the unlawful purpose of retaliating against her:

(a) for exercising her freedom of speech, freedom of association, and her right to petition the government for the redress of grievances, which are

guaranteed by the First Amendment and the Fourteenth Amendment of the Constitution of the United States, and

(b) for her efforts, as Mesa County Clerk and by law the designated election official, to preserve election records in compliance with federal and state law in violation of her right to due process of law and her privileges and immunities as a citizen of the United States guaranteed by the Fourteenth Amendment of the Constitution of the United States.

2. This action is grounded on the elementary proposition of law that a command of a state officer, in whatever form, which as applied would compel a county official to violate a federal or state statute has no standing as a legitimate, legally binding command, and so has no force or effect. And when that command is designed to conceal official malfeasance affecting the public interest in accurate and fair elections, which the county official discovers by her efforts to faithfully comply with those federal and state statutes, her truthful public disclosures of the facts of that malfeasance are protected by the most fundamental principles of the First Amendment. The importance of that protection is at its highest in the face of grossly untrue calumny by that state official and the use of government power to retaliate against the county official.

3. Furthermore, under the Fourteenth Amendment it is a privilege and immunity of national citizenship to comply with federal law and engage in the administration of government functions free from retaliation by state and local officials. And the due process of law guaranteed by the Fourteenth Amendment shields a citizen of the United States from the use of the instrumentalities of state or local government, including criminal prosecution, to retaliate against that citizen for her compliance with federal law.

4. Defendants' conduct exposes their singular goal of achieving political power and maintaining it, even at the cost of undermining the system of fair and trustworthy election that is a cornerstone of our democracy.

PARTIES

5. Plaintiff Tina Peters is a citizen of the United States, a resident of the State of Colorado, and the former Mesa County Clerk and Recorder.

6. Defendant United States is the government established by the Constitution of the United States.

7. Defendant Merrick B. Garland is sued in his official capacity as Attorney General of the United States. Defendants Garland and the United States may be collectively referred to herein as the "Federal Defendants."

8. Defendant Jena Griswold is sued in her official capacity as Secretary of State of Colorado.

9. Defendant Daniel P. Rubinstein is sued in his official capacity as District Attorney of the 21st Judicial District of Colorado. Defendants Rubinstein and Griswold may be referred to collectively as the "State Defendants."

JURISDICTION AND VENUE

10. Jurisdiction is predicated on 28 U.S.C. §§ 1331, 1343(a)(3), and 1346(a)(2).

11. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to the claims asserted in this Complaint occurred in Denver, Colorado, in this District.

PETERS' DUTIES AS COUNTY CLERK AND THE DESIGNATED ELECTION OFFICIAL

12. On November 8, 2018, Peters was elected County Clerk and Recorder of Mesa County, Colorado for a four-year term.

13. As County Clerk and Recorder, Peters served as the designated election official who exercised authority and was charged with responsibility for, among other things, the "running" of the 2020 election of presidential electors in Mesa County and the 2021 municipal elections in the City of Grand Junction, Colorado. C.R.S. § 1-1-104(8).

14. The Mesa County election management system ("EMS") server contained electronic records of the November 2020 election, and the 2021 municipal election.

15. Under federal statutes, voting systems must "produce a record with audit capacity," 52 U.S.C. § 21081(a)(2)(A), and every officer of election must retain and preserve, for a period of twenty-two months, "all records and papers" related to any federal election. 52 U.S.C. § 20701.

16. The criminal penalty for violating 52 U.S.C. § 20701 is a fine of up to $1,000 or imprisonment for up to one year or both.

17. Griswold and Peters were both "officers of election" as defined in 52 U.S.C. § 20706.

18. C.R.S. § 1-7-802 requires every designated election official to preserve "any election records" for a period of at least twenty-five months after the election.

19. Peters had independent statutory duties to preserve election records under both federal and state law.

20. The purposes of preserving electronic election records are, among other things, to detect and prosecute civil rights violations and election crimes, to

audit the performance of the computer voting system, and to reconstruct an election when necessary to confirm its legitimacy.

FACTUAL ALLEGATIONS

A. Peters' Efforts to Preserve Election Records

21. On April 21, 2021, Peters requested the Mesa County Information Technology Department to make a copy of the Mesa County EMS hard drive, which would have preserved all election records on the physical server. That request was denied.

22. On April 30, 2021, Griswold issued a directive (the "Griswold directive") requiring county election officials, including Peters, to participate in installing a "Trusted Build" software upgrade to the hard drives of county computer voting systems. A copy of the directive is Exhibit 1.

23. Griswold and Dominion Voting Systems, Inc. ("Dominion") jointly developed the protocol and requirements for the installation of the Trusted Build upgrade.

24. Before the installation of the Trusted Build upgrade, Peters was advised by David Stahl, a Dominion employee, during a telephone conversation in April 2021 that one effect of the Trusted Build upgrade would be to make it impossible to read the digital election records used in the 2020 election of

presidential electors in Mesa County and the 2021 municipal election in Grand Junction.

25. Though the Griswold directive instructed local election officials to backup "election projects" before the upgrade, those "projects" did not include all the records that are essential for a post-election audit, such as audit logs, access logs, and an image of the hard drive of the County's EMS server.

26. The federal and Colorado statutes requiring election records to be preserved had not yet expired when the Trusted Build upgrade was scheduled to occur.

27. Peters understood from her communications with Griswold's staff that Griswold was fully aware that the Trusted Build upgrade would erase at least some of the existing election records on the Mesa County EMS server in violation of federal and Colorado laws. And Griswold's actions in 2021 and 2022 during which Griswold had repeatedly interfered with Peters' supervision of the Mesa County election function and falsely accused Peters of violating Griswold's rules convinced Peters that Griswold was determined to delete the records of the recent elections and that it would be futile to request that Trusted Build not be installed.

28. The official website of the Colorado Secretary of State stated that the federal election records preservation statute is binding on all election officials,

which confirms that Griswold knew or was charged with knowledge that the destruction, deletion, alteration, or overwriting of election records by any election official within the specified period after a federal election was prohibited by federal law.

29. Similarly, Peters was aware when she learned of the Griswold directive that Peters had a duty under both federal and Colorado law to assure the preservation of all election records on the Mesa County EMS server.

30. The Griswold directive requiring Peters and other local election officials to assist in the Trusted Build upgrade violated Griswold's own duty under federal and Colorado laws to preserve all election records for prescribed periods and compelled Colorado election officials, including Peters, to violate those laws.

31. To comply with her legal obligations to preserve election records, Peters lawfully exercised her authority to arrange for a consultant on May 23, 2021, before the upgrade, to make a forensic image of the Mesa County EMS hard drive. A "forensic image" is a bit-by-bit, non-modifiable (read only) copy of all the digital data stored on a disk drive.

32. On May 25, 2021, agents of Griswold performed the Trusted Build upgrade, which caused election records and data, including at least operating system log files, on the Mesa County EMS server to be overwritten and to be no

longer recoverable in violation of federal and Colorado records-preservation statutes.

33. On May 26, 2021, after the upgrade, Peters again lawfully exercised her authority to arrange for a consultant to make a forensic image of the Mesa County EMS server.

34. At all times when that consultant was in a secure area, he was supervised by an employee with authorized access in compliance with Election Rule 20.5.3(b).

35. The making of the forensic images of the Mesa County EMS server did not interfere with or obstruct in any way the installation of the Trusted Build upgrade nor did it breach security in any way.

36. Upon receiving the forensic images, Peters provided them to cyber security expert Douglas W. Gould for analysis.

37. Mr. Gould served as Chief Cyber Security Strategist for AT&T. He has been involved in cybersecurity issues at the highest levels of government and corporate entities for decades. He served as Chief Security Officer at the World Institute for Security Enhancement and is currently Chief Technical Officer at CyberTeamUS.

38. The forensic images were also later provided to computer experts Walter C. Daugherity, Ed.D. and Jeffrey O'Donnell. Dr. Daugherity received his Masters in the Art of Teaching Mathematics from Harvard University in 1967 (at the age of 20), and received his doctorate in Mathematical Education, also from Harvard, in 1977. Dr. Daugherity works as a computer consultant, and in that capacity has worked for clients in the private and public sectors, including the New York Times, the Washington Post, IBM's Federal Systems Division, Southwestern Bell Telephone, the Texas Department of Agriculture, and the U.S. Customs Service. He currently is also a Visiting Assistant Professor at Texas A & M University in the Departments of Computer Science and Engineering. He has also worked as a Teaching Fellow in the Division of Engineering and Applied Sciences and as a Systems Programmer in the Computer-Aided Instruction Laboratory, both at Harvard. He is the author of numerous refereed publications and other technical papers and presentations.

39. O'Donnell is a Full Stack software and database developer and analyst with degrees in Computer Science and Mathematics from the University of Pittsburgh. He has been a consultant to numerous American corporations and private entities, including Rockwell International, Westinghouse Electric Nuclear, General Defense, U.S. Steel, Mellon Bank, IOTA 360, and the Penn State Applied

Research Laboratory. He currently serves as President of Qest Development, a full service software consulting and publishing company, and Chief Information Officer of Ordros Analytics, which specializes in election analytics of all types.

40. These experts analyzed the forensic images. They concluded that the Mesa County disk drive images revealed an unusual phenomenon that occurred during both the November 2020, General Election and the April 2021, Grand Junction municipal election. After some of the ballots were processed and their information recorded in a set of Microsoft SQL database tables for the respective election ("Set 1"), no further data were entered in Set 1 even though ballot processing was not complete. Rather, data from processing additional ballots were entered into a separate, newly created set of tables ("Set 2"). Further, some but not all of the data from Set 1 was copied into Set 2. Accordingly, neither Set 1 nor Set 2 contained all the data from counting all the ballots. Because the creation of Set 2 hid Set 1 from election workers, breaking the chain of custody and violating federal auditability requirements, election officials had no way to examine or review the ballots in Set 1 which were not copied to Set 2. This calls into question the integrity of the vote counting process and the validity of the election results. The experts issued Mesa Report 3, which explains why the authors believe the

unusual creation of Set 2 and the partial copying of some but not all of the data from Set 1 did not result from intervention by Mesa County election personnel.

41. The experts also concluded that Dominion's Trusted Build upgrade overwrote the entire EMS operating system, including electronic system log files containing auditable election records of the 2020 and 2021 elections.

42. Evidence of unexplained multiple ballot databases on the Mesa County EMS server, as well as log files and other 2020 and 2021 election records, all of which were subsequently overwritten by the Trusted Build upgrade, were election records required to be preserved by federal and Colorado law and regulations.

43. On July 28, 2021, the Department of Justice published a report announcing that those who insist on conducting election audits could be subject to federal investigation and prosecution. That report committed the Department to "ensure full compliance with all federal laws that govern the retention and preservation of election records." https://www.justice.gov/ag/page/file/1438936/download. The publication confirmed that state election officials "must therefore also retain and preserve records created in digital or electronic form."

B. Retaliation and Harassment by State and Federal Officials

44. Griswold's response upon learning on or about August 2, 2021, that an image of the Mesa County EMS hard drive had been made was to order several of her staff members to take control of the office of the Mesa County Clerk and Recorder and to begin an investigation.

45. The making and dissemination of the forensic images violated no statute, administrative regulation, rule, or order in existence at any relevant time.

46. Nevertheless, Griswold has described the forensic images made of EMS as "unauthorized" and sought prosecutions of Peters and others in Peters' office for making the forensic images. But Griswold has not investigated the creation of additional ballot databases on the Mesa County EMS during the 2020 and 2021 elections, nor has she acknowledged the illegality of her own directive that caused election records to be deleted when the trusted build was installed.

47. Griswold's characterization that the making of forensic images was somehow unlawful or improper is unequivocally untrue, as her own deputy admitted under oath. Appearing on behalf of the Secretary of State in *Griswold v. Schroeder,* Case No. in the District Court of Elbert County on November 2, 2022, Deputy Secretary Christopher Beall testified that Elbert County Clerk and

Recorder Dallas Schroeder had lawfully made an image of that County's EMS server in August 2021.

48. Beall testified further that neither Colorado law nor a rule or order of the Secretary prohibited Schroeder from making the image in August 2021.

49. Schroeder's conduct causing an image to be made of the Elbert County EMS server was substantially the same as Peters' conduct causing Mesa County's forensic images to be made.

50. Beall also admitted that the installation of the Trusted Build update in May 2021 overwrote the memory contained on the hard drives that are a component of the EMS server. This overwritten memory is where log files created by the EMS server are stored.

51. Defendant Rubinstein initiated an investigation of Peters and members of her office on or about August 9, 2021, at the request of Griswold.

52. Rubinstein requested the involvement of the Office of Colorado Attorney General Philip Jacob Weiser in the investigation of the making of the forensic images.

53. Rubinstein then communicated with federal law enforcement officials and requested that they investigate Peters.

54. Rubinstein and the federal and state law enforcement officials involved in the investigation knew that deletion of election records by an election official constitutes a violation of federal and Colorado law in the circumstances of this case, but they declined to pursue Griswold's potential violations of federal and Colorado election records preservation laws.

55. Rubinstein and Weiser joined forces in August 2021 to conduct a joint investigation of the circumstances surrounding the making of the forensic images in Mesa County but have not brought a charge against Griswold for violating Colorado's election records preservation statute or investigated whether there was a violation of Colorado law in the unexplained creation of additional ballot databases in two consecutive elections on the Mesa County EMS.

56. On August 9, 2021, Griswold issued Election Order 2021-01 (Exhibit 2), ordering Peters to permit an investigation of the voting system components and security protocol, and requiring Peters to produce records. The order stated that the "breach in security protocol has not created an imminent direct security risk to Colorado's elections."

57. On August 10, 2021, while Peters was participating in a Cyber Symposium in South Dakota sponsored by Michael J. Lindell, at which she made a presentation on the findings of the computer experts who had analyzed the Mesa

County EMS server images, Griswold's agents, accompanied by Rubinstein's agents, inspected Mesa County voting system components and records at the Mesa County Clerk and Recorder's Office.

58. During the inspection on August 10, 2021, Griswold's agents found no damage to Mesa County voting system components or software.

59. On August 12, 2021, Griswold issued Election Order 2021-02 (Exhibit 3), which prohibited Peters and Mesa County from using its computer voting system "because the Department could not establish that the voting system was not compromised."

60. Election order 2021-02 was unnecessary. Making the forensic images had caused no harm to the voting system hardware or software. Election Order 2021-02 served to humiliate Peters and make her unpopular with voters by requiring Mesa County to purchase a new voting system. It was intended to silence Peters and other critics of computer voting systems.

61. On information and belief, Rubinstein obtained possession of the Mesa County voting system components that were listed in Election Order 2021-02, and subsequently delivered possession of the components to agents of the Federal Bureau of Investigation in Denver, Colorado. On information and belief,

the Denver FBI office still has possession of the Mesa County voting system equipment.

62. On August 17, 2021, Griswold issued Election Order 2021-03 (Exhibit 4) assuming responsibility for the supervision of elections in Mesa County, prohibiting Peters' staff from any involvement in elections, and appointing Sheila Reiner to supervise all elections in the County.

63. Under Colorado law, an elected official cannot be removed without a recall vote by voters in the district or county in which she was elected.

64. Prior to August 2021, Griswold advocated to the Mesa County Board of County Commissioners (the "County Board") to replace the Dominion voting system, with a different system from the vendor Clear Ballot.

65. On August 24, 2021, the County Board entered into an agreement with Dominion Voting Systems, Inc. for Dominion to replace the computer voting system equipment. A copy of the Agreement is attached as Exhibit 5.

66. On August 30, 2021, Griswold filed a petition in the District Court of Mesa County (Civil Action 2021-CV-30214) requesting the District Court to replace Peters as Mesa County's designated election official with Wayne Williams for the 2021 election.

67. On September 1, 2021, a meeting requested by Peters' political associate Sherronna Bishop to allow her to present her concerns about computerized voting systems was held in the offices of the Mesa County government attended in person or virtually by representatives of U.S. Attorney General Garland, Rubinstein and members of his staff, personnel from the office of Secretary of State Griswold, officers of Dominion, an FBI Special Agent, members of the Mesa County Board of County Commissioners, Ryan Macias, a critic of those who questioned the regularity of elections, Ms. Bishop, and retired U.S. Air Force Colonel Shawn Smith.

68. At the September 1, 2021, meeting, Colonel Smith presented his position and evidence that there are multiple vulnerabilities in the Dominion voting machines, which others at the meeting declined to address.

69. On September 3, 2021, Griswold approved the County Board's lease of new equipment from Dominion and disposal of the old equipment. A copy of the approval is attached as Exhibit 6.

70. On September 17, 2021, Peters presented a petition to the County Board to discontinue the use of computer voting systems in Mesa County supported by a report concerning the two forensic images made of the Mesa County EMS server in May 2021 prepared by Mr. Gould entitled *Forensic*

Examination and Analysis Report (Mesa Report 1). Copies of the petition and the report are attached as Exhibit 7.

71. The report concluded that election records that were required to be preserved pursuant to federal and Colorado law had been destroyed, that any comprehensive forensic audit of the elections in 2020 and 2021 would be impossible, and that the certification by the Secretary of State of the Mesa County computerized voting system had been vitiated.

72. On October 13, 2021, the Mesa County District Court issued its order appointing Wayne Williams as the designated election official for Mesa County for the 2021 election and confirming Sheila Reiner's appointment as Election Supervisor. A copy of the Order is attached as Exhibit 8.

73. On October 20, 2021, the Colorado Supreme Court declined to exercise its jurisdiction to review the District Court's October 13 Order. A copy of the Supreme Court's Order is attached as Exhibit 9.

74. On November 16, 2021, agents of the Federal Bureau of Investigation, under the ultimate direction of Garland, accompanied by state and local law enforcement personnel executed search-and-seizure warrants on the residences of Peters, Sherronna Bishop, Sandra Brown, and Gerald Wood.

75. Those warrants were executed in a manner that involved excessive force and unnecessary damage to private property.

76. The following day, on November 17, 2021, Rubinstein and Colorado Attorney General Philip J. Weiser issued a joint press release stating that the execution of search and seizure warrants was a joint operation involving agents of the FBI, Colorado Attorney General, and Rubinstein.

77. On January 10, 2022, Griswold issued Election Order 2022-01 (Exhibit 10), which recited public statements made by Peters asserting, among other things, that Griswold's Department had "destroyed election records" and "allow[ed] influences to come into our computers changing votes…." That order required Peters to "repudiate, in writing, both the statement she made on January 5, 2022, in a FacebookLive broadcast indicating [Peters'] willingness to compromise voting equipment, that is, [Peters'] assertion that 'we've got to get those machines so… they're not able to do what they're designed to do,' and further all other statements [Peters]has made indicating a willingness to compromise voting system equipment."

78. This "repudiation" was to be expressed within 72 hours by a "Certification and Attestation," which is attached as Exhibit 11.

79. Peters has never stated or intimated any willingness to compromise the lawful operation of Mesa County's or any other voting system equipment.

80. When Peters did not sign the "Certification and Attestation" within 72 hours, on January 18, 2022, Griswold filed civil action 2022CV3007 in the District Court of Mesa County, requesting that Peters be replaced as designated election official for Mesa County for the remainder of her four-year term of office.

81. On March 1, 2022, Peters again petitioned the County Board to discontinue using computer voting systems in Mesa County. Peters supported her petition with the second report of Mr. Gould (Mesa Report 2). A copy of Peters' petition and Mr. Gould's report are attached collectively as Exhibit 12.

82. On April 23, 2022, citizens Cory Anderson and Sherronna Bishop submitted Mesa Report 3 to Rubinstein. A copy of the report is attached as Exhibit 13.

83. Based on their detailed analysis, Dr. Daugherity and Mr. O'Donnell determined that the forensic image made before the trusted build showed that ballot tabulations had been interrupted, and ballot tabulation databases had been altered, during both the November 3, 2020, election and the 2021 municipal elections.

84. Dr. Daugherity and Mr. O'Donnell further determined that the forensic image showed the unexpected and anomalous creation of a second set of ballot databases and a digital transfer of selected batches of thousands of previously tabulated ballots into those databases.

85. As demonstrated by the report of Dr. Daugherity and Mr. O'Donnell, the unexplained and unexpected creation of a second set of ballot databases during two consecutive elections, could not have been triggered by Dominion's certified software, leading to the conclusion that uncertified software may have been clandestinely installed on the Mesa County EMS.

86. On May 10, 2022, in civil action 2022CV3007, the Mesa County District Court granted Griswold's petition to permanently replace Peters as the designated election official for Mesa County. A copy of the court's Order is attached as Exhibit 14.

87. In response to Mesa Report 3, Rubinstein and Investigator Michael Struwe presented a report to the Mesa County Board on May 19, 2022. A copy of that report is attached as Exhibit 15.

88. Rubinstein's report was prepared and submitted in bad faith and for the purpose of intimidating and deterring Peters from continuing to speak out about

2020 election anomalies and weak election security, and from continuing to advocate for ending reliance on computerized voting systems, such as Dominion's.

89. The findings of Rubinstein and Struwe have been challenged by Walter Daugherty in his declaration, which is attached as Exhibit 16.

90. Rubinstein and Struwe have no expertise in cyber or database matters and did not have the benefit of independent cyber or database expertise in preparing their findings.

91. On information and belief, the only advice or assistance that Rubinstein and Struwe received in preparing their findings was from the office of the Colorado Secretary of State and Dominion.

92. Exhibit 16 explains that the Rubinstein report wrongly claimed that Sandra Brown caused the creation of the second ballot database by halting and re-starting the adjudication of ballots. In fact, Rubinstein had never interviewed Sandra Brown. When Sandra Brown was interviewed by Jeff O'Donnell, Ms. Brown stated that she never initiated a "halt and re-start" of ballot adjudication, as the Rubinstein report claimed. The Rubinstein report failed to mention or explain the fact that in two consecutive elections, the Mesa County voting system created an extra database that masked the actual election results.

93. The campaign launched by the State Defendants against Peters in retaliation for her obedience to the law and her truth-telling concerning the malfeasance she discovered was punctuated by an aggressive campaign to personally disparage and denigrate Peters, falsely accusing her of illegal conduct.

94. For example, in a news release published by Griswold on January 18, 2022, announcing her action to remove Peters as the Designated Election Official, Griswold stated:

> Clerk Peters' actions constituted one of the nation's first insider threats where an official, elected to uphold free, fair, and secure selections risked the integrity of the election system in an effort to prove unfounded conspiracy theories.

95. Griswold stated to a media outlet in February 2022: "Our expectations of elected officials is to follow the law and election rules and protocols. We unfortunately are seeing the clerk [Peters] spread misinformation about Colorado elections."

96. Griswold did not apply that same expectation to herself by evaluating her own failure to follow laws mandating the preservation of election records.

97. Griswold has taken no action in response either to the discovery of problems on the EMS server, or to Griswold's own unlawful directive that caused the deletion of election records.

98. This unbridled viciousness directed at Peters reached the point where on July 11, 2022, Rubinstein's investigator, James Cannon, would falsely state in an affidavit to the judge presiding over Peters' criminal trial that making a digital image of the EMS' hard drive was unlawful. Affidavit of James Cannon, at 9 (July 11, 2022) (attached as Exhibit 17). It was only four months later, as described above, that Griswold's deputy, Beall, admitted under oath that making such an image was not unlawful.

i. The Federal Investigation

99. The administration of President Joe Biden assumed power on January 20, 2021, and shortly thereafter announced its National Strategy for Countering Domestic Terrorism. https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy -for-Countering-Terrorism.pdf.

100. Several cabinet officers issued reports, press releases, or public statements announcing that they would attempt to suppress speech that questioned the legitimacy of Biden's election. These actions were part of the administration's campaign to punish citizens for, and to discourage citizens from, exercising their rights of free speech, association, the press, and the right to petition for the redress of grievances by speaking out about election fraud in the 2020 election.

101. Director of National Intelligence Avril Haines issued a report on March 1, 2021, asserting that those who espouse "narratives of fraud in the recent election…will almost certainly spur some [domestic violent extremists] to try to engage in violence…." https://www.dni.gov/documents/assessments/Unclass-SummaryofDVEAssessment-17MAR21.pdf.

102. Newly confirmed United States Attorney General Merrick Garland gratuitously announced in July 2021 that claims of vote fraud in the 2020 presidential election were baseless and the Department of Justice would investigate and prosecute individuals who pursued audits of elections that violated federal law. https://www.bloomberg.com/articles/2021-03-01/doj-pick-garland-disputes-trump-claims-of-widespread-voter-fraud#xj4y7vzkg.

103. On May 14, 2021, in a National Terrorism Advisory Bulletin, the Department of Homeland Security referenced a heightened threat environment fueled by disinformation, conspiracy theories, and false narratives. https://www.dhs.gov/news/2021/05/14/dhs-issues-national-advisory-system-ntas-bulletin. *See also* https://www.dhs.gov/news/2021/01/27/dhs-issues-national-terrorism-advisory-system-ntas-bulletin."

104. Secretary of Homeland Security Alejandro Mayorkas published a document in March 2021 in support of the National Strategy for Countering

Terrorism that associated domestic extremism with "sociopolitical developments such as narratives of fraud in the recent general election." https://www.dhs.gov/sites/default/files/publication/21_0301_odni_unclass-summary-of-dve-assessment-17_march-final_508.pdf.

105. Attorney General Garland published a report on July 28, 2021, threatening to investigate and prosecute those citizens who pursued forensic audits of the 2020 election. https://www.justice.gov/ag/page/file/1438936/download.

106. Rubinstein communicated with federal law enforcement officials about the state investigation of Peters, knowing that Biden Administration officials had published such statements threatening federal investigation of those who challenged the result of the 2020 general election or sought audits of that election. A federal investigation of Peters was initiated in August 2021.

107. In 2022, the U.S. Department of Justice convened a federal grand jury to investigate Tina Peters and the forensic imaging of the Mesa County EMS server.

108. Speaking out and associating with others of like mind to advance a message about the need for election integrity is protected by the First Amendment, regardless of whether the statements contained in the message are accurate.

109. The investigation of Peters by the Department of Justice was undertaken to punish and retaliate against her for having exercised her rights guaranteed by the First Amendment to question the integrity of the November 2020 election and to intimidate and discourage her from continuing to do so.

110. The tactics used by the FBI during the investigation into the making and publishing of the Mesa County forensic images were intended to intimidate and deter citizens from associating with those, including Peters, who advocate ending the use of computerized voting systems, such as Dominion's. Such intimidation tactics burden Peters' ability to engage in protected First Amendment communications and associational activity.

111. The Department of Justice exercised bad faith in launching the investigation of Peters because it knew or should have known it had no reasonable prospect of obtaining convictions on the basis of charges under the three statutes it has invoked: 18 U.S.C. §§ 371, 1028(a)(7), and 1030(a)(2)(A).

112. The charge of a violation of 18 U.S.C. § 1028(a)(7) is legally insufficient because there was no intent to violate another statute, the access card involved was not "issued by or under the authority of the United States or a sponsoring entity of an event designated as a special event of national significance," and there was no federal nexus giving the court jurisdiction.

113. The charge of a violation of 18 U.S.C. § 1030(a)(2)(A) fails because there was no damage to the EMS server caused by the making of the forensic images.

114. The charge of a violation of 18 U.S.C. § 371 fails because there was no violation of either of the other two statutes.

115. On information and belief, the Federal Defendants have not pursued any investigation to determine how additional databases were created on the Mesa County EMS during ballot tabulations in two consecutive elections.

116. At the conclusion of the state investigation conducted jointly by District Attorney Rubinstein and the Colorado Attorney General, Rubinstein issued a press release on August 30, 2022, announcing that he and Attorney General Weiser had asked the United States Attorney to continue his federal investigation of Peters. The press release is attached as Exhibit 18.

117. The Department of Justice, including the FBI, has continued its investigation to determine if any federal crime had been committed by Peters but ignored Griswold's violation of the federal election records preservation statutes.

ii. The State Prosecution

118. After launching his investigation of Peters and the making of the images of the Mesa County EMS hard drive, Rubinstein convened a grand jury in

Mesa County to investigate Tina Peters and the forensic imaging of the Mesa County EMS

119. In bad faith, Rubinstein submitted applications to magistrates for search warrants and arrest warrants and asked the Mesa County grand jury to indict Peters without advising the grand jury that the deletion of election records of the 2020 presidential election ordered by Griswold as a result of the installation of the Trusted Build upgrade violated federal and Colorado law, or that Peters and the other individuals charged had a legal obligation to preserve the election record that Griswold had directed them to delete.

120. The grand jury returned the indictment against Peters on March 8, 2022. A copy of the indictment is attached as Exhibit 19.

121. Rubinstein acted in bad faith to present the indictment of Peters to the grand jury because none of the counts has a reasonable prospect of justifying a conviction.

122. The bad faith of Rubinstein is underscored by the fatally flawed charges he has brought against Peters, in particular the failure of the indictment to address Peters' understanding of her duty under federal and Colorado laws to preserve election records on the Mesa County EMS server, negating the criminal intent required to establish the offenses charged.

123. An equally fundamental legal insufficiency of the indictment is the absence of clear allegations giving at least the bare bones detail needed to put Peters on notice of the charges against her and to define exactly what the prosecution must prove.

124. The charges set out against Peters fail to pass muster as a minimally sufficient indictment under basic norms of due process because they fail to allege facts supporting critical elements of the offenses charged. For example,

a) Counts 1, 2, and 5 allege attempts to influence public servants by "deceit," which Colorado law understands as a *fraudulent* misrepresentation or conduct designed to *defraud* another, but these counts contain no factual allegations of fraud by Peters.

b) Counts 4, 6, and 7 charge criminal impersonation, which under Colorado law must be undertaken for *unlawful* purposes with the intent to *unlawfully* gain a benefit or to *injure* or *defraud* another. No factual allegations can be found in the indictment supporting such characterizations of Peters' conduct.

c) Count 8 charges identity theft which must be done to obtain money or, other thing of value, but includes no factual allegations to this effect. Even more fundamentally troubling, the indictment fails to include the undisputed fact that

the individual whose information was purportedly stolen gave his permission for Peters to use it.

d) Count 9 charges first degree official misconduct, which requires conduct done to obtain a benefit or maliciously cause harm to another. Again, no factual allegations are included in the indictment supporting such a characterization of Peters' conduct.

e) Count 10 charges a violation of duty and Count 11 charges a failure to comply with requirements of the Secretary of State. While it is not clear what specific conduct is being alleged in these counts, Peters violated no lawful "requirement" of the Secretary of State but rather fulfilled her duty to preserve election records as required by federal and state laws.

125. Rubinstein's investigator falsely represented in his affidavit in support of the application for an arrest warrant for Sandra Brown, who was Peters' elections manager, that Belinda Knisley had stated in her proffer interview with Rubinstein and the investigator that Peters had instructed Knisley to lie to the Mesa County Human Resources Department about Gerald Wood when the transcript of the interview showed that Knisley made no such statement.

126. Rubinstein played a role in the exorbitant $500,000 bond requirement imposed on Peters after she was indicted and arrested.

127. In July 2022, Rubinstein requested revocation of Peters' bond to punish and retaliate against her for making public statements on matters of grave public concern when she left Colorado to speak about illegal activity by Griswold and Dominion.

128. In August 2022, Rubinstein again maliciously opposed Peters' request to travel outside Colorado to engage in protected First Amendment activity, saying: "Ms. Peters is seeking permission to leave the state so that she can be celebrated as a hero for the conduct that a grand jury has indicted her for…." His opposition was plainly prompted by his expressly articulated disapproval of Peters' repeated assertions that Griswold had violated federal and Colorado law by ordering the deletion of election records.

129. After the death of Peters' father, Struwe contacted Peters' 93-year-old mother, her sister, her daughter, and other members of Peters' family pressing them for information about Peters as a method of harassing Peters and her family members as retaliation against Peters for her role in the making and publishing of the forensic images, her outspoken criticism of Griswold, and her statements about the need to end the use of computerized voting systems, such as Dominion's.

130. Personnel from Rubinstein's office contacted Peters' husband, who was suffering from Parkinson's Disease and dementia at an adult care facility in Mesa County and pressured him to execute certain documents.

131. A lawyer representing Peters and her husband in November 2021 in connection with domestic matters emailed Peters to advise her that a member of the District Attorney's office had left a voicemail on the lawyer's telephone notifying the lawyer that Peters was the subject of a potential investigation into her actions as an agent under a power of attorney. The voicemail prompted the lawyer to advise Peters that he had a conflict of interest and could no longer represent her and her husband.

132. Despite the insistence by Peters' counsel that her experts only be contacted through him, Rubinstein's investigator Struwe repeatedly contacted Peters' expert Mr. O'Donnell directly in violation of the Colorado Rules of Professional Conduct.

133. On June 5, 2022, the state court judge presiding over Peters' criminal prosecution ruled that she may not present evidence at trial to support her First and Fourteenth Amendment defenses to the charges against her (Exhibit 20). The effect of the ruling is to deny Peters the opportunity (a) to introduce evidence of Griswold's violation of federal and Colorado election-record preservation statutes

and Griswold's directive that local election officials must participate in those violations, (b) to assert as a defense Peters' constitutional immunity from retaliation, including spurious criminal prosecution, for making forensic images to preserve election records, and (c) to invoke the protections of the United States Constitution's First, Fifth, and Fourteenth Amendments.

134. Strikingly, even though Peters has not violated any state statute, the Department of Justice itself has nonetheless conceded in related litigation that violating a state statute cannot be criminally sanctioned where the individual "would be forced to choose between 'intentionally flouting state law' and 'forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in (another) criminal proceeding.'" *Lindell v. United States,* No. 22-3510 (8th Cir.) (Appellees' Response Brief at 15).

PETERS' CONSTITUTIONALLY PROTECTED ACTIVITIES

135. Government misconduct and the legitimacy of elections are matters of public concern.

136. Speech concerning election integrity and government misconduct is protected by the First Amendment.

137. Investigation of government misconduct and election irregularities is activity protected by the First Amendment.

138. Pursuant to the Privileges and Immunities Clause in the Fourteenth Amendment and the Supremacy Clause in Article VI of the United States Constitution, a citizen of the United States, including a state or local official like Peters, is immune from prosecution for alleged violations of state law when that law is applied to prevent that citizen from complying with the requirements of a federal statute.

139. Under the unambiguous language of the federal and Colorado election records preservation laws, Peters had an overriding obligation to preserve all election records on the Mesa County EMS server for the prescribed periods and she cannot be held criminally liable – or be prosecuted -- for failing to comply with any directive from Griswold requiring Peters to violate, or cooperate in the violation of, those laws.

140. All directives from Griswold that were intended to cause, and had the effect of causing, the deletion of election records which must be preserved under federal and Colorado law were unlawful, beyond Griswold's authority, void, and not binding on Peters.

141. The callous malfeasance of the State Defendants in their unrestrained, vicious attacks on Peters and her family is highlighted by the fact that they were well-aware of the requirements of the federal election records preservation statute.

The official website of the Colorado Secretary of State stated at all relevant times that that statute is binding on all election officials.

142. The use of the instrumentalities of state or local government, including criminal prosecution, to retaliate against a citizen of the United States for compliance with federal law is a violation of that citizen's right to due process of law guaranteed by the Fourteenth Amendment.

143. If a forensic image of the EMS hard drive had not been made before the Trusted Build upgrade was installed, all election records showing the creation of the second set of ballot databases and the digital transfer of selected batches of thousands of previously tabulated Mesa County ballots would have been overwritten, deleted, and made no longer recoverable.

144. Peters exercised her rights to free speech, free association, and to petition for the redress of grievances when she informed others about the existence and contents of the forensic images and about the conclusions of the cyber experts for the ultimate purpose of publicizing to authorities and the general public the unlawful deletion of election records at the direction of Griswold in violation of federal and Colorado election records preservation laws, and problems with the Mesa County computer voting system. Peters violated no laws when she publicized either the forensic images or the cyber and database experts' findings.

145. Peters has spoken at numerous rallies and other gatherings on the subjects of election security, Griswold's unlawful directive to delete election records, and the software installed on the Mesa County EMS server. Peters violated no laws by her actions participating at these events.

146. Peters' actions to secure a forensic image of the EMS server before the trusted build was an exercise of her privilege to comply with federal law with immunity from retaliatory action from state or local officials.

COUNT 1

Violations by the Federal Defendants of Plaintiff's First Amendment Rights of Freedom of Speech, Freedom of Association, and the Right to Petition for the Redress of Grievances

147. The allegations in the foregoing paragraphs of this Complaint are incorporated here by reference.

148. Any form of official retaliation for exercising Plaintiff's freedoms guaranteed by the First Amendment, including prosecution, threatened prosecution, bad faith investigation, and legal harassment constitutes a violation of the First Amendment.

149. The Federal Defendants' past and ongoing retaliatory and punitive conduct toward Peters was and is substantially motivated by Peters' constitutionally protected activity. Federal Defendants' conduct has caused and continues to threaten injuries to Peters that would chill a person of ordinary firmness from continuing to engage in Peters' constitutionally protected conduct.

150. Based upon the foregoing allegations and assertions, Defendant the United States has investigated Plaintiff to punish her for exercising her First Amendment free speech right for the purpose of informing her fellow citizens of illegal actions of Griswold and problems with the computer voting system in Mesa County, to petition for the redress of grievances, to associate for the purpose of

expressive advocacy, and to discourage her and those who would associate with her from exercising their right to associate, to petition for redress of grievances, and to speak freely and publicly about the need for reform of the election system.

151. Peters' First Amendment rights will be violated by any further action of Defendants to investigate and prosecute her because of Defendants' bad faith and retaliatory actions and because Colorado courts have barred Peters from asserting in her criminal case the right not to be punished for exercising federal constitutional rights to engage in free speech, free association, and petitioning the government for redress of grievances.

152. Plaintiff is entitled to prospective injunctive relief from federal constitutional violations by federal officials.

153. Plaintiff is entitled to declaratory relief under 28 U.S.C. § 2201.

COUNT 2

Violations by the State Defendants of Plaintiff's Rights, Privileges, and Immunities Secured by the United States Constitution

154. The allegations in the foregoing paragraphs of this Complaint are incorporated here by reference.

155. State Defendants Rubinstein and Griswold, acting under color of Colorado law, have undertaken an investigation and prosecution of Plaintiff to punish Peters, in violation of federal law,

(a) for the exercise of her First Amendment rights to inform her fellow citizens of illegal actions of Griswold and problems with the computer voting system in Mesa County, to associate for the purpose of expressive advocacy, and to discourage Plaintiff and other citizens who have associated with Plaintiff or might associate in the future from exercising their right to associate, to petition for the redress of grievances, and to speak publicly for reform of the election system; and

(b) for her efforts to comply with federal law governing the maintenance of election records in violation of her right to the due process of the laws and her privileges and immunities as a citizen of the United States guaranteed by the Fourteenth Amendment.

This conduct is ongoing and threatens continuing and future injury to Peters.

156. State Defendants' past and ongoing retaliatory and punitive conduct toward Peters was and is substantially motivated by Peters' constitutionally protected activity. State Defendants' conduct has caused and continues to threaten injuries to Peters that would chill a person of ordinary firmness from continuing to engage in Peters' constitutionally protected conduct.

157. Plaintiff is entitled to prospective injunctive relief from federal constitutional violations by state officials under 42 U.S.C. § 1983 and *Ex parte Young,* 209 U.S. 123 (1908).

158. Plaintiff is entitled to declaratory relief under 42 U.S.C. § 1983, *Ex parte Young,* 209 U.S. 123 (1908), and 28 U.S.C. § 2201.

PRAYER FOR RELIEF

Wherefore, Plaintiff requests the entry of an Order or Orders:

(a) Granting preliminary and permanent injunctive relief prohibiting Defendants from conducting and proceeding with criminal proceedings, including investigations and prosecutions, against the Plaintiff pending the resolution of Plaintiff's claims brought in this action;

(b) Declaring that Defendants' actions alleged herein have violated Plaintiff's First Amendment rights of freedom of speech, freedom of association, freedom of the press, right to petition for the redress of grievances, and the Supremacy Clause, as well as Plaintiff's rights to due process and to enjoy her privileges and immunities as a citizen of the United States under the Fourteenth Amendment.

(c) Declaring that all warrants issued were in violation of the First and Fourteenth Amendments and, therefore, invalid;

(d) Declaring that subpoenas issued by the 21st Judicial District grand jury were in violation of the First and Fourteenth Amendments;

(e) Declaring that the indictment of Plaintiff by the 21st Judicial District grand jury was in violation of the First and Fourteenth Amendments;

(f) Granting reasonable attorneys' fees to Plaintiff pursuant to 28 U.S.C. § 2412 and 42 U.S.C. § 1988 and any other applicable laws; and

(g) Granting such other and further relief as the Court deems just and proper.

Respectfully submitted December 22, 2023

s/ Robert J. Cynkar
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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2023, 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 address:

For Defendants United States of America and Merrick Garland:

Jennifer Lake
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United States Attorney's Office, District of Colorado
Jennifer.Lake@usdoj.gov

For Defendant Daniel Rubinstein:

Todd Starr
Mesa County Attorney
Todd.starr@mesacounty.us

I hereby certify that on December 22, 2023, I sent the foregoing to the following individuals at the email addresses set out below:

For Defendant Jena Griswold:

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/s/ *Robert J. Cynkar*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.1:23-cv-03014

TINA PETERS

Plaintiff,

v.

UNITED STATES OF AMERICA,
MERRICK B. GARLAND, Attorney General of the United States in his official capacity,
JENA GRISWOLD, Colorado Secretary of State, in her official capacity, and
DANIEL P. RUBINSTEIN, District Attorney of the Twenty-First Judicial District, in his official capacity,

Defendants.

PLAINTIFF'S AMENDED OPPOSITION TO
DEFENDANT RUBINSTEIN'S MOTION TO DISMISS

Rubinstein's Motion to Dismiss fails to acknowledge the holdings in *Dombrowski v. Pfister,* 380 U.S. 479 (1965) and *Phelps v. Hamilton,* 59 F.3d 1058 (10th Cir. 1995) that abstention in a case such as this is inappropriate. The doctrine established by *Younger v. Harris,* 401 U.S. 37 (1971) does not bar an injunction in this case.

Dombrowski expressly rejected the assertion made by Rubinstein that a federal court must abstain from entertaining an action to enjoin a state prosecution

where "the chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." 380 U.S. at 487. That opinion left no doubt that abstention is not appropriate in a First Amendment case such as the instant case:

> We hold the abstention doctrine is inappropriate for cases such as the present one where, unlike Douglas v. City of Jeannette, [319 U.S. 157,] statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities.

Id., at 489-90. That rule is not limited to challenges to statutes and applies as well to bad faith prosecutions. *E.g., Phelps,* 59 F.3d at 1063-64.

Phelps noted the exceptions to the *Younger* abstention rule:

> *Younger* authorizes federal courts to enjoin a pending state criminal prosecution provided that it was (1) commenced in bad faith or to harass, (2) based on a flagrantly and patently unconstitutional statute, or (3) related to any other such extraordinary circumstance creating a threat of "irreparable injury" both great and immediate.

59 F.3d at 1063-64 (citing *Dombrowski,* 401 U.S. at 53-54). Both *Dombrowski* and *Phelps* are settled and binding authorities. Counsel for Peters has not identified a single case since the *Phelps* decision in which the *Younger* doctrine has been invoked in this Circuit in an attempt to bar an injunction of a criminal proceeding in a First Amendment retaliation claim—until this case.[1]

[1] Courts in other circuits have uniformly adopted the reasoning in *Dombrowski* and rejected the argument that the *Younger* doctrine bars federal court injunctions of state criminal or disciplinary proceedings in the exceptional circumstances described in *Younger. E.g., Lacey v. Maricopa Cnty.,* 593 F.3d 896, 936-37 (9th Cir.

None of the decisions cited by Rubinstein in support of his jurisdictional contention is apposite. None involves a claim of retaliation for the exercise of First Amendment rights.

Peters' First Amendment interests outweigh the State's interests.

Rubinstein argues that the State's "important" interests warrant abstention. ECF No. 23 at 9. But it is well-recognized that those interests pale before the constitutional interests in jeopardy in cases like this one. As the Supreme Court has explained, what is at stake is "free expression – of transcendent value to all society, and not merely to those exercising their rights." *Dombrowski,* 380 U.S. at 486. Reflecting the constitutional solicitude for this "transcendent value," the Tenth Circuit has repeatedly held that a plaintiff's First Amendment interests outweigh the kind of "important" and "substantial" state interests that Rubinstein posits here. *Planned Parenthood Ass'n of Utah v. Herbert,* 828 F.3d 1245, 1265 (10th Cir. 2018); *Bass v. Richards,* 362 F.3d 1081, 1089 (10th Cir. 2012); *Utah Licensed Beverage Ass'n v. Leavitt,* 256 F.3d 1061, 1069-75 (10th Cir. 2001).

2012); *Cullen v. Fliegner,* 18 F.3d 96, 103-05 (2d Cir. 1994); *Lewellen v. Raff,* 843 F.2d 1103, 1109-10 (8th Cir. 1988); *Wilson v. Thompson,* 593 F.2d 1375, 1381 (5th Cir. 1979); *Timmerman v. Brown,* 528 F.2d 811, 814-15 (4th Cir. 1975); *Ruscavage v. Zuratt,* 821 F.Supp. 1078,1081-83 (E.D.Pa. 1993).

The State Court is not an adequate forum in these circumstances.

The Mesa County District Court will not provide Peters with an adequate opportunity to litigate the federal constitutional issues essential to prevailing on her First Amendment claim. *See Younger,* 401 U.S. at 48-49; *Dombrowski,* 380 U.S. at 486. Peters has asserted her right and duty pursuant to the Privileges or Immunities Clause of the Fourteenth Amendment to enforce and comply with the federal statute mandating that all election officials preserve election records when she made the forensic images for the purpose of complying with that statute. 52 U.S.C. § 20701. Although she referred to her right to make a record of government misconduct (*i.e.,* make the forensic images) to expose problems with the computerized voting system and her duty under federal law to preserve election records, the state court has refused to rule on any federal constitutional issues. In a June 5, 2022 ruling, the state court rejected any application of the statutory choice-of-evils defense, but went further, ruling that "[t]he jury will not be asked to address any questions regarding the functioning of the election equipment." Ex. 16 at 3. In so doing, the state court effectively barred Peters from demonstrating that the installation of the Trusted Build upgrade deleted election records in violation of the federal and Colorado election records preservation statutes. That deprives Peters of due process by preventing her from asserting her Privileges or Immunities Clause defense and her right and duty to take action to preserve the

election records as required by the federal statute. "[The] State's criminal prosecution will not assure adequate vindication of constitutional rights." *Younger,* 401 U.S. at 48-49.

Rubinstein's discussion of the Colorado statutory defense of choice-of-evils (C.R.S. § 18-1-702(1) is entirely beside the point. ECF No. 23 at 8-9. Peters did not confront any "choice of evils" because she violated no law in making the forensic images of the EMS server. The state law choice-of-evils defense is distinct from the federal constitutional issue of whether the prosecution itself is an unlawful retaliatory action in violation of the First Amendment. *Dombrowski,* 380 U.S. at 487. Even if these two issues were not distinct, Peters should not have to invoke a choice-of-evils defense (and show that her conduct avoided an injury to the public at large) when she can instead simply establish that her right to obey the federal law against destroying election records was affirmatively protected by the Privileges or Immunities Clause of the Fourteenth Amendment. Yet, Peters has been barred from litigating the latter defense in the state prosecution because she is forbidden to introduce evidence necessary to show that she was exercising her federal constitutional right to obey federal law by not destroying the election records. In short, Rubinstein's waiver argument ignores that Peters is being deprived of a federal constitutional right as well as that she objects to the prosecution in state court because it has been brought to punish her for, and to

deter her from, exercising her First Amendment rights to speak out, to associate with others to advance their common beliefs, and to petition her government for redress of grievances. Peters can litigate neither of these constitutional issues in the state prosecution. For that reason, abstention is unwarranted under *Dombrowski, Younger,* and *Phelps.*

Rubinstein argues that a June 3, 2022, order of the state court concluding that probable cause was properly established for each of the counts in the indictment against Peters defeats her bad faith contention. Even if the order defeats Peters' contention that Rubinstein had no reasonably objective hope of securing a valid conviction (and it does not), that is but a single factor in the *Phelps* three-part test of whether a prosecution is commenced in bad faith or to harass. The other factors have also been established by the complaint: whether the prosecution was motivated by Rubinstein in retaliation for Peters' exercise of constitutional rights and whether the prosecution was conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion. *Phelps,* 59 F.3d at 1065.

Peters has presented a *prima facie* case of retaliation by Rubinstein for the exercise of her First Amendment rights.

The Motion to Dismiss argues based on an excerpt from the state court's June 5, 2022, Order (Ex. D to the Motion) that Rubinstein could not have retaliated against Peters for exercising her First Amendment rights because "she herself chose not to exercise them in the first place." ECF No. 23 at 12-14. This is an

absurd statement that ignores the examples of free speech, expressive association activities, and her petitions submitted to the Mesa County Board of County Commissioners for redress of grievances that prompted the retaliation. Complaint ¶¶ 36-42, 70-71, 81-85. Even if Peters was under an obligation, as the June 5, 2022, Order assumed, to discuss her "issues with the election equipment" with the Secretary of State and with local, state, and federal law enforcement and to file a civil lawsuit to stop the installation of the Trusted Build upgrade, that has nothing to do with Rubinstein's actions to punish her for, and to deter her from continuing: (1) her public exposure of the directive of the Secretary of State to delete election records by installing the Trusted Build upgrade that violated federal and Colorado election records preservation statutes, (2) her expressive association activities with others, such as Sherronna Bishop, to raise public awareness about the vulnerabilities of computerized voting systems, and (3) her submissions of expert reports to the Mesa County Board of County Commissioners with their conclusions about the deletion of election records and the uncertified software on the EMS server that allowed for the creation of additional ballot databases, which could not have been created by personnel in the Clerk's office.

Reliance on the state court's June 5, 2022, Order as the sole basis for the conclusion that "the prosecution cannot be in retaliation for the exercise of rights

that never occurred" is so preposterous and without merit that the following recital of Rubinstein's retaliatory actions is hardly necessary:

1. He falsely accused Peters of unlawfully downloading the images of the EMS server. Compl. ¶ 47 (Hereinafter, ¶ relates to Complaint unless otherwise indicated.).
2. He declined to investigate Griswold's violation of the election records preservation statutes. ¶ 117.
3. He never investigated the effect of the creation of additional, unauthorized ballot databases during the 2020 and 2021 elections. ¶ 55.
4. He submitted a report to the Board of County Commissioners without expert assistance that erroneously concluded that the additional ballot databases were created by an employee of the County Clerk and Recorder in a failed attempt to undermine the credibility of Peters' experts. ¶ 88-92; Ex. 22 to MPI.
5. He instructed a lawyer representing Peters and her husband not to communicate with Peters because she was under investigation in connection with her exercise of a power of attorney she had been given. ¶ 133.

6. He obtained an indictment of Peters shortly after she made a presentation to the County Board about the problems with its computerized voting system. Ex. 7 and 8 to MPI.
7. He played a role in the exorbitant $500,000 bond requirement imposed on Peters after she was indicted and arrested. ¶ 52.
8. After Peters' bond was reduced to $25,000, he insisted on requirements that prohibited her from contacting members of her staff and barred her from entering her office. ¶ 53.
9. His investigator harassed Peters' family members with telephone calls as he attempted to gather information about Peters after her father's death. ¶ 131.
10. He persuaded the state court to deny Peters' travel requests so that she could speak to audiences about election irregularities and raise funds for her defense. Ex. 2, ¶ 57.
11. When Peters sent an email to other county clerks and recorders regarding her request for a recount of an election, he claimed that the email violated her bond requirements and persuaded the state court to deny her travel requests. Ex. 2, ¶ 59.
12. His investigators repeatedly misrepresented facts in applying for warrants. ¶ 98.

13. His investigator participated in the execution of a search warrant at the residence of Peters' associate, Sherronna Bishop, who had arranged a November 1, 2021, meeting with the County Board to describe the vulnerabilities of the County computerized voting system, and when Ms. Bishop asked the investigator why the warrant was served on her, he answered "because you connect people." Ex. 25 to MPI ¶ 40.

14. He presented the indictment to the grand jury without advising the members that Peters had made the forensic images to preserve election records as federal and Colorado law required. ¶¶ 119, 121- 122.

15. He included a charge in the indictment that Peters had violated a rule or rules of the Secretary of State regarding access of her consultant who made the forensic images when the rule expressly provided that the consultant could have access if supervised by an employee of the Clerk's office who did have authorized access. Secretary of state's Rule 20.5.3(b); MPI at 33-34.

16. When the only grounds for a federal investigation was Griswold's violation of the federal election records preservation statute, he urged the U.S. Department of Justice to investigate Peters without a reasonable basis for doing so, and not to investigate Griswold. ¶¶ 53, 111, 112, 113, and 114.

17. He coordinated his retaliatory efforts against Peters with Griswold, the Colorado Attorney General, and the Department of Justice. ¶ 116; Ex.2 to MPI.

These allegations are more than sufficient to satisfy the *Phelps* test of whether the prosecution and Rubinstein's other actions were undertaken to retaliate or harass Peters for exercising her First Amendment rights. *Phelps,* 59 F.3d at 1065.

For the foregoing reasons, Rubinstein's Motion to Dismiss should be denied.

Date: December 22, 2023

/s/ *Robert J. Cynkar*

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DISTRICT COURT, MESA COUNTY, COLORADO Court Address: MESA COUNTY JUSTICE CENTER, 125 NORTH SPRUCE STREET, GRAND JUNCTION, CO, 81501	DATE FILED: July 2, 2024 11:37 AM CASE NUMBER: 2022CR371
THE PEOPLE OF THE STATE OF COLORADO v. **Defendant(s)** TINA MARIE PETERS	⚠ **COURT USE ONLY** ⚠ Case Number: 2022CR371 Division: 9 Courtroom:

Order:People's Motion to Strike Defenses and Clarify Prior Orders

The motion/proposed order attached hereto: SO ORDERED.

Unless otherwise modified, all prior orders issued by me remain in effect.

Consistent with established case law, only those affirmative defenses identified by the legislature are available to Defendant. Oram v. People, 255 P.3d 1032, 1036 (Colo. 2011), as modified on denial of reh'g (Aug. 1, 2011) ("[A]ll affirmative defenses to crimes must be defined by the General Assembly in the Colorado Revised Statutes.")

In light of the applicable law and consistent with my prior orders (Order on People's Motion to Strike, 1/29/24, pg. 5), only those defenses authorized by statute will be provided to the jury. In light of this, no instructions on the proposed defenses of Advice of Counsel, Whistleblower, Immunity, Equitable Estoppel, Execution of a Public Duty, and Vindictive and Selective Prosecution will be submitted to the jury for consideration.

The Court further notes the purported defenses regarding immunity and vindictive prosecution are legal questions for a court to resolve (and has resolved) and not for a jury.

Issue Date: 7/2/2024

MATTHEW DAVID BARRETT
District Court Judge

District Court Mesa County, State of Colorado Court Address: 125 N. Spruce St., Grand Jct., CO 81501	
Plaintiff(s): People of the State of Colorado, **vs.** **Defendant(s): TINA MARIE PETERS**	↑ COURT USE ONLY ↑ Case No. 22CR371 Div.: 9 Ctrm: Barrett
Daniel P. Rubinstein, District Attorney District Attorney's Office Twenty-First Judicial District of Colorado P.O. Box 20,000 Grand Junction, CO 81502-5031 Phone Number: (970) 244-1730 Fax Number: (970) 244-1729 Email: dan.rubinstein@mesacounty.us Atty. Reg. #: 27473	

MOTION TO STRIKE DEFENSES and CLARIFICATION OF PRIOR ORDERS

The People move this court to strike the defenses of Immunity under Supremacy Clause, Whistleblower, Advice of Counsel, Equitable Estoppel and Vindictive and Selective Prosecution in their entirety. The People further request that the court clarify that the prior orders remain in effect as they relate to the endorsed defenses of Execution of Public Duty, Consent of Victim, and Mistaken Belief of Law.

As Grounds Therefor, the People state:

On June 25, 2024 the defense filed an Amended Notice of Endorsement of Defenses, some of which have already been ruled upon and others which are not recognized defense in Colorado. The People seek an order from the court striking some, and confirming that the prior ruling remains in effect as to others. Taking the defenses in order of those listed in the Defendant's Amended Notice, the People assert as follows:

1) Execution of Public Duty. The People previously sought an order striking this defense. The court, on January 29, 2024, entered an order denying, without prejudice, the motion to strike noting that the defense would need to make a threshold showing, at trial, "as to the law defendant was relying upon that she believed entitled her to commit any one or more of the offenses." See *Order Re: Motion to Strike Affirmative Defenses*, Pg. 4. **The People seek clarification that this order remains in effect with respect to this more recent Amended Notice re-asserting the defense.**

2) Immunity under Supremacy Clause. This is not a defense in Colorado. While this is something that can be asserted to preclude a prosecution from happening, it is not a jury

question, but rather a question of law, which the defense has already filed in a motion to dismiss, and the court has already denied. See *Order Denying Motion to Dismiss for Lack of Jurisdiction*, May 7, 2024. **The People seek an order from this court precluding the defense from raising this issue in front of the jury.**

3) Consent of Victim. The People previously sought an order striking this defense as to some counts. The court, on January 29, 2024, entered an order striking the defense, as an affirmative defense, with respect to identity theft, and reserving ruling on the remaining charges until evidence is introduced at trial. See *Order Re: Motion to Strike Affirmative Defenses*, Pg. 4. **The People seek clarification that the prior order striking the defense in part remains in effect with respect to this more recent Amended Notice re-asserting the defense.**

4) Mistaken Belief of Law. The People previously sought an order striking this defense. The court, on January 29, 2024, entered an order denying, without prejudice, the motion to strike noting that the defense would need to make a threshold showing, at trial, "as to the law defendant was relying upon that she believed entitled her to commit any one or more of the offenses." See *Order Re: Motion to Strike Affirmative Defenses*, Pg. 5. **The People seek clarification that this order remains in effect with respect to this more recent Amended Notice re-asserting the defense.**

5) Mistaken Belief in Fact. The People, at this time do not seek anything with respect to this defense.

6) Entrapment. The People, at this time do not seek anything with respect to this defense.

7) Whistleblower. As was noted in the People's prior motion, Colorado law only recognizes statutory defenses. See *Oram v. People*, 255 P.3d 1032, 1036 (Colo. 2011), as modified on denial of reh'g (Aug. 1, 2011)("[A]ll affirmative defenses to crimes must be defined by the General Assembly in the Colorado Revised Statutes."). **The People seek an order from the court striking this defense and an order precluding the defense from raising this issue in front of the jury.**

8) Advice of Counsel. As was noted in the People's prior motion, and the courts prior order striking this defense, this is not a defense recognized in Colorado, and the court has already stricken it. This new filing re-asserting it does not change Colorado law, which does not recognize it. See *Oram*, at 1036, and See *Order Re: Motion to Strike Affirmative Defenses*, Pg. 5. **The People seek an order from the court striking this defense and an order precluding the defense from raising this issue in front of the jury.**

9) Equitable Estoppel. As was noted in the People's prior motion, Colorado law only recognizes statutory defenses. See *Oram* at 1036. This is not a statutory defense. **The People seek an order from the court striking this defense and an order precluding the defense from raising this issue in front of the jury.**

10) Vindictive and selective prosecution. This is not a defense in Colorado that is submitted to a jury, but rather could be grounds for relief from the court. It could be, and was, raised in a motion to dismiss that was previously filed by the defense and the court has already

denied. See *Order: Motion for Selective Prosecution*, May 7, 2024. **The People seek an order from the court striking this defense and an order precluding the defense from raising this issue in front of the jury.**

Wherefore, the People respectfully request that the court grant the relief requested by the People.

Respectfully submitted this 1st day of July, 2024.

DANIEL P. RUBINSTEIN
District Attorney
Twenty-first Judicial District

/s/ Daniel P. Rubinstein
Daniel P. Rubinstein, Reg. No. 27473
District Attorney

CERTIFICATE OF DELIVERY

I certify that on this 1st day of July, 2024, a true and correct copy of the foregoing Motion to Strike Defenses and Clarification of Prior Orders was served via Colorado Courts E-Filing on all parties who appear of record and have entered their appearances herein according to Colorado Courts E-Filing.

/s/ Daniel P. Rubinstein

Federal Law Constraints on Post-Election "Audits"

Published July 28, 2021

The U.S. Department of Justice is committed to ensuring full compliance with all federal laws regarding elections. This includes those provisions of federal law that govern the retention and preservation of election records or that prohibit intimidation of, or interference with, any person's right to vote or to serve as an election official.

The Department is also committed to ensuring that American elections are secure and reflect the choices made on the ballots cast by eligible citizens. "The November 3rd election was the most secure in American history," according to a Joint Statement issued by federal and state officials and released by the federal Cybersecurity & Infrastructure Security Agency. In many jurisdictions, there were automatic recounts or canvasses pursuant to state law due to the closeness of the election results. None of those state law recounts produced evidence of either wrongdoing or mistakes that casts any doubt on the outcome of the national election results.

In recent months, in a number of jurisdictions around the United States, an unusual second round of examinations have been conducted or proposed. These examinations would look at certain ballots, election records, and election systems used to conduct elections in 2020. These examinations, sometimes referred to as "audits," are governed, in the first instance, by state law. In some circumstances, the proposed examinations may comply with state law; in others, they will not. But regardless of the relevant state law, federal law imposes additional constraints with which every jurisdiction must comply. This document provides information about those federal constraints, which are enforced by the Department of Justice.

Constraints Imposed by the Civil Rights Act of 1960

The Civil Rights Act of 1960, now codified at 52 U.S.C. §§ 20701-20706, governs certain "[f]ederal election records." Section 301 of the Act requires state and local election officials to "retain and preserve" all records relating to any "act requisite to voting" for twenty-two months after the conduct of "any general, special, or primary election" at which citizens vote for "President, Vice President, presidential elector, Member of the Senate, [or] Member of the House of Representatives," 52 U.S.C. § 20701. The materials covered by Section 301 extend beyond "papers" to include other "records." Jurisdictions must therefore also retain and preserve records created in digital or electronic form.

The ultimate purpose of the Civil Rights Act's preservation and retention requirements for federal elections records is to "secure a more effective protection of the right to vote." State of Ala. ex rel. Gallion v. Rogers, 187 F. Supp. 848, 853 (M.D. Ala. 1960) (citing H.R. Rep. 956, 86th Cong., 1st Sess. 7 (1959)), aff'd sub nom. Dinkens v. Attorney General, 285 F.2d 430 (5th Cir. 1961) (per curiam). The Act protects the right to vote by ensuring that federal elections records remain available in a form that allows for the Department to investigate and prosecute both civil and criminal elections matters under federal law. The Federal Prosecution of Election Offenses, Eighth Edition 2017 explains that "[t]he detection, investigation, and proof of election crimes – and in many instances Voting Rights Act violations – often depend[s] on documentation generated during the voter registration, voting, tabulation, and election certification processes." Id. at 75. It provides that "all documents and records that may be relevant to the detection or prosecution of federal civil rights or election crimes must be maintained if the documents or records were generated in connection with an election that included one or more federal candidates." Id. at 78.

The Department interprets the Civil Rights Act to require that covered elections records "be retained either physically by election officials themselves, or under their direct administrative supervision." Federal Prosecution of Elections Offenses at 79. "This is because the document retention requirements of this federal law place the retention and safekeeping duties squarely on the shoulders

of election officers." *Id.* If a state or local election authority designates some other individual or organization to take custody of the election records covered by Section 301, then the Civil Rights Act provides that the "duty to retain and preserve any record or paper so deposited shall devolve upon such custodian." 52 U.S.C. § 20701.

Therefore, if the original election official who has custody of records covered by the Act hands over those election records to other officials (for example, to legislators or other officeholders) or the official turns over the records to private parties (such as companies that offer to conduct "forensic examinations"), the Department interprets the Act to require that "administrative procedures be in place giving election officers ultimate management authority over the retention and security of those election records, including the right to physically access" such records. *Id.* In other words, the obligation to retain and preserve election records remains intact regardless of who has physical possession of those records. Jurisdictions must ensure that if they conduct post-election ballot examinations, they also continue to comply with the retention and preservation requirements of Section 301.

There are federal criminal penalties attached to willful failures to comply with the retention and preservation requirements of the Civil Rights Act. First, Section 301 itself makes it a federal crime for "[a]ny officer of election" or "custodian" of election records to willfully fail to comply with the retention and preservation requirements. 52 U.S.C. § 20701. Second, Section 302 provides that any "person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper" covered by Section 301's retention and preservation requirement is subject to federal criminal penalties. *Id.* § 20702. Violators of either section can face fines of up to $1000 and imprisonment of up to one year for each violation.

Election audits are exceedingly rare. But the Department is concerned that some jurisdictions conducting them may be using, or proposing to use, procedures that risk violating the Civil Rights Act. The duty to retain and preserve election records necessarily requires that elections officials maintain the security and integrity of those records and their attendant chain of custody, so that a complete and

uncompromised record of federal elections can be reliably accessed and used in federal law enforcement matters. Where election records leave the control of elections officials, the systems for maintaining the security, integrity and chain of custody of those records can easily be broken. Moreover, where elections records are no longer under the control of elections officials, this can lead to a significant risk of the records being lost, stolen, altered, compromised, or destroyed. This risk is exacerbated if the election records are given to private actors who have neither experience nor expertise in handling such records and who are unfamiliar with the obligations imposed by federal law.

Constraints Imposed by the Federal Laws Prohibiting Intimidation

Federal law prohibits intimidating voters or those attempting to vote. For example, Section 11(b) of the Voting Rights Act of 1965 provides that "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote...." 52 U.S.C. § 10307(b). Similarly, Section 12 of the National Voter Registration Act of 1993 makes it illegal for any person, "including an election official," to "knowingly and willfully intimidate[], threaten[], or coerce[], or attempt to intimidate, threaten, or coerce, any person for . . . registering to vote, or voting, or attempting to register or vote" in any election for federal office. *Id.* § 20511(1)(A). Likewise, Section 131 of the Civil Rights Act of 1957 provides that "[n]o person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate" for federal office. 52 U.S.C. § 10101(b).

The Attorney General is authorized to file a civil action seeking preventative relief, including a temporary or permanent injunction, against any person who engages in actions that violate these statutes. See 52 U.S.C. §§ 10308(d); 20510(a). And there are criminal penalties as well. *See, e.g., id.* § 10308(a); 18 U.S.C. §§ 241, 242, 594; *see generally* Federal Prosecution of Election Offenses, at 33-38, 49-54, 56-58.

Judicial decisions have established that voter intimidation need not involve physical threats. In certain contexts, suggesting to individuals that they will face adverse social or legal consequences from voting can constitute an impermissible threat. Here are a few examples of the types of acts that may constitute intimidation:

- Sending a letter to foreign-born Latino registered voters warning them that "if they voted in the upcoming election their personal information would be collected … and … could be provided to organizations who are 'against immigration'" was potentially intimidating. *See United States v. Nguyen*, 673 F.3d 1259 (9th Cir. 2012).
- Having police officers take down the license plate numbers of individuals attending voter registration meetings contributed to intimidating prospective voters. *See United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967).
- Sending robocalls telling individuals that if they voted by mail, their personal information would become part of a public database that could be used by police departments to track down old warrants and credit card companies to collect outstanding debts could constitute intimidation. *See Nat'l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457 (S.D.N.Y. 2020).
- Linking individual voters to alleged illegalities in a way that might trigger harassment could constitute intimidation. *See League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Int. Legal Found.*, 2018 WL 3848404, at *4 (E.D. Va. Aug. 13, 2018).
- Conducting a "ballot security" program in which defendants stand near Native American voters discussing Native Americans who had been prosecuted for illegally voting, follow voters out of the polling places, and record their license plate numbers might constitute intimidation. *See Daschle v. Thune*, No. 4:04 Civ. 04177 (D.S.D. Nov. 1, 2004).

See also United States v. North Carolina Republican Party, No. 5:92-cv-00161 (E.D.N.C. Feb. 27, 1992) (approving a consent decree in a case where the United States alleged that it violated Section 11(b) to send postcards to voters in predominantly African American precincts falsely claiming that voters were required to have lived in the same precinct for thirty days prior to the election and stating that it is a "federal crime to knowingly give false information about your name, residence or period of residence to an election official").[1]

[1] While voter intimidation need not involve physical threats, federal law of course prohibits using "force or threat of force" to intimidate or interfere with, or attempt to intimidate or interfere with, any person's "voting or qualifying to vote" or serving "as a poll watcher, or any legally authorized election official, in any primary, special, or general election." 18 U.S.C. § 245(b)(1)(A). The Deputy Attorney General recently issued Guidance Regarding Threats Against Election Workers.

There have been reports, with respect to some of the post-2020 ballot examinations, of proposals to contact individuals face to face to see whether the individuals were qualified voters who had actually voted. *See, e.g.*, Cyber Ninjas Statement of Work ¶ 5.1 (proposing to select three precincts in a large urban county to collect information from individuals through "a combination of phone calls and physical canvassing").

This sort of activity raises concerns regarding potential intimidation of voters. For example, when such investigative efforts are directed, or are perceived to be directed, at minority voters or minority communities, they can have a significant intimidating effect on qualified voters that can deter them from seeking to vote in the future. Jurisdictions that authorize or conduct audits must ensure that the way those reviews are conducted has neither the purpose nor the effect of dissuading qualified citizens from participating in the electoral process. If they do not, the Department will act to ensure that all eligible citizens feel safe in exercising their right to register and cast a ballot in future elections.

If jurisdictions have questions about the constraints federal law places on the kinds of post-election audits they can conduct, they should contact the Voting Section of the Civil Rights Division. If citizens believe a jurisdiction has violated the Civil Rights Act's election record retention and preservation requirements, or believe they have been subjected to intimidation, they can use the Civil Rights Division's online complaint form to report their concerns or call (800) 253-3931.