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

BRIEF FOR PLAINTIFF-APPELLANT

PATRICK M. MCSWEENEY
MCSWEENEY, CYNKAR
& KACHOUROFF, PLLC
3358 John Tree Hill Road
Powhatan, Virginia 23139
(804) 937-0895
patrick@mck-lawyers.com

ROBERT CYNKAR
MCSWEENEY, CYNKAR
& KACHOUROFF, PLLC
10506 Milkweed Drive
Great Falls, Virginia 22066
(703) 621-3300
rcynkar@mck-lawyers.com

JOHN CASE
JOHN CASE PC
6901 South Pierce Street, Suite 340
Littleton, Colorado 80128
(303) 667-7407
brief@johncaselaw.com

Attorneys for Plaintiff-Appellant

March 12, 2024

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

Cases

PAGE(S)

PAGE(S)

Statutes

PAGE(S)

Rules

Regulations

Constitutional Provisions

Other Authorities

PAGE(S)

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*

John Case
John Case, P.C.
6901 South Pierce St. #340
Littleton, CO 80128
(303) 667-7407
brief@johncaselaw.

Patrick M. McSweeney
Robert J. Cynkar
Christopher I. Kachouroff
Lyndsey L. Bisch
McSweeney, Cynkar & Kachouroff, PLLC
10506 Milkweed Drive
Great Falls, VA 22066
(703) 621-3300
rcynkar@mck-lawyers.com

Counsel for Plaintiff-Appellant Tina Peters

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:

CHRISTOPHER W. BROPHY
ANDREW B. CLAUSS
DINSMORE & SHOHL LLP
1775 Sherman Street, Suite 2500
Denver, Colorado 80203
(303) 381-6972
chris.brophy@dinsmore.com
andrew.clauss@dinsmore.com

TODD M. STARR
MESA COUNTY ATTORNEY'S OFFICE
Department 5004
P.O. Box 20,000
Grand Junction, Colorado 81502
(970) 244-1612
todd.starr@mesacounty.us

Attorneys for Defendant-Appellee

Dated: March 12, 2024

/s/ Patrick M. McSweeney
Patrick M. McSweeney
MCSWEENEY, CYNKAR
& KACHOUROFF, PLLC
3358 John Tree Hill Road
Powhatan, Virginia 23139
(804) 937-0895
patrick@mck-lawyers.com
Attorneys for Plaintiff-Appellant

ADDENDUM

TABLE OF CONTENTS

PAGE

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]

---

[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

---

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**;

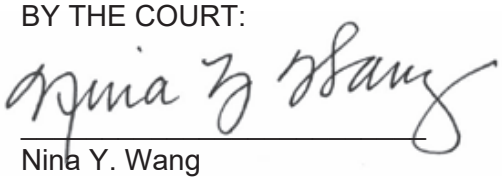
(2) Plaintiff's claims for declaratory and injunctive relief against Defendant Daniel P. Rubinstein in his official capacity are **DISMISSED WITHOUT PREJUDICE**;

(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

---

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**;

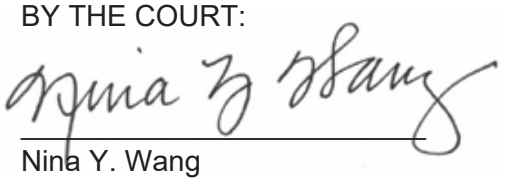
(2) The Court hereby **CERTIFIES** that its January 8, 2024, Order on Motion to Dismiss [Doc. 39] is a final judgment for purposes of Rule 54(b) of the Federal Rules of Civil Procedure, and there is no just reason for delaying an appeal; and

(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.