IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-01951-CNS-MDB

JACQUELINE ARMENDARIZ and CHINOOK CENTER,

Plaintiffs,

v.

CITY OF COLORADO SPRINGS,
DANIEL SUMMEY, a detective with the Colorado Springs Police Department, in his individual capacity,
B.K. STECKLER, a detective with the Colorado Springs Police Department, in his individual capacity,
JASON S. OTERO, a sergeant with the Colorado Springs Police Department, in his individual capacity,
ROY A. DITZLER, a police officer with the Colorado Springs Police Department, in his individual capacity, and
FEDERAL BUREAU OF INVESTIGATION.

Defendants.

MOTION TO DISMISS BY THE FEDERAL DEFENDANTS

Defendant Summey, the FBI, and the United States move to dismiss Claims 1, 4, and 6 of the First Amended Complaint, ECF No. 12. Undersigned counsel conferred with Plaintiff's counsel regarding this motion on November 14, 2023, and Plaintiff opposes this motion.

INTRODUCTION

In 2021, Plaintiff Jacqueline Armendariz was arrested on charges of attempted assault of a police officer, stemming from an incident during a protest in Colorado Springs. She pleaded guilty to a lesser offense. Now, she challenges whether the search warrants—which, among other things, authorized searching her digital devices for evidence related to the crime—violated the First and Fourth Amendments of the U.S. Constitution or the state constitution.

Claim 1 (against Defendant Summey) must be construed as a *Bivens* claim because Summey obtained the warrants in his capacity as a "Task Force Officer" for the FBI's Joint Terrorism Task Force. The claim presents a new *Bivens* context because, among other things, it arises under a different provision of the Fourth Amendment than the claim in *Bivens* itself and because the searches were conducted pursuant to warrants, implicating different Fourth Amendment interests. And special factors counsel hesitation in creating a remedy in this context. Independently, Summey is entitled to qualified immunity for two reasons. First, Plaintiff fails to allege that the warrants violate constitutional requirements. Second, it was not clearly established that the warrants were defective, and it was objectively reasonable for Summey to believe that the warrants complied with the First and Fourth Amendments.

Claim 4 (against the United States) should be dismissed for lack of jurisdiction for two reasons. First, Plaintiff did not exhaust administrative presentment requirements. Second, she does not plead that a private person would be liable to her for the conduct alleged. Both defects are jurisdictional.

Claim 6 (against the FBI) should be dismissed because Plaintiff cannot force the FBI to dispossess itself of copies of evidence obtained lawfully, and the FBI's retention of unlawfully obtained evidence does not violate the Fourth Amendment.

BACKGROUND

In 2021, Plaintiff was arrested on charges of attempted assault of a police officer. ECF No. 12 ¶¶ 88-89. She alleges that she only "dropped her bike" in the path of the officer who was running past her during a housing rights protest, *id.* ¶ 42, but she pleaded guilty to obstructing a peace officer. *Id.* ¶ 119. The incident was captured on police bodycam footage. *Id.* ¶ 42. Daniel Summey,

a Task Force Officer for the FBI's Joint Terrorism Task Force and a Colorado Springs Police Department officer, investigated. *Id.* ¶¶ 57, 111-12.

The case against the federal defendants arises out of two search warrants Summey obtained as part of the investigation. The first ("Warrant 1") authorized a search of Plaintiff's residence. *See* **Exhibit 1**, Warrant 1 & affidavit (8/6/21).[1] The second warrant ("Warrant 2") authorized a search of Plaintiff's digital devices. *See* **Exhibit 2**, Warrant 2 & affidavit (8/20/21). Summey's affidavits identified Colo. Rev. Stat. § 18-2-101 (attempted second-degree assault) as the crime being investigated and recounted facts supporting a fair probability that Plaintiff's digital devices contained evidence that would be useful in prosecuting the attempted assault. Ex. 1 at 17; Ex. 2 at 18; *see also* ECF No. 12 ¶¶ 64-67, 75-76, 85, 103, 110 (describing Plaintiff's digital and social media activity and Summey's training and experience in similar cases). Notably, Summey confirmed with Plaintiff's supervisor that Plaintiff attended the protest and shared digital media of it with her. Ex. 2 at 19. Two different state-court judges, finding probable cause, issued the warrants. *Id.* at 1-2; Ex. 1 at 1; ECF No. 12 ¶ 118.

I. MOTION TO DISMISS BY DEFENDANT SUMMEY (Claim 1)

In Claim 1, Plaintiff alleges that the warrants violated the Fourth Amendment's particularity and probable cause requirements and failed to limit the discretion of the officer executing the

[1] Because the warrants and affidavits are referenced and quoted in the First Amended Complaint, are central to Plaintiff's claims, and their authenticity is not disputed, the Court may consider the documents, attached here with limited redactions, on a motion to dismiss without converting the motion to one for summary judgment. *See N. Arapaho Tribe v. Becerra*, 61 F.4th 810, 814 (10th Cir. 2023). "Factual allegations that contradict a properly considered document are not well-pleaded facts that the court must accept as true." *Farrell-Cooper Mining Co. v. U.S. Dep't of the Interior*, 728 F.3d 1229, 1237 n.6 (10th Cir. 2013) (cleaned up).

search. ECF No. 12 ¶ 154. She also alleges that the First Amendment "may require more than ordinary Fourth Amendment compliance." *Id.* ¶ 150. Although she asserts this claim under 42 U.S.C. § 1983, Claim 1 is properly construed as a *Bivens* claim against Summey. *See Belhomme v. Widnall*, 127 F.3d 1214, 1217 (10th Cir. 1997) (Section 1983 "does not apply to federal officers acting under color of federal law") (citation omitted).

Plaintiff pleads facts suggesting that Summey was acting under color of federal law. Specifically, she alleges that Summey signed the affidavits as a "Task Force Officer." ECF No. 12 ¶¶ 111-12; Ex. 1 at 3, 17 (stating Summey is "currently assigned to the FBI Joint Terrorism Task Force" and signing the affidavit as a "Task Force Officer"); Ex. 2 at 5, 28 (same). Plaintiff also alleges that "the FBI had been spying on the Chinook Center and other activist groups since the summer of 2020." ECF No. 12 ¶ 25; *see also id.* ¶ 28. Plaintiff further alleges that her digital devices were taken to "an FBI-run forensic computer laboratory" to extract data pursuant to the warrants. *Id.* ¶¶ 127-28. These facts plausibly suggest that Summey obtained the warrants in his capacity as a federal Task Force Officer under color of federal law.[2]

Courts routinely interpret § 1983 claims against federal task force officers as *Bivens* claims. *See Colorado v. Nord*, 377 F. Supp. 2d 945, 949 (D. Colo. 2005) ("Courts have consistently treated

[2] Plaintiff does not plausibly allege that Summey was acting color of state law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief."). The facts that Summey was employed by the Colorado Springs Police Department and obtained state warrants related to state charges are not inconsistent with the federal character of the Joint Terrorism Task Force or of deputized Task Force Officers. *See King v. United States*, 917 F.3d 409, 433 (6th Cir. 2019), *rev'd on other grounds*, *Brownback v. King*, 141 S. Ct. 740 (2021) ("[T]he nature and character of a cooperative federal-state program is determined by the source and implementation of authority for the *program*, not for the particular work that the agency chooses, in the exercise of its authority, to perform on a given day.").

local law enforcement agents deputized as federal agents and acting as part of a federal task force as federal agents."); *see also Gaspard v. DEA Task Force*, No. 15-cv-1802, 2016 WL 2586182, at *7 (C.D. Cal. Apr. 4, 2016), *recommendation adopted*, 2016 WL 2349093 (C.D. Cal. May 4, 2016) (stating that the "weight of authority" "treat[s] local law enforcement agents deputized as part of a federal task force as federal agents," collecting cases).

A. The Court should decline to recognize a *Bivens* remedy.

To determine whether a *Bivens* remedy exists, a court first asks "whether the case presents 'a new *Bivens* context'–*i.e.*, is it 'meaningful[ly] different from the three cases in which the Court has implied a damages action." *Egbert v. Boule*, 596 U.S. 482, 492 (2022). If so, "a *Bivens* remedy is unavailable if there are 'special factors' indicating that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Id.* Expanding *Bivens* is "impermissible in virtually all circumstances." *Silva v. United States*, 45 F.4th 1134, 1140 (10th Cir. 2022).

1. This case arises in a new *Bivens* context.

The only Fourth Amendment case in which the Supreme Court implied a *Bivens* remedy was *Bivens* itself. *Bivens* involved agents of the Federal Bureau of Narcotics who, without a warrant, entered the plaintiff's apartment, "manacled" him in front of his wife and children, "threatened to arrest the entire family," searched the apartment "from stem to stern," and subjected him to interrogation and a "visual strip search." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). The plaintiff sued the agents for excessive force and making a warrantless arrest without probable cause. *Id.* at 389-90.

Plaintiff's claim here presents a new context because it is meaningfully different from that

alleging a warrantless arrest executed with excessive force. Claim 1 arises under a different constitutional provision. *Compare* U.S. Const., amend IV (guaranteeing "no Warrants shall issue, but upon probable cause") *with id.* (prohibiting "unreasonable searches and seizures"); *see Egbert*, 596 U.S. at 498 ("[A] new context arises when there is a new 'constitutional right at issue'"). The conduct alleged is meaningfully different, too. Plaintiff does not challenge the constitutionality of her arrest or assert that it was made with excessive force but whether Summey's affidavits established probable cause to search her digital devices. The fact that Summey *obtained* warrants raises distinct Fourth Amendment considerations, which are subject to distinct judicial guidance and which "pose a greater risk of intruding on the investigatory and prosecutorial functions of the executive branch." *Annappareddy v. Pascale*, 996 F.3d 120, 135-37 (4th Cir. 2021) (finding a new context where the search and seizure was conducted "*with* a warrant"); *see also Ziglar v. Abbasi*, 582 U.S. 120, 140 (2017) (meaningful differences from prior cases include different "judicial guidance" to executing officers and different "risk[s] of disruptive intrusion by the Judiciary into" functions of the executive branch). This case also concerns a "new category of defendant[]," *Egbert*, 596 U.S. at 492—a local law enforcement officer assigned to an FBI task force vs. a federal narcotics agent—which raises unique issues of intergovernmental relations. For these reasons, the claim arises in a new context. Additionally, the First Amendment claim presents a new context, because the Supreme Court has never implied a First Amendment *Bivens* remedy. *Id.* at 498-49.

2. Existing processes counsel against an implied remedy.

The "sole[]" purpose of *Bivens* is to deter unconstitutional acts. *Id.* at 498. An independent reason to dismiss the *Bivens* claim is that "Congress or the Executive" has already provided a mechanism to deter the misconduct alleged. *Id.* Congress created the Inspector General Act of 1978,

which provides a mechanism to raise allegations of misconduct by employees of the Department of Justice. 5 U.S.C. § 413(d). Congress also authorized the DOJ's Inspector General to investigate allegations of misconduct, refer allegations to the Office of Professional Responsibility, or refer them to the internal affairs office of the appropriate component of the DOJ. *Id.* § 413(b). This mechanism is an adequate remedial process to deter unconstitutional conduct. *Cf. Pettibone v. Russell*, 59 F.4th 449, 456-57 (9th Cir. 2023) (Inspector General investigations at the Department of Homeland Security and the potential for corrective action against malfeasant employees was an "adequate alternative to *Bivens*").

3. Special factors counsel hesitation in creating a *Bivens* remedy.

Congress is at least arguably better positioned to create a damages remedy in this context. If there is "*any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed,'" no *Bivens* remedy can lie. *Egbert*, 596 U.S. at 496. Implying a remedy against a member of a Joint Terrorism Task Force has the potential to raise national security concerns, independently foreclosing *Bivens* relief. *See id.* at 494 ("a *Bivens* cause of action may not lie where, as here, national security is at issue"). Creating a judicial remedy also could have consequences for the FBI's ability to recruit local officers to participate in joint task forces, hindering the effectiveness of those task forces and their missions. A damages remedy also could have a chilling effect on law enforcement, who, despite believing they had probable cause for a warrant, might forego valid investigative techniques to avoid any prospect of a lawsuit. Criminal defendants, meanwhile, could use *Bivens* claims to obtain discovery of documents that wouldn't otherwise be available to them in a criminal suit, as the rules of criminal discovery are more restrictive than the Federal Rules of Civil Procedure. Finally, the Court should

hesitate to create a *Bivens* remedy here because challenges by defendants to probable-cause determinations are so common that permitting a civil cause of action in this context could have a significant impact on litigation against law enforcement organizations. *See id.* at 500 ("If anything, that retaliation claims are common, and therefore more likely to impose 'a significant expansion of Government liability,' counsels against permitting *Bivens* relief.") (citation omitted). The Court should dismiss Claim 1.

B. Independently, Summey is entitled to qualified immunity.

Qualified immunity shields government officials from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is available to defendants facing either § 1983 or *Bivens* claims. *Johnson v. Fankell*, 520 U.S. 911, 914-15 (1997). Officials "will not be held personally liable as long as their actions are reasonable in light of current American law." *Anderson v. Creighton*, 483 U.S. 635, 646 (1987). The analysis comprises two prongs: (1) whether the plaintiff has alleged facts which, when taken as true, show that "the defendant plausibly violated [her] constitutional rights," and (2) whether the law "clearly established" the conduct as violating the constitution "at the time of violation." *Hunt v. Montano*, 39 F.4th 1270, 1278 (10th Cir. 2022). When the defendant invokes qualified immunity, "the burden shifts to the plaintiff to establish both prongs of the defense." *Id.* at 1284.

1. Prong One: Plaintiff fails to state a plausible constitutional violation.

A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Where a complaint pleads facts "merely consistent with" liability, the claim "stops

short of the line between possibility and plausibility of entitlement to relief." *Id.*

a. Fourth Amendment standards.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend IV. Probable cause exists "if the totality of the information" in the affidavit supporting a warrant "establishes the fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Knox*, 883 F.3d 1262, 1275 (10th Cir. 2018). Whether probable cause exists is a "'flexible, common-sense standard,' and no single factor or factors is dispositive." *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983)). Probable cause "is not a high bar: It requires only the 'kind of fair probability on which reasonable and prudent [people,] not legal technicians, act." *Kaley v. United States*, 571 U.S. 320, 338 (2014).

Warrants are sufficiently particular if they "affirmatively limit the search to evidence of specific ... crimes or specific types of material," but warrants "do not have to identify specific statutes for the crimes to which they are limited." *United States v. Palms*, 21 F.4th 689, 698-99 (10th Cir. 2021); *see also United States v. Brooks*, 427 F.3d 1246, 1252-53 (10th Cir. 2005) (computer search warrant was sufficiently particular when limited to "evidence of child pornography"). Where a warrant incorporates and attaches the officer's affidavit, the affidavit can be used to cure particularity defects of the warrant itself. *See United States v. Suggs*, 998 F.3d 1125, 1135 (10th Cir. 2021); *see also United States v. Leary*, 846 F.2d 592, 603 (10th Cir. 1988).

For digital searches, the Fourth Amendment does not require "a warrant to prospectively restrict the scope of a search by directory, filename or extension" or by "search methods—that process must remain dynamic." *United States v. Christie*, 717 F.3d 1156, 1166 (10th Cir. 2013);

Palms, 21 F.4th at 700 ("search warrants typically contain few—if any—restrictions on where *within a computer* or other electronic storage device the government is permitted to search"). The particularity requirement has never "been understood to demand of a warrant 'technical precision,' or 'elaborate detail,' but only 'practical' limitations affording 'reasonab[le] specificity.'" *Christie*, 717 F.3d at 1166 (citations omitted). Warrants to search computers may be limited "by content," such as files containing evidence related to the crime being investigated. *United States v. Burgess*, 576 F.3d 1078, 1092-93 (10th Cir. 2009). As the Tenth Circuit put it: "it is folly for a search warrant to attempt to structure the mechanics of the search and a warrant imposing such limits would unduly restrict legitimate search objectives."[3] *Id.* at 1094.

b. Both warrants complied with the Fourth Amendment.

Particularity. The warrants were sufficiently particular. Warrant 1 authorized the seizure of "[d]igital media storage devices, to include phones, computers, tablets, thumb drives, and external hard drives found to be associated with Jacqueline Armendariz," along with other evidence of the attempted assault. Ex. 1 at 18. Warrant 1 was not a general warrant that allowed law enforcement to seize any property found within Plaintiff's home. Warrant 2 authorized the search of the specifically enumerated devices for two categories of information: (1) photos, videos, messages, emails, and location data "that are determined to be relevant to this investigation" for a limited date range before and after the incident; and (2) files with enumerated keywords that "would be relevant to the investigation." Ex. 2 at 29. This level of detail was unnecessary, as the warrant needed only to articulate a limiting principle—the crime being investigated—not the specific search protocol law

[3] To the extent Plaintiff's claim is based on a failure to contain a date-range limitation for keyword searches, ECF No. 12 ¶ 154(d), the claim should be rejected based on this case law.

enforcement would use. *See Burgess*, 576 F.3d at 1092-93; *Christie*, 717 F.3d at 1165-67. Here, the scope of the warrants was limited to certain types of data and only those "relevant to this investigation."

The affidavits supplied further particularity, because each was expressly incorporated in, and attached to, its respective warrant. *See* Ex. 1 at 1 ("Whereas Task Force Officer Daniel Summey . . . has made an Application and Affidavit, which is *attached and expressly incorporated* into this Search Warrant . . . .") (emphasis added); Ex. 2 at 1 (same). An affidavit can cure a warrant's lack of particularity if it is attached and expressly incorporated into the warrant. *See Suggs*, 998 F.3d at 1135; *Burgess*, 576 F.3d at 1091-92 (using the affidavit to interpret the terms of the warrant permitting a search of computer records).

The affidavits stated that Plaintiff was being investigated for a violation of Colo. Rev. Stat. § 18-2-101 ("Criminal Attempt - Second Degree Assault - Class 5 Felony (F5)") during the July 31, 2021, protest. Ex. 1 at 17; Ex. 2 at 18. The affidavits further stated that the matters described "would be material evidence in the subsequent prosecution of [Plaintiff] for attempting to assault Officer Spicuglia." Ex. 1 at 17; Ex. 2 at 28. The warrants, therefore, were limited in scope to evidence related to the crime of attempted assault.[4] Ex. 1 at 17-18; Ex. 2 at 28-29. Against this overarching limitation, the file types, date range, and keywords *further* restricted what law enforcement could examine from the devices. Combined, these limitations more than satisfied the Fourth Amendment's particularity requirement. *See, e.g.*, *Brooks* 427 F.3d at 1252.

Probable cause. The warrants' scope did not exceed the probable cause established in the

[4] These facts dispose of Plaintiff's claims that the warrant was defective for failing to limit the search to a specific crime or limit the discretion of the officers. *See* ECF No. 12 ¶ 154(c), (e).

affidavits. There was a fair probability that Plaintiff's digital devices contained evidence relevant to her prosecution. The affidavits, at length, recounted facts to tie Plaintiff to the attempted assault. Ex. 1 at 4-14; Ex. 2 at 6-15. The affidavits also included a "selfie" by Plaintiff from July 3, 2021—just four weeks before the protest—while she was wearing the same bicycle gear she did on July 31, 2021, Ex. 1 at 11; Ex. 2 at 13; this supported the fair probability that Plaintiff carried her phone on the day of the protest, even if traveling by bicycle, and that there was a fair probability that Plaintiff would have taken photographs. The affidavits showed that Plaintiff was an active user of social media, maintaining multiple accounts and interacting with users regarding her role as an "organizer." Ex. 1 at 11 ("You are a good organizer Chica"); *see also id.* at 10, 12-16; Ex. 2 at 13-18. The affidavits showed that Plaintiff had digitally connected with the person Officer Spicuglia was pursuing when Plaintiff "dropped" her bicycle. Ex. 1 at 10; Ex. 2 at 12, 25. These facts supported a fair probability that Plaintiff would have messaged or called acquaintances regarding the incident, which would be relevant to her prosecution.

The affidavits also recounted Summey's training and experience, which instructed that protesters "frequently carry their phones with them to take photos of their activity and message others" regarding their activity. Ex. 1 at 17; Ex. 2 at 19. The affidavits noted other lessons from Summey's training and experience, including: that location-tracking functions of phones can show where a person is at a given time, Ex. 1 at 17; Ex. 2 at 19; that people regularly back up phones and transfer photos to computers, Ex. 1 at 17; Ex. 2 at 19; that people who commit crimes in furtherance ideological goals typically share this information with others through messaging applications, emails, or texts to take credit for their actions, Ex. 2 at 20; and that people often engage in personal communications on work devices even if contrary to company policy, *id.* The Tenth Circuit has

"long recognized that magistrate judges may 'rely on the opinion' of law enforcement officers 'as to where . . .' evidence 'may be kept.'" *United States v. Biglow*, 562 F.3d 1272, 1279 (10th Cir. 2009); *see also Bowling v. Rector*, 584 F.3d 956, 970 (10th Cir. 2009) (officer's "experience in cattle theft cases leading him to believe there would be large numbers of documents . . . and computerized business records" supported probable cause).

Common sense and the "practical considerations of everyday life" also supported the "likelihood that certain evidence will be found at a particular place." *Biglow*, 562 F.3d at 1280. There was a fair probability that someone of Plaintiff's age, *see* Ex. 1 at 10 (showing Plaintiff to be 33 or 34 years old at the time of the protest), biking with a backpack, *id.* at 6-8, would carry a phone with her to a protest. Common sense and experience also suggested a fair probability that the phone would contain some files—location data, messages, photographs—that would prove that Plaintiff attended the protest, the planning for, or intent behind, her obstructionist conduct, or her contemporaneous reactions to the incident, any of which could be relevant to her prosecution.

The second affidavit recounted that Summey spoke directly with Plaintiff's supervisor, who confirmed that Plaintiff "attended the protest" and had "sent her digital media of the protest." Ex. 2 at 19. A reasonable person, based on this fact alone, could conclude that there was a fair probability that Plaintiff's devices possessed evidence that would be relevant to her prosecution. Such evidence could help establish that Plaintiff attended the protest that day and was, at the very least, the person involved in the incident with Officer Spicuglia. *See Christie*, 717 F.3d at 1167 n.2 (plaintiff's argument that the government lacked probable cause to think the computer contained evidence related to the charges did not "merit[] extended discussion," because "by the time of the second warrant the government had amassed a great deal of evidence suggesting . . . Ms. Christie's

computer would yield further valuable evidence.").

Probable cause does not require certainty that evidence will be found in a particular place. *Biglow*, 562 F.3d at 1280 ("[P]robable cause is a matter of 'probabilities and common sense conclusions, not certainties.'"). Affidavits need only support a fair probability, judged by a reasonable person, that evidence will be found in a place. Here, Plaintiff's (1) obstructionist conduct, (2) creation of digital content, (3) sharing of media from the protest, and (4) active social media use, (5) Summey's training, experience and opinions, and (6) common sense, and (7) practical considerations of everyday life supplied probable cause to seize and search Plaintiff's devices for evidence of a specific crime. There was a *fair probability* that the devices contained evidence that would place her on the scene or reveal the intent behind, or reaction to, her conduct.

c. The warrants did not offend the First Amendment.

There is no authority suggesting that the Fourth Amendment requirements are heightened when the police investigate an attempted assault that occurred at a protest, even if First Amendment interests are involved.[5] *See New York v. P.J. Video, Inc.*, 475 U.S. 868, 875 (1986) ("[A]n application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally."). Here, Summey obtained warrants to investigate second-degree attempted assault. ECF No. 12 ¶ 43; Ex. 1 at 17; Ex. 2 at 18. Plaintiff pleaded guilty to obstructing a peace

[5] This case is not analogous to the Supreme Court's prior restraint cases, where the seizure of films, books, or papers, *based on their content*, raised special First Amendment concerns. *See Maryland v. Macon*, 472 U.S. 463, 468-69 (1985). Material that is seized for purposes other than the content of the expression is not treated differently than other goods under the Fourth Amendment. *See Stanford v. Texas*, 379 U.S. 476, 485 & n.16 (1965).

officer, ECF No. 12 ¶ 119, and her allegations that law enforcement sought the warrants because of her First Amendment-protected activities, rather than the identified crime, are conclusory and speculative. Plaintiff does not separately state a plausible First Amendment violation.

2. Prong Two: It was not clearly established that Summey's conduct violated the constitution.

Assuming, for the sake of argument, that Plaintiff has pleaded a constitutional violation, Claim 1 fails under Prong Two of the qualified immunity test, because the facts alleged, together with the warrants and affidavits, do not show a violation of clearly established law. "'Clearly established' means that, at the time of the officer's conduct, the law was 'sufficiently clear that every reasonable official would understand that what he is doing' is unlawful." *Dist. of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). The test is objective. *Id.* Existing law must be so clear as to have "placed the constitutionality of the officer's conduct 'beyond debate.'" *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). This "demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted,'" which "requires a high 'degree of specificity.'" *Id.* Courts "must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'" *Id.* at 63-64. Specificity is "especially important in the Fourth Amendment context," because probable cause "'turn[s] on the assessment of probabilities in particular factual contexts,' and cannot be 'reduced to a neat set of legal rules,'" and "officers will often find it difficult to know how the general standard of probable cause applies 'in the precise

situation encountered.'" *Id.* at 64. The Supreme Court has "stressed the need to 'identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment.'" *Id.* A "'body of relevant case law' is usually necessary to 'clearly establish the answer' with respect to probable cause." *Id.*

Whether qualified immunity protects an officer "generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012). When a judge signs an unconstitutional warrant, the officer seeking or executing the warrant will only be held personally liable where "it is obvious that no reasonably competent officer would have concluded that a warrant should issue," such as where the supporting affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 547. The "threshold for establishing this exception is a high one, and it should be." *Id.*

Clearly established. For the reasons explained above, it was not clearly established, beyond debate, by the Supreme Court or Tenth Circuit that the warrants here violated the Fourth Amendment. The warrants attached and incorporated affidavits, which identified—by statute, words, and pictures—the crime being investigated and *further* limited the scope of the digital search to particular files that would be "relevant" to the investigation. Established law from the Tenth Circuit would have instructed a reasonable officer that: (1) the search protocols were not necessary to include in a warrant, so their inclusion could not have invalidated Warrant 2, and (2) affidavits attached to and incorporated in warrants could be used to interpret the terms of the warrants, *see, e.g.*, *Burgess*, 576 F.3d at 1091-93. Therefore, a reasonable officer could rely on case law that the affidavit and warrant, together, satisfied the Fourth Amendment particularity requirement.

Regarding probable cause, no case law from the Supreme Court or Tenth Circuit clearly established, beyond debate, that probable cause was lacking to seize and search Plaintiff's digital devices. Both affidavits tied Plaintiff to the incident and recounted facts regarding Plaintiff's social media use, including a recent example of a photograph she took while biking, as well as facts drawn from Summey's experience and training stating what kinds of evidence was likely to be located on Plaintiff's devices. Moreover, case law suggests that "common sense" or "practicalities of everyday life" can be used to support the fair probability that Plaintiff carried a cell phone with her to the protest and it contained evidence relevant to the investigation into the alleged assault. Warrant 2, which authorized the search of the digital devices, recited facts confirming that Plaintiff had attended the protest and had sent her supervisor digital media of the protest. It was not clearly established that these facts, in combination, failed to establish probable cause. *See United States v. Thomas*, 290 F. Supp. 3d 1162, 1173-75 (D. Colo. 2017) (probable cause existed to seize mobile phones, despite the defendant's claim that there was a "dearth of any meaningful discussion of cellular devices" in the warrant); *United States v. Gholston*, 993 F. Supp. 2d 704, 718-20 (E.D. Mich. 2014) (affidavit that described the offense under investigation, the identification of the defendant, and the officer's "training and experience" sufficed to establish probable cause to seize and search a cell phone). For these reasons alone, Summey is entitled to qualified immunity.

Objective reasonableness. Another way of viewing the second prong is whether the judge who signed each warrant "so obviously erred that any reasonable officer would have recognized the error." *Messerschmidt*, 565 U.S. at 556. The "occasions on which this standard will be met" and where "it will be appropriate to impose personal liability on a lay officer in the face of judicial approval of his action" will be "rare." *Id.*

Here, several factors point toward the objective reasonableness of Summey's actions. First, two different judges approved the two warrants. ECF No. 12 ¶ 118; Ex. 1 at 1-2; Ex. 2 at 1. Judicial approval of a warrant "is the clearest indication that the officers acted in an objectively reasonable manner." *Messerschmidt*, 565 U.S. at 546; *United States v. Cotto*, 995 F.3d 786, 795 (10th Cir. 2021) ("The judge's decision that an affidavit submitted in support of a warrant established probable cause must be given great deference."). The fact that multiple judges found that the affidavits, which relied on largely identical facts, *compare* Ex. 1 at 3-17 *with* Ex. 2 at 5-19, established probable cause strongly suggests that a reasonable officer could believe the warrants were constitutional.

Second, Summey's applications were reviewed by a second officer. ECF No. 12 ¶¶ 113, 115; *see also, e.g.*, Ex. 1 at 3 (initialing the affidavit); Ex. 2 at 5 (same). "[T]he fact that the officers sought and obtained approval of the warrant application from a superior" supports "the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause." *Messerschmidt*, 565 U.S. at 553.

Third, Summey executed the search warrant. Ex. 2 at 19 (recounting Summey's participation in the execution of Warrant 1). "[I]t is indicative of good faith when the officer who prepares an affidavit is the same one who executes a search." *Cotto*, 995 F.3d at 796.

Fourth, both affidavits tied Plaintiff to the attempted assault and detailed her recent digital and social media use and Summey's training and experience investigating similar cases. *See supra* § I.B.1.b. Based on these facts, a reasonable officer could have believed there was a fair probability that Plaintiff carried her cell phone to the protest and that evidence would be found on one or more of Plaintiff's digital devices that "would prove helpful in prosecuting" her for the attempted assault.

Messerschmidt, 565 U.S. at 551. Such evidence could help establish Plaintiff's identity as the attempted assailant or the planning for, intent behind, or reactions to, her conduct. *See, e.g.*, ECF No. 12 ¶ 42 (alleging that Plaintiff merely "dropped" her bike).

Fifth, it was objectively reasonable, based on common sense and practicalities of everyday life, to think that a media-savvy, "[p]rofessional truth teller" like Plaintiff, *see, e.g.*, ECF No. 12 ¶¶ 76, 108; Ex. 1 at 15 ("more than a decade of media and government career experience"), probably carried a phone with her to a protest and the phone probably would contain messages, photos, or data that would be relevant to her prosecution.

Sixth, with respect to Warrant 2, Summey confirmed that Plaintiff attended the protest and transmitted digital media from it. Ex. 2 at 19. Any reasonable officer would consider this fact strongly indicative of probable cause that Plaintiff's devices would contain material evidence.

The warrants were not "so obviously lacking in probable cause that the officers can be considered 'plainly incompetent' for concluding otherwise." *Messerschmidt*, 565 U.S. at 556. Because Plaintiff's allegations fail to meet the high bar for establishing that the warrants were so obviously defective, Summey is entitled to qualified immunity.

II. MOTION TO DISMISS BY THE UNITED STATES (Claim 4)[6]

The United States generally enjoys sovereign immunity from suit. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Congress has waived the United States' sovereign immunity through the Federal

[6] Pursuant to 28 U.S.C. § 2679(d)(1), "[u]pon certification by the Attorney General" that Summey was acting within the scope of his federal employment, the action against Summey "*shall be deemed* an action against the United States" (emphasis added), and "the United States Shall be substituted as the party defendant." The U.S. Attorney so certified. ECF No. 39-1. While Plaintiff intends to oppose the substitution of the United States, as of this filing, the action is "deemed" one "against the United States." 28 U.S.C. § 2679(d)(1).

Tort Claims Act ("FTCA") for the "wrongful act[s]" of its employees "if a private person, would be liable to the claimant" under the law of the state where the allegedly wrongful act occurred. *See* 28 U.S.C. § 1346(b)(1). It is the plaintiff's burden to establish subject matter jurisdiction. *Merida Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir. 2005).

A. The failure to exhaust administrative processes deprives this Court of jurisdiction.

To benefit from the FTCA's waiver of sovereign immunity, claimants must exhaust administrative processes with the appropriate federal agency before bringing suit in federal court. *See* 28 U.S.C. § 2675(a). Under Section 2675(a), no action may be filed against the United States "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." This presentment requirement is jurisdictional, must be strictly construed, and cannot be waived. *Bradley v. United States ex rel. Veterans Admin.*, 951 F.2d 268, 270 (10th Cir. 1991). To satisfy this requirement, a claimant must, among other things, provide (1) a written statement describing the injury to enable the agency to begin its own investigation and (2) a sum certain damages claim. *Id.*

Plaintiff has not presented an administrative claim related to her allegations against Summey to the FBI. **Exhibit 3**, Decl. of William L. Harris, ¶ 7.[7] Accordingly, her claim against the United States must be dismissed for lack of subject matter jurisdiction. *Pipkin v. U.S. Postal Serv.*, 951 F.2d 272, 273 (10th Cir. 1991) (affirming dismissal of FTCA claim under Rule 12(b)(1) for failure to exhaust); 28 U.S.C. § 2675(a).

[7] The Court may consider evidence in adjudicating a motion to dismiss for lack of jurisdiction. *Graff v. Aberdeen Enterprizes, II, Inc.*, 65 F.4th 500, 507 (10th Cir. 2023).

B. A "private person" would not be liable for violating the state constitution.

A "plaintiff must plausibly allege that 'the United States, if a private person, would be liable to the claimant' under state law both to survive a merits determination under Rule 12(b)(6) and to establish subject-matter jurisdiction." *Brownback v. King*, 141 S. Ct. 740, 749 (2021).

Claim 4 alleges a violation of Colo. Rev. Stat. § 13-21-131(1), which provides in relevant part that a "peace officer, as defined in section 24-31-901(3), who, under color of law, subjects . . . any other person to the deprivation of individual rights that create binding obligations on government actors secured by the bill of rights, article II of the state constitution, is liable to the injured party . . . ." A "peace officer" means "any person employed by a political subdivision of the state . . . , a Colorado state patrol officer . . . , and any noncertified deputy sheriff . . . ." *Id.* § 24-31-901(3). In other words, these statutes create a cause of action against officers employed by the state, a city, or a county—not private persons. Congress has not waived sovereign immunity for claims that a peace officer violated a right that a plaintiff enjoys against the government. *See* 28 U.S.C. § 1346(b)(1). Because Plaintiff does not allege that a private person could be liable for the claim asserted, the Court lacks subject matter jurisdiction over Claim 4.

III. MOTION TO DISMISS BY THE FBI (Claim 6)

In Claim 6, Plaintiff seeks injunctive relief against the FBI "ordering the return or destruction of Ms. Armendariz's digital data." ECF No. 12 ¶ 216. The claim should be dismissed because: (1) it is not unlawful for the FBI to possess evidence obtained lawfully; and (2) even if the warrants were defective, the First and Fourth Amendments do not require the FBI to dispossess itself of the electronic copies of Plaintiff's files. It bears clarification that Plaintiff does not allege that the government continues to possess her physical property—phones, computers, or hard

drives—but rather digital copies of files obtained from those devices. *See* ECF No. 12 ¶ 215.

First, the constitution does not constrain the government's possession of lawfully obtained evidence. *See Malik v. U.S. Dep't of Homeland Sec.*, 78 F.4th 191, 200-01 (5th Cir. 2023) (plaintiff was not entitled to "expungement" of electronic data when he did not show a constitutional violation); *Conyers v. City of Chicago*, 10 F.4th 704, 710 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1669 (2022) (the district court properly rejected a claim that the Fourth Amendment governed whether the city had to release lawfully seized property to the plaintiff); *Case v. Eslinger*, 555 F.3d 1317, 1330-31 (11th Cir. 2009) (Fourth Amendment not violated by retention of legally seized property); *Matter of the Search of Twenty-Six Digital Devices*, No. 21-SW-233, 2022 WL 998896, at *12 n.5 (D.D.C. Mar. 14, 2022) (courts have "reasonably refused to enlist the Fourth Amendment to serve as the constitutional guardian of such concerns"). For the reasons set forth in Part I.B.1, the warrants did not violate the constitution, and therefore the FBI's collection of evidence was lawful. There is no constitutional basis for ordering the FBI to destroy lawfully obtained evidence.

Second, even if the warrants were somehow defective, the FBI's retention of electronic copies of evidence obtained in violation of the Fourth Amendment does not violate the constitution. For example, the Supreme Court has long held that the government may use illegally obtained evidence for certain purposes. *See Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362-64 (1998) ("the governments' use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution"); *United States v. Calandra*, 414 U.S. 338, 349-50 (1974) (exclusionary rule does not apply to grand jury proceedings); *United States v. Janis*, 428 U.S. 433, 454 (1976) (exclusionary rule did not bar introduction of unconstitutionally obtained evidence in a civil tax proceeding). The Tenth Circuit recently ruled that evidence obtained from a defective warrant could

be used under the inevitable discovery exception, if law enforcement would have obtained a valid warrant had the initial warrant been denied. *See United States v. Streett*, 83 F.4th 842, 849-52 (10th Cir. 2023). Necessarily, then, the Fourth Amendment does not require the government to dispossess itself of unlawfully obtained evidence, because the constitution tolerates the *use* of that evidence for various purposes.

Finally, the Fourth Amendment does not govern whether the FBI has a duty to destroy electronic copies obtained from Plaintiff's devices. *See Winters v. Bd. of Cnty. Comm'rs*, 4 F.3d 848, 853, 856 (10th Cir. 1993) (analyzing an initial seizure under the Fourth Amendment but holding that the ultimate disposition of property had to comply with procedural due process); *Snider v. Lincoln Cnty. Bd. of Cnty. Comm'rs*, 313 F. App'x 85, 93 (10th Cir. 2008) (stating that a "seizure is a single act, and not a continuous fact," and analyzing the retention of property under procedural due process); *see also Conyers*, 10 F.4th at 710 (concluding that the government's retention of property "falls more naturally under the Due Process Clause of the Fourteenth Amendment, or perhaps the Takings Clause of the Fifth Amendment," and courts are "correct[to] reject[] the plaintiffs' Fourth Amendment theory"); *Denault v. Ahern*, 857 F.3d 76, 84 (1st Cir. 2017) ("where property is concerned, it would seem that the Fifth Amendment's express protections for property provide the appropriate framework," citing other U.S. Court of Appeals decisions). Claim 6 fails as a matter of law and should be dismissed.

CONCLUSION

The federal defendants respectfully request that the Court dismiss Claims 1, 4, and 6.

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CERTIFICATE OF SERVICE

I certify that November 20, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve all parties and counsel of record.

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