**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,
FEDERAL BUREAU OF INVESTIGATION, and
THE UNITED STATES OF AMERICA,

Defendants.

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**REPLY IN SUPPORT OF MOTION TO DISMISS (Doc. 49)**

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The federal defendants file this reply to "Plaintiff's Combined Response In Opposition to Motion to Dismiss . . . ," Doc. 60 (filed 12/18/23), and in support of their motion to dismiss, Doc. 49 (filed 11/20/23). The Court should grant the motion.

## I. The Court should construe Claim 1 as a *Bivens* claim.

### A. Summey was acting under color of federal law.

Plaintiff argues that Defendant Summey, a deputized federal task force officer ("TFO"), acted under color of state law for purposes of § 1983. Doc. 60 at 6-10.[1] But her factual allegations are insufficient to overcome the presumptions that: (1) "Congress did not intend for federal officers to be subject to § 1983 litigation'" and (2) "where federal and state actors come together, they are acting pursuant to supreme law." *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 870 n.8 (10th Cir. 2016).

Plaintiff cites out-of-jurisdiction cases suggesting that the color-of-law question turns on whether day-to-day operations were supervised by the federal or state government. Doc. 60 at 6-7. But in the Tenth Circuit, plaintiffs must "at least allege that federal and state actors shared a 'common, unconstitutional goal,' or point to a 'substantial degree of cooperative action' or 'overt' and significant state participation." *Big Cats*, 843 F.3d at 870. "Most courts agree that conspiracy with state actors is a requirement to finding that federal actors jointly acted under color of state law." *Id.* at 869. To so plead, plaintiffs must allege an "agreement to violate the law." *Id.* at 870.

Plaintiff's factual allegations, and incorporated documents, do not overcome the presumptions that Summey was acting under color of federal law. Plaintiff relies on

[1] The federal defendants cite to page numbers as they appear in the ECF headers.

allegations that Summey was employed by the CSPD, Doc. 60 at 8, but *all* deputized TFOs are employed by their local agencies, and that fact does not plausibly suggest that a TFO acted under color of state law. *See Colorado v. Nord*, 377 F. Supp. 2d 945, 949 (D. Colo. 2005) ("Courts have consistently treated local law enforcement agents deputized as federal agents and acting as part of a federal task force as federal agents."); *Wilson v. Price*, 624 F.3d 389, 392 (7th Cir. 2010) ("The mere assertion that one is a state officer does not necessarily mean that one acts under color of state law."). Here, Summey stated in his affidavits that he was "currently assigned" to the FBI Joint Terrorism Task Force, and he signed the affidavits as a "Task Force Officer." Doc. 49-1 at 3, 17; Doc. 49-1-at 5, 28; Doc. 12 ¶¶ 111-12. Additionally, whether the CSPD separately initiated a criminal case and whether Summey used local resources—including Defendant Ditzler to review state-court warrants—in the course of his duties, *see* Doc. 60 at 7, is irrelevant to whether those duties were federal in nature. The complaint suggests those duties were federal by alleging that (1) the FBI had been investigating "the Chinook Center and other activist groups," (2) the devices were sent to an FBI lab, and (3) Summey requested authority for the FBI to participate in the searches, implying federal interests in the search. Doc. 12 ¶¶ 25, 28, 127; Doc. 49-1 at 17; Doc. 49-2 at 28; *see also Boudette v. Sanders*, No. 18-cv-02420-CMA-MEH, 2019 WL 3935168, at *17 (D. Colo. Aug. 19, 2019) ("Where, as here, officers act in their capacity as DEA task force agents, they are acting pursuant to federal law."). Plaintiff's allegations are, at best, "merely consistent with" acting under color of state law, but "stop[] short of the line between possibility and plausibility of entitlement to relief," given

the dual presumptions *against* holding a federal agent liable under § 1983. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Big Cats*, 843 F.3d at 870 n.8.

Plaintiff also fails to allege an agreement between Summey and state officials to violate the law. Because Plaintiff does "not allege that there was an illegal conspiracy between state and federal actors" to achieve an unconstitutional goal, Plaintiff fails to state a § 1983 claim against Summey. *See Boudette*, 2019 WL 3935168, at *17; *Big Cats*, 843 F.3d at 870.

Plaintiff does not cite any cases construing a claim against a deputized federal TFO, who claimed to be acting under color of federal law, as a § 1983 claim. Plaintiff relies on *Halik v. Brewer*, No. 21-cv-00508-PAB-NYW, 2022 WL 488608 (D. Colo. Feb. 17, 2022), but in that case, the TFO admitted that he was acting under color of *state* law. *Id.* at *5 ("Officer Brewer contends that he 'was acting under color of state law at all times relevant to this litigation'"). Plaintiff also cites *Pettiford v. City of Greensboro*, 556 F. Supp. 2d 512 (M.D.N.C. 2008), but that case did not involve a deputized TFO. Even the *Pettiford* court recognized that, "[a]s federal agents, cross-deputized local law enforcement officers avoid prosecution under section 1983 because they are not acting under color of state law." *Id.* at 534-35.

Other courts have construed § 1983 claims as *Bivens* claims. *See Lee v. Vill. of Glen Ellyn*, No. 16-cv-7170, 2017 WL 2080422, at *3 & n.1 (N.D. Ill. May 15, 2017) (construing a § 1983 claim, on a motion to dismiss, as a *Bivens* claim, and collecting cases, stating that "any action taken on the part of the DEA agents is action under federal, not state law"); *see also* Doc. 49 at 4-5 (collecting cases). The Court should

construe Claim 1 as a *Bivens* claim.[2]

**B. Plaintiff's *Bivens* analysis is incomplete and improper.**

Plaintiff argues that she has stated a *Bivens* claim, because Claim 1 alleges "an unreasonable search and seizure." Doc. 60 at 10-11. But the Supreme Court has repeatedly rejected this approach of describing claims at too high a level of generality. *See, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020). Even cases that "arguably present 'almost parallel circumstances' or a similar 'mechanism of injury'" as prior *Bivens* cases are "not enough to support the judicial creation of a cause of action." *Egbert v. Boule*, 596 U.S. 482, 495 (2022).

Here, Plaintiff's claim arises in a new *Bivens* context. *See* Doc. 49 at 5-6. A case arises in a new context when, among other things, "there are 'potential special factors that previous *Bivens* cases did not consider.'"[3] *Id.* at 492. For example, as discussed in the motion to dismiss, this case presents a new context because the claim arises under the warrant provision of the Fourth Amendment, and *Bivens* concerned a warrantless arrest. Also, the claim addresses a new category of defendant; *Bivens* did not involve a deputized TFO or consider issues of intergovernmental relations

[2] To the extent the Court believes that the disposition of Claim 1 depends on whether Summey was acting within the scope of his federal employment, the Court should reserve judgment on this motion until the Court resolves Plaintiff's scope challenge. *See Hernandez v. Mesa*, 582 U.S. 548, 553 (2017) (describing "the *Bivens* question" as "antecedent").

[3] Plaintiff relies on *National Commodity & Barter Association v. Archer*, 31 F.3d 1521 (10th Cir. 1994), and *Groh v. Ramirez*, 540 U.S. 551 (2004), Doc. 60 at 10-11, but those cases predate the Supreme Court's modern *Bivens* jurisprudence and neither engaged in a new-context analysis. Whether a *Bivens* remedy existed was not a question presented in *Groh*. *See Groh*, 540 U.S. at 553.

implicated by joint task forces. For these reasons, and others discussed in the motion to dismiss, *see* Doc. 49 at 5-8, this case meaningfully differs from *Bivens*.

Plaintiff does not argue that the second prong of the *Bivens* analysis favors her position. That is, she does not argue the absence of any rational reason "to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Egbert*, 596 U.S. at 496. Because such rational reasons exist, *see* Doc. 49 at 6-8, no *Bivens* remedy may lie. Independently, an alternative remedial process precludes *Bivens* relief. *Id.* at 6-7; *see also Noe v. United States*, No. 23-1025, 2023 WL 8868491, at *3 (10th Cir. Dec. 22, 2023) ("where the government has provided an alternative remedy, a court generally should not recognize a *Bivens* claim even if the factual context is not meaningfully different from that in *Bivens*, *Davis*, or *Carlson*."). The Court should dismiss Claim 1.

## II. Summey is entitled to qualified immunity.

### A. Prong One: Plaintiff fails to state a constitutional violation.

As an initial matter, the Court should reject Plaintiff's request to substitute its opinion of the warrants for that of the issuing court. Doc. 60 at 12-13. "[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review." *Illinois v. Gates*, 462 U.S. 213, 236 (1983). The issuing judge's "determination of probable cause should be paid great deference by reviewing courts." *Id.* This is so because a "grudging or negative attitude by reviewing courts toward warrants" would have the perverse effect of encouraging police to "resort to warrantless searches, with the hope of relying on consent or some other exception to

the warrant clause that might develop at the time of the search." *Id.* The Court need only find that the issuing judge had a "substantial basis" for concluding that the search would uncover evidence related to the crime; "the Fourth Amendment requires no more." *Id.*; *see also United States v. Biglow*, 562 F.3d 1272, 1281 (10th Cir. 2009).

**1. The warrants are sufficiently particular.**

Plaintiff contends that the warrants at issue are insufficiently particular for two reasons: (1) the boundaries of "this investigation" could not be discerned from the warrant or affidavit; and (2) the keywords to be searched in Warrant 2 are overbroad.[4] Doc. 60 at 13-18. Plaintiff misreads the warrant and incorporated affidavit.

In the Tenth Circuit, particularity defects of a warrant may be cured by attaching and incorporating the supporting affidavit, as the warrants did here. *See United States v. Suggs*, 998 F.3d 1125, 1135 (10th Cir. 2021); *see also* Doc. 49-1 at 1 (incorporating and attaching the affidavit); Doc. 49-2 at 1 (same). The affidavits described in detail the attempted assault being investigated. Doc. 49-1 at 4-10; Doc. 49-2 at 6-12. They identified the criminal statute that Plaintiff violated. Doc. 49-1 at 17; Doc. 49-2 at 18. They stated that the items described "would be material evidence in the subsequent prosecution of Armendariz for attempting to assault Officer Spicuglia." Doc. 49-1 at 17; Doc. 49-12 at 28. This case is thus distinguishable from those in which warrants did not identify a specific crime or referred to a criminal statute that encompassed such a broad range of activity that the reference was, effectively, no limitation at all.[5] The warrants

[4] Plaintiff does not argue that Warrant 1 insufficiently describes the items to be seized or that Warrant 2 insufficiently describes the devices to be searched.

[5] Thus, *Voss v. Bergsgaard*, 774 F.2d 402 (10th Cir. 1985), is distinguishable. In *Voss*,

here instructed law enforcement to search for evidence of the specific attempted assault described in the affidavits.

Against this overarching limitation on the scope of the warrant, Summey narrowed the scope of Warrant 2 further: by file type, date, and/or keyword. These restrictions were *additional limitations* on the material that could be searched relating to the crime being investigated—not a fishing expedition that somehow expanded the warrant beyond the crime identified. In other words, both warrants limited their scope only to evidence relating to the attempted assault of Officer Spicuglia, and Warrant 2 *further* limited its scope to the subset of evidence enumerated in Attachment B, which reiterated that property to be searched must be "relevant to this investigation," referring to "the crime" identified in the affidavit.[6] *See* Doc. 49-1 at 17; Doc. 49-2 at 27-29. In the Tenth Circuit, this level of detail was not required in the context of a digital search. *See, e.g.*, *United States v. Burgess*, 576 F.3d 1078, 1092-94 (10th Cir. 2009); *see also* Doc. 49 at 9-10 (summarizing case law). The warrants were sufficiently particular.

It is also easy to see how the evidence sought could support a prosecution for

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the warrant authorized the government to seek "*any information pertaining to any federal crime*." 774 F.2d at 405 (emphasis added). While the warrant in *Voss* referenced 18 U.S.C. § 371, that statute was so broad and encompassed so much potential conduct that the reference was effectively "no real limitation." *Id.* Here, by contrast, the warrant was limited to the attempted assault of Officer Spicuglia. *See, e.g.*, Doc. 49-1 at 17; Doc. 49-2 at 28. Plaintiff's reliance on a *Taylor v. State*, 260 A.3d 602 (Del. 2021), which post-dates the conduct at issue, is similarly misplaced, because: (1) the warrants here affirmatively limited the files to be searched, unlike the warrant in *Taylor*; and (2) *Taylor* does not accurately reflect Tenth Circuit law on warrants for digital searches. *See* Doc. 49 at 9-10.

[6] Because the keywords define a subset of evidence of the crime of attempted assault, the keywords need not be supported separately by probable cause, contrary to Plaintiff's suggestion. Doc. 60 at 13.

attempted assault. Evidence of Plaintiff's close relationship with Mr. Walls, for instance—the man Officer Spicuglia was pursuing—could tend to prove that Plaintiff's actions were not a mere accident, as she continues to suggest. *See, e.g.,* Doc. 12 ¶ 119 (referring to the "bike dropping incident"); Doc. 60 at 7 ("dropping a bicycle"). Other evidence of Plaintiff's animosity toward law enforcement also could help establish a motive for her conduct or, again, the absence of an accident. *See Messerschmidt v. Millender*, 565 U.S. 535, 551 (2012) (approving the pursuit of evidence to "help to establish motive"). In the second affidavit, Summey explained that the evidence sought could reveal "any planning leading up to the crime, the period when the crime took place, and the subsequent taking credit for committing a violent act against a police officer." Doc. 49-2 at 27. The evidence also could establish Plaintiff attended the protest and was the biker in question. Doc. 49 at 13, 18-19.

Finally, Plaintiff's arguments about the First Amendment are misplaced. Doc. 60 at 13-15. In *New York v. P.J. Video, Inc.*, 475 U.S. 868, 875 & n.6 (1986), the Supreme Court rejected the notion that Plaintiff advances, *see* Doc. 60 at 14 (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)), that a warrant authorizing seizure of materials presumptively protected by the First Amendment should be governed by a different standard than other materials. *See also* Doc. 49 at 14. The warrants here were not premised on the content of disfavored speech. Plaintiff was investigated for attempted assault, and she pleaded guilty to obstructing a peace officer. Doc. 12 ¶ 119. The warrants do not raise the First Amendment concerns that Plaintiff suggests, because the investigation arose from illegal conduct, not speech.

**2. Probable cause supported the issuance of the warrants.**

Plaintiff argues that the only information supporting the seizure and search of Plaintiff's digital devices are "boilerplate statements." Doc. 60 at 19. But Summey's affidavits provided much more. He recounted his experience specifically related to bias-motivated crimes and crimes arising out of protest activity, including by members and associates of the Chinook Center. Doc. 49-1 at 3; Doc. 49-2 at 5. He recounted that, based on his training and expertise, he knew that people who engage in illegal activity related to protests frequently carry their phones, take photos of their activity, and message others about it, and provided general information about the data stored on phones or other devices. Doc. 49-1 at 17; Doc. 49-2 at 19-20. He described the incident with Officer Spicuglia, explaining his review of video showing Plaintiff's throwing of her bicycle at Spicuglia. Doc. 49-1 at 4-5, 9-10; Doc. 49-2 at 6-12. He recounted evidence showing Plaintiff's own recent use of digital and social media; her electronic communications with others related to community organizing; her social media connection and relationship to Walls; her appearance on a show co-hosted by him; her attendance at a protest promoted by him; and Walls's repeated statements supporting or approving of violence against police officers—which support a fair probability that Plaintiff communicated electronically about the incident. Doc. 49-1 at 10-17; Doc. 49-2 at 12, 20-27. In the second warrant, Summey added that Plaintiff's devices were recovered from her home and that Plaintiff's supervisor confirmed that Plaintiff shared digital media from the protest. Doc. 49-2 at 19. Summey's opinion, therefore, that there was a fair probability that Plaintiff's digital devices contained evidence that could be

useful in her prosecution was not an idle generalization based only on boilerplate language. All these facts, paired with common sense and the practical realities of modern cell-phone usage, all pointed to a *fair* probability that Plaintiff's devices contained evidence material to her prosecution. A ruling in Summey's favor here would not mean that police could seize and search cell phones in every case, based only on boilerplate language, as Plaintiff suggests. Doc. 60 at 20.

Courts have recently found that similar or less-detailed affidavits satisfied probable cause. *See United States v. Spruell-Ussery*, No. 22-cr-20027-01, 2023 WL 7696546, at *6 (D. Kan. Nov. 15, 2023) (holding that a TFO's "professional experience . . . may serve as a source of probable cause" to search cell phones, coupled with a rational connection between the type of crime and devices); *United States v. Skyfield*, No. 23-cr-569, 2023 WL 8879291, at *15 (S.D.N.Y. Dec. 22, 2023) (an officer's opinion about how digital devices are used supported probable cause, when the officer tied the defendant to the suspected crime and to the phone); *see also United States v. Espinoza*, No. 21-cv-281, 2022 WL 658791, at *3 (D. Neb. Jan. 28, 2022) (probable cause for a search warrant of digital devices was established by the officer's statements about her training and experience, paired with the fact that phones were recovered at an address where drugs were delivered).

Plaintiff's reliance on *Mora* is misplaced. *See* Doc. 60 at 12, 19, 21. In that case, the Tenth Circuit held that the assumption that the defendant's cell phone contained evidence did not justify a search of the defendant's *house*. *United States v. Mora*, 989 F.3d 794, 802 (10th Cir. 2021). The case did not suggest that a search of the

defendant's phone would have been improper. To the contrary, the Tenth Circuit implied that a search of the phone itself would be proper, based on assumptions that the phone contained relevant evidence. *See id.* ("Even if Defendant used a GPS, online banking, or other means of electronic record-keeping for his alien smuggling operation, we could reasonably infer that he did so on a cell phone."). Probable cause supported the issuance of both warrants here.

**B. Prong Two: Summey did not violate clearly established law.**

Even if both warrants were defective, Plaintiff bears the burden to establish that Summey violated clearly established law. *Hunt v. Montano*, 39 F.4th 1270, 1284 (10th Cir. 2022). To be "clearly established," a "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'"—a standard that requires "a high 'degree of specificity.'" *Dist. of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). In the Fourth Amendment context, a plaintiff must "identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment," and the precedent must place the unlawfulness of the officer's action "beyond debate." *Id.* at 64. "[A] body of relevant case law' is usually necessary to 'clearly establish the answer' with respect to probable cause." *Id.* The law must be "settled" by "'controlling authority' at the time of the incident, *i.e.*, a Supreme Court or Tenth Circuit published decision, or a 'robust consensus of cases of persuasive authority . . . .'" *Lewis v. City of Edmond*, 48 F.4th 1193, 1198 (10th Cir. 2022).

Plaintiff fails to identify controlling cases or a robust consensus of authority holding that an officer violated the Fourth Amendment in similar circumstances. That is,

Plaintiff fails to identify cases where an officer violated the Fourth Amendment by obtaining search warrants for digital devices based on affidavits that sought evidence of a narrow crime, supported by detailed facts regarding the defendant, the crime, and the defendant's use of digital devices. Here, Summey's affidavits tied Plaintiff both to the crime and the devices, recounted her recent cell phone and digital and social media use, described Plaintiff's connections to the person Officer Spicuglia was pursuing, and offered his opinion based on his training and experience about where evidence would be found. The cases Plaintiff cites would have offered little guidance to Summey in this situation and would not have placed the unlawfulness of this conduct beyond debate:

• *Massachusetts v. Sheppard*, 468 U.S. 981, 989-90 (1984), held that an officer was not required "to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested" and did not have "a duty to disregard the judge's assurances that the requested search would be authorized and the necessary changes would be made" to the warrant form.

• *Groh*, 540 U.S. at 558, 564, concerned a warrant to search for firearms that contained a "glaring deficiency"—the warrant "did not describe the items to be seized *at all*," only the *residence* to be searched—which would have been obvious upon a "cursory reading of the warrant" or "perhaps just a simple glance."

• *Cassady v. Goering*, 567 F.3d 628, 635 (10th Cir. 2009), concerned a warrant to search a farm for "[a]ny and all illegal contraband," "all other evidence of criminal activity," and any property "used to commit" a crime or that "would be material evidence

in a criminal prosecution in Colorado or any other state"; in other words, "the warrant authorized the seizure of *all* possible evidence of *any* crime in *any* jurisdiction."

- *United States v. Leary*, 846 F.2d 592, 601 (10th Cir. 1988), concerned a warrant related to an investigation of federal export laws, but the Tenth Circuit found that the export statutes potentially covered such a "broad range of activity" that reference to them did "not sufficiently limit the scope of the warrant." *See also id.* at 602 ("The warrant encompassed virtually every document that one might expect to find in a modern export company's office.").

- *United States v. Gonzales*, 399 F.3d 1225, 1227-28 (10th Cir. 2005), concerned a warrant to search a residence for firearms, sought after police found ammunition in the defendant's car, but which was defective because it never linked the *residence* to be searched to the defendant, the car, or the crime.

- *Jordan v. Jenkins*, 73 F.4th 1162, 1170-71 (10th Cir. 2023), concerned whether there was probable cause for a warrantless arrest, based only on the defendant's criticisms of police, *unaccompanied* by any physical act that interfered with an officer's official duties. *Jordan* also post-dates the relevant conduct in the present case by approximately two years, so it cannot be a source of clearly established law.

These cases are distinguishable on their facts—none concerned warrants to search digital devices for a narrow, specific crime—and by the alleged defects of the warrants. Plaintiff fails to carry her burden to identify even a single case that found an officer violated the Fourth Amendment under like circumstances. Against the backdrop of case law described above and in the motion to dismiss, *see* Doc. 49 at 9-14, the

unlawfulness of Summey's affidavits was not clearly established.

**Objective reasonableness.** Under the Supreme Court's familiar qualified immunity analysis, as embodied in *Wesby*, 583 U.S. at 63-64, the Court need go no further; Summey is entitled to qualified immunity. However, in the context of Fourth Amendment claims challenging probable cause, the Tenth Circuit also has stated that an officer "is entitled to qualified immunity if a reasonable officer could have believed that probable cause existed . . . ." *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014). An officer is entitled to qualified immunity if there was even "arguable probable cause" for the challenged search, meaning that "the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists." *Id.* Warrants usually confer a "shield of immunity" on officers. *Messerschmidt*, 565 U.S. at 547. The threshold for establishing the objectively unreasonable exception to this immunity "is a high one, and it should be." *Id.*

Plaintiff suggests that the Court should discount as irrelevant the fact that two different, neutral judges approved the two warrants, in part because Summey prepared the affidavits. Doc. 60 at 26 (citing *Malley v. Briggs*, 475 U.S. 335, 345 (1986), and *Groh*, 540 U.S. at 564). But the Supreme Court more recently stressed the relevance of this fact, clarifying that the holding in *Malley* "did not suggest that approval by a [judge] or review by others is irrelevant to objective reasonableness of the officers' determination that the warrant was valid." *Messerschmidt*, 565 U.S. at 555. Indeed, securing such approvals "is certainly pertinent in assessing whether [officers] could have held a reasonable belief that the warrant was supported by probable cause." *Id.*

"[T]he fact that a neutral [judge] has issued a warrant is the clearest indication" of objective reasonableness. *Id.* at 546. This is true even for an officer who prepared the warrants. *See id.* at 541, 543 (recounting that Messerschmidt prepared the warrants).

Plaintiff argues that no reasonable officer could have believed the warrant complied with the Fourth Amendment. Doc. 60 at 24-25. But such an officer would have had many reasons to believe that Summey's actions were objectively reasonable and that the warrants were supported by probable cause, including: (1) court approval of nearly identical affidavits by two different, neutral judges; (2) Ditzler's separate approval of the affidavits; (3) Summey's execution of the search warrants; (4) the detailed description tying Plaintiff to the crime and the place to be searched; (5) the detailed explanation of Plaintiff's active digital and social media use, including recent examples of a selfie Plaintiff took wearing her biking gear and communications related to organizing; (6) Plaintiff's media experience and savviness; (7) Plaintiff's relationship to the man that Officer Spicuglia was pursuing, suggesting a motive or lack of accident and a fair probability that devices would contain communications related to the incident; (8) Summey's explanation of his training and experience with crimes arising from protest activity, including those related to the Chinook Center and its associates, and how individuals use cell phones and digital media; (9) the overarching limitation on the scope of the warrants to the crime of attempted assault of Officer Spicuglia; (10) additional restrictions on the evidence to be searched in Warrant 2, by file type, date, or keyword; (11) common-sense understandings of how people like Plaintiff use cell phones and laptops, including those who engaged in illegal activity during protests;

(12) confirmation from Plaintiff's work supervisor that Plaintiff actually sent her digital media from the protest; and (13) case law identified above suggesting that courts may rely on officers' opinions, training, and experience, plus other minimal facts, to establish probable cause. *See* Doc. 49 at 10-14, 16-19; Doc. 49-1 at 1-18; Doc. 49-2 at 1-29.

The question is not whether the state-court judges "erred in believing there was sufficient probable cause to support the scope of the warrant [they] issued." *Messerschmidt*, 565 U.S. at 556. Rather, the question is "whether the [judges] so obviously erred that *any reasonable officer* would have recognized the error"—in other words, whether the warrant was "so obviously lacking in probable cause that the officers can be considered '*plainly incompetent*' for concluding otherwise," despite judicial approval. *Id.* (emphasis added). "The occasions on which this standard will be met may be rare, but so too are the circumstances in which it will be appropriate to impose personal liability on a lay officer in the face of judicial approval of his actions." *Id.* Plaintiff does not carry her heavy burden to establish objective unreasonableness. Because the limited warrants were not so obviously lacking in probable cause, Summey is entitled to qualified immunity under this standard, too.

## III. The Court lacks jurisdiction over Claim 4 against the United States.

Plaintiff argues that Claim 4 should not be dismissed because she did not know that Summey was a federal employee. Doc. 60 at 30. Courts have rejected this argument. *See, e.g.*, *Chin v. Wilhelm*, 291 F. Supp. 2d 400, 403-04 (D. Md. 2003) (dismissing claims without prejudice under the FTCA for failure to present an administrative claim, despite the plaintiffs' argument that they did not and could not

have known that the officer in question was a federal agent). Presentment of an administrative claim to the appropriate agency is jurisdictional. *See Est. of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 852 (10th Cir. 2005). Thus, the defense cannot be waived or excused. *Id.* Claim 4 must be dismissed for lack of jurisdiction.

The Court separately lacks jurisdiction over Claim 4 because Plaintiff does not allege that private parties could be liable for similar conduct. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994) (failure to allege that a private person would be liable under the same circumstances is a jurisdictional defect). Plaintiff argues that two criminal statutes prevent private parties from committing theft or cybercrime. Doc. 60 at 31-32. Setting aside the fact that plaintiffs must find an analogue in tort law, not criminal law, *see United States v. Agronics Inc.*, 164 F.3d 1343, 1346 (10th Cir. 1999), Plaintiff could not make out a claim for civil theft against Summey. Civil theft requires the plaintiff to show that property was taken by threat, deceit, or without authorization. *See Bermel v. BlueRadios, Inc.*, 440 P.3d 1150, 1157 (Colo. 2019). But here, Summey had authorization: the warrants. Civil theft also requires the defendant to act with intent to permanently deprive the plaintiff of the use or benefit of the item taken. *See* Colo. Jury Instr., Civil 32:4 (enumerating elements of civil theft and citing supporting authority). But Plaintiff fails to allege this element, because she does not contend that her devices continue to be held by Summey or the FBI. Other common-law torts, such as trespass, also require the plaintiff to show the defendant acted without permission. *See Hoery v. United States*, 64 P.3d 214, 217 (Colo. 2003). In analyzing a private-party analogue, the Court cannot apply a counterfactual set of facts, where Summey's conduct was

unauthorized. Plaintiff does not identify any grounds for holding a private person liable for Summey's conduct. Indeed, other courts have concluded that there isn't a private-party analogue to executing a search warrant. *See Washington v. Drug Enf't Admin.*, 183 F.3d 868, 873 (8th Cir. 1999) ("the application process for, and execution of, a search warrant has no private analogue"). The Court should dismiss Claim 4.

## IV. The Court should dismiss Claim 6 against the FBI.

Plaintiff does not identify a single case in which a Court ordered the government to return or destroy evidence lawfully obtained under the Fourth Amendment. Because the FBI obtained Plaintiff's data lawfully, as explained above, the Court should dismiss Claim 6. *See also* Doc. 49 at 10-15, 22.

Defendants cited caselaw from multiple circuits establishing that the Fourth Amendment does not govern claims for return or destruction of property. *See* Doc. 49 at 22-23. Plaintiff's efforts to distinguish Defendants' caselaw are unpersuasive. Plaintiff argues that cases establishing that the Fourth Amendment does not govern the return of property should not apply in the digital context, Doc. 60 at 28-29, but offers no reason why the constitution would make such a distinction. Plaintiff does not explain why the First, Fifth, Seventh, Tenth, and Eleventh Circuits, for example, are wrong.

Plaintiff relies primarily on *Lindell v. United States*, 82 F.4th 614 (8th Cir. 2023), but *Lindell* has limited relevance to this case. First, *Lindell* presented the question of whether the government could retain physical possession of Lindell's phone (and its data), even though no criminal charges had been filed against him. 82 F.4th at 617; *see also id.* at 622 ("[u]ntil criminal charges are brought, the property owner is to be

considered an innocent bystander"). This case raises separate concerns: whether, after a criminal defendant pleads guilty to a charge, the Fourth Amendment requires the government to disgorge itself of data obtained pursuant to a warrant. Second, the persuasive value of the divided panel's opinion is minimal, because, as the dissenting judge noted, the discussion of property retention "concerns a ruling that was never made on a motion that was never filed," and the matter was "not briefed" by the parties on appeal. 82 F.4th at 623 (Colloton, J., dissenting in part). Third, *Lindell* is at odds with the majority view that the disgorgement of property requires a threshold showing of unlawfulness. *See, e.g.*, Doc. 49 at 22. Finally, *Lindell* also stakes out a new minority position under the Fourth Amendment, contrary to Tenth Circuit law and that of other circuits, which analyze property disposition under procedural due process, not the Fourth Amendment. *See id.* at 23; *see also Thompson v. Whitman*, 85 U.S. 457, 471 (1873) (stating that the seizure of property "is a single act, and not a continuous fact").

Plaintiff asks the Court to take the extraordinary step of interfering with the records retention of the FBI, after a criminal defendant pleaded guilty, on the grounds that the Fourth Amendment *requires* such disgorgement. Similar claims could be echoed by countless convicted individuals who, like Plaintiff, opted not to challenge the propriety of warrants during his or her criminal prosecution in the first instance. The Court should reject the invitation.

* * *

The Court should dismiss Claim 1 against Summey, Claim 4 against the United States, and Claim 6 against the FBI.

Respectfully submitted on January 8, 2024.

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**CERTIFICATE OF SERVICE**

I certify that January 8, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve all parties and counsel of record.

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