IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02-Z-0473 (BNB)

DENVER JUSTICE AND PEACE COMMITTEE, INC. and
LUIS ESPINOSA-ORGANISTA,

Plaintiffs,

v.

CITY OF GOLDEN; et al.,

Defendants.

PLAINTIFF DENVER JUSTICE AND PEACE COMMITTEE, INC.'S RESPONSE TO JOINT MOTION TO DISMISS OR STAY

Plaintiff Denver Justice and Peace Committee, Inc. ("DJPC") respectfully submits the following response to the Joint Motion to Dismiss or Stay Plaintiffs' Second Amended Complaint (the "Motion") of defendants City of Golden, Jeff D. Kreutzer ("Kreutzer"), Kirsten J. Puttkammer, Becky J. Ryder, and John Evans (the "Golden Defendants"), and defendants David J. Thomas ("Thomas") and Mark Pautler ("Pautler") (the "District Attorney Defendants"; collectively, the "Moving Defendants").[1]

[1] The Moving Defendants do not seek dismissal of the claims of plaintiff Luis Espinosa-Organista. In fact, the defendants against whom Mr. Espinosa-Organista asserted his claims in Plaintiffs' proposed Third Amended Complaint, the City and County of Denver and Anthony Ortiz, do not join in the Motion. Because the Court has not yet granted Plaintiffs' Motion for Leave to File Third Amended Complaint, DJPC cites to the Second Amended Complaint ("Complaint") below when referring to its allegations.

INTRODUCTION

On December 14, 2000, Golden and Denver police officers raided the offices of DJPC and conducted an illegal search and seizure. They carted off hundreds of pages of materials fully protected by the First Amendment that are an integral component of DJPC's lawful advocacy of its political views and its political associations. The police took DJPC's membership lists, mailing lists, phone tree lists, leaflets, pamphlets, posters, newsletters, articles, and other expressive materials, none of which was evidence of any crime.

The Moving Defendants seek to justify their flagrant violation of DJPC's First and Fourth Amendment rights by feebly attempting to link the seized political materials to vandalism that occurred at Kohl's Department Store in Golden following an anti-sweatshop protest, based on invented facts nowhere found in the Complaint. Contrary to the Moving Defendants' baseless assertions, there is no linkage between the prosecution of Douglas Bohm ("Bohm") and this action. The Moving Defendants seek to distract this Court from the central issue in this litigation -- that the affidavit Kreutzer prepared and Pautler approved did not justify confiscating DJPC's membership lists and other expressive materials that are protected under the First Amendment.

First, none of the individual defendants is entitled to qualified immunity because, at the time of the search and seizure at DJPC's offices, the law was clearly established that the First and Fourth Amendments prohibit the seizure of membership lists and other expressive materials and, as a result, no reasonable officer could have believed that the warrant was valid. Nor could any reasonably well-trained officer have believed that the law permitted the seizure of the numerous expressive materials items not described in the warrant. Second, the Moving

Defendants have failed to demonstrate that DJPC's Privacy Protection Act claims are subject to dismissal.

Third, the District Attorney Defendants are not entitled to immunity. Because Pautler was acting in an investigative capacity, rather than as a courtroom advocate, he is not entitled to absolute immunity. Nor is he entitled to qualified immunity, because a reasonable government official in Pautler's position would have known that Kreutzer's affidavit failed to justify seizing membership lists and expressive material, and would have known that the warrant failed to meet the particularity requirement of the Fourth Amendment.

Fourth, neither Younger abstention or Colorado River abstention applies to this case because DJPC is not a party to any pending state court proceeding, nor does Younger require that DJPC initiate a state court action or intervene in one to which it is not already a party. Even if DJPC were to file a Rule 41(e) action in state court, as the Moving Defendants suggest, the state criminal court could not adjudicate DJPC's federal claims.

Fifth, the Moving Defendants have not made a sufficient case to justify a more definite statement under Rule 12(e). DJPC cannot be expected at this stage to know facts that are in the exclusive control of the defendants.

DJPC'S ALLEGATIONS

DJPC is a Colorado non-profit corporation that has operated in Denver for over twenty years. Complaint ¶ 5. It is an inter-faith, grass-roots organization that works for lasting peace and economic justice in Latin America. DJPC peacefully promotes its views through such lawful activities as public education, legislative advocacy, and non-violent campaigns. Id. ¶ 1. In its non-violent advocacy and action campaigns, DJPC condemns the spread of sweatshops

under the *maquila* model of development that depends on exploitation of third world workers. Id. DJPC conducts its advocacy through its newsletter, the Mustard Seed, through its website, and through speakers, articles, leaflets, letter-writing campaigns, peaceful picketing, legislative activity, and coalition work. Id. ¶ 7.

On December 14, 2000, defendant police officers took control of DJPC's office for three and a half hours, while they searched and seized hundreds of pages of DJPC documents. Id. ¶¶ 38, 39, 48. Police officers rummaged through closets, desk drawers, cupboards, file cabinets, and file folders. Id. ¶ 45. They removed items such as posters and handwritten pages from closets and photographed them. Id. The officers justified their search and seizure of such protected materials by referring to a search warrant (the "Illegal Search Warrant") that purportedly authorized seizure of specified property at DJPC's offices, including, but not limited to, the following:

- "Pamphlets, papers, and fliers that are protest related";
- "Posters that are protest related";
- "Videotape and still photographs of persons protesting any organization or business"; and
- "Membership lists for Denver Peace & Justice Committee."

Id. ¶ 36.

Not only did the police officers seize the items specified in the Illegal Search Warrant, but they also took a video titled, "We Said No Nukes," that belongs to American Friends Service Committee, whose offices DJPC shares, and numerous articles, posters, pamphlets,

correspondence, writings, mailing lists, media contact lists, phone tree lists, and other written materials not specified in the Illegal Search Warrant. Id. ¶ 46.

The Illegal Search Warrant was allegedly part of an investigation into reported vandalism at the Kohl's department store in Golden. During 2000, DJPC participated in a nationwide non-violent action campaign to provide support for workers who were organizing and fighting for improved working conditions at various factories in Nicaragua, including a Taiwanese-owned plant that produces blue jeans for Kohl's. Id. ¶ 23. The campaign included peaceful picketing and leafleting at Kohl's department stores around the country. Id. ¶ 25. As part of this effort, DJPC sponsored a peaceful rally at the Kohl's store in Golden on December 9, 2000. Id. at ¶ 27.

During the rally, participants sang carols, displayed signs, and peacefully distributed literature to shoppers and to others passing by outside Kohl's. Id. ¶ 28. They also asked shoppers to sign communications addressed to Kohl's management to express support for exploited workers. Id. A number of shoppers signed these letters. Id.

About half an hour after the rally and literature distribution had begun, a group of individuals dressed in Santa Claus costumes arrived at and entered the store. Id. ¶ 29. They allegedly spray-painted store merchandise. Id. Such individuals then fled. Id.

DJPC had no advance knowledge of, and neither condoned, authorized, approved, nor ratified the alleged vandalism. Id. ¶ 30. To the contrary, DJPC contemporaneously and subsequently strongly condemned the destruction of Kohl's property, and stressed that DJPC opposes any and all acts of law breaking or violence. Id. ¶ 31.

ARGUMENT

I. THE MOVING DEFENDANTS' DISTORTIONS OF DJPC'S ALLEGATIONS VIOLATE THE PRINCIPLE THAT THIS COURT MUST ACCEPT AS TRUE ALL ALLEGATIONS IN DJPC'S COMPLAINT, AND MUST DRAW ALL REASONABLE INFERENCES IN DJPC'S FAVOR.

The Moving Defendants ignore the proper standard for deciding a Rule 12(b)(6) motion through their inaccurate characterizations of DJPC's claims. As the Moving Defendants themselves concede, "[a] dismissal is appropriate 'only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle him to relief, accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff.'" Motion at 5, quoting Yoder v. Honeywell Inc., 104 F.3d 1215, 1224 (10th Cir. 1997) (emphasis added). Throughout the Motion, however, the Moving Defendants construe DJPC's allegations as negatively as possible, to the point of inventing facts to support Moving Defendants' position.

The Moving Defendants devote a page of the Motion to the argument that they should be permitted to present the Court with extrinsic evidence. While it is true that, on a motion to dismiss, the Court may consider documents "referred to in the complaint and . . . central to the plaintiff's claim," GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997), the indictment against Bohm that the Moving Defendants beg the Court to review is not referenced in the First Amended Complaint and is irrelevant to DJPC's claims. To the contrary, the central issues in this case turn are whether Kreutzer's affidavit contained sufficient facts to justify seizing DJPC's materials protected under the First Amendment, whether the warrant was invalid on its face, and whether the police officer defendants wrongfully confiscated expressive materials not even specified in the warrant. As noted above, even if this Court were

to accept the Moving Defendants' improper attempt to present the Court with an irrelevant document, the indictment does not establish any linkage between DJPC and Bohm that warrants dismissal or a stay of this action.

II. NONE OF THE DEFENDANTS IS ENTITLED TO QUALIFIED IMMUNITY, BECAUSE ANY REASONABLY WELL-TRAINED OFFICER WOULD HAVE KNOWN THAT THE CHALLENGED SEARCH AND SEIZURE VIOLATED CLEARLY-ESTABLISHED LAW

The defense of qualified immunity is not available when a reasonably well-trained officer would have known that an arrest or a search is not objectively reasonable. Ordinarily, an arrest or a search is objectively reasonable when it is authorized by a warrant issued by a neutral and detached magistrate. See United States v. Leon, 468 U.S. 897, 924 (1984). Reliance on a warrant is not objectively reasonable, however, when "a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." Malley v. Briggs, 475 U.S. 335, 345 (1986); Leon, 468 U.S. at 922 n.23.

Although Leon is a criminal case, in which the Court announced an "objective good faith" exception to the exclusionary rule, it also provides the standard for determining an officer's entitlement to qualified immunity when plaintiffs allege that their constitutional rights were violated by an arrest or search that is authorized by a warrant. See Malley, 475 U.S. at 344 ("we hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in Leon . . . defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest").

In Leon, the Supreme Court described four situations in which a police officer's reliance on a warrant is not objectively reasonable: 1) if the warrant is based on an affidavit containing intentionally or recklessly false statements of material facts; 2) if the magistrate "wholly

abandoned his judicial role"; 3) if the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and 4) when the warrant is so facially deficient, for example in failing to describe with particularity the place to be searched or the things to be seized, that the executing officers cannot reasonably presume that it is valid. Leon, 468 U.S. at 923. The third and fourth examples are particularly relevant in this case.

The substantive First Amendment law that governs this case dates as far back as NAACP v. Alabama, 357 U.S. 449 (1958), where the Supreme Court recognized that the Constitution requires heightened scrutiny when the government demands the membership list of an organization that espouses controversial views. Recognizing that "compelled disclosure of affiliation with groups engaged in advocacy" may constitute an "effective . . . restraint on freedom of association," id. at 462, the Court held that Alabama had not shown a sufficiently compelling interest in obtaining the records to justify the chilling effect on the right of association. Id. at 466; see Buckley v. Valeo, 424 U.S. 1, 64 (1976) ("Since NAACP v. Alabama [the Court has] required that the subordinating interests of the state must survive exacting scrutiny").

In Zurcher v. Stanford Daily, 436 U.S. 547 (1978), the Supreme Court analyzed the Fourth Amendment's application to materials protected by the First Amendment. In Zurcher, police had obtained a warrant to search the office of Stanford University's student newspaper, as part of an investigation into criminal activity that had allegedly taken place at a demonstration. The warrant authorized a search for photographs taken by the news staff while covering the

event. Although the Supreme Court upheld the search,[2] it reaffirmed prior cases holding that the Fourth Amendment must be enforced with "scrupulous exactitude" when "the materials sought to be seized may be protected by the First Amendment." Id. at 564. In such cases, "the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field." Id. As an example, the Court recalled its holding in Stanford v. Texas, 379 U.S. 476 (1965), which invalidated a warrant authorizing police to search a home for books, records, and other materials relating to the Communist Party. Because the Stanford warrant authorized police "to rummage among and make judgments about books and papers," the Court concluded that it was "the functional equivalent of a general warrant, one of the principal targets of the Fourth Amendment." Zurcher, 436 U.S. at 564.

Applying these First and Fourth Amendment principles, the Tenth Circuit made clear, in a series of decisions handed down in the 1980s and 1990s, that special considerations and heightened judicial scrutiny are required when law enforcement agencies seek information about the membership or expressive activities of advocacy groups that espouse controversial or unpopular viewpoints. See First Nat'l Bank v. United States, 701 F.2d 115, 117-18 (10th Cir. 1983) (government must show "compelling need" to justify a subpoena for documents identifying organization's members); Voss v. Bergsgaard, 774 F.2d 402, 405-06 (10th Cir. 1985) (overbroad search warrant particularly egregious when it implicates rights of speech and association); Grandbouche v. Clancy, 825 F.2d 1463, 1465-67 (10th Cir. 1987) (reversing

[2] The Court's decision that the search was constitutional prompted Congress to create supplemental protections in the Privacy Protection Act, on which DJPC also relies. See Section III below.

dismissal of lawsuit and remanding for determination whether First Amendment privilege shields plaintiff from defendant's discovery request for production of mailing list and membership list); Pleasant v. Lovell, 876 F.2d 787, 795 (10th Cir. 1989) (in rejecting qualified immunity defense, reaffirming that clearly established law requires government to demonstrate "overriding and compelling" state interest to justify compelled disclosure of group's members); Nat'l Commodity & Barter Ass'n v. Archer, 31 F.3d 1521, 1533 (10th Cir. 1994) (denying qualified immunity to government agents sued for seizing organization's membership list and expressive materials).

In this case, reasonably well trained officers in the defendants' positions would have known that the search and seizure was illegal, despite the warrant. See Malley, 475 U.S. 345; Complaint ¶¶ 37, 96-100. Reasonably well-trained officers would have known that clearly-established law prohibits the seizure of DJPC's membership list and the expressive materials listed in the warrant. No reasonable police officer could have considered the items referenced in the warrant, see Complaint ¶ 36, to be evidence of crime. See id. ¶ 37. Accordingly, the officers carrying out the search "cannot reasonably presume that [the warrant] is valid." Leon, 468 U.S. at 923. Reasonably well-trained officers should have known that the affidavit used to procure such a warrant was "so lacking in indicia" of the appropriate legal standard "as to render official belief in its existence entirely unreasonable." Id.; see Complaint ¶ 97.[3]

[3] In analyzing objective good faith, it is not relevant that the officers executing the warrant may have been unaware of the actual contents of the supporting affidavit. See Leon, 468 U.S. at 897 n.24.

Moreover, reasonably well-trained officers would have known that the warrant's vague descriptions, such as "pamphlets, papers, and flyers that are protest related," failed to meet the test of "scrupulous exactitude," Zurcher, 436 U.S. 564. Instead, the vaguely-worded warrant authorized police "to rummage among and make judgments about books and papers" and was "the functional equivalent of a general warrant, one of the principal targets of the Fourth Amendment." Zurcher, 436 U.S. at 564.

Reasonably well-trained officers would also have known that seizure of membership lists, phone tree lists, and expressive materials not listed on the warrant also violated clearly established law. Complaint ¶¶ 46, 99. See Pleasant v. Lovell, 876 F.2d 787, 803 (10th Cir. 1989), quoting LeClair v. Hart, 800 F.2d 692, 694-96 (7th Cir. 1986) ("law was clearly established that special agents of the IRS could not go beyond terms of search warrant and copy all financial records when warrant was far narrower"). As these allegations demonstrate, DJPC has adequately pleaded that defendants violated clearly established law and carried out an objectively unreasonable search.[4]

III. THE MOVING DEFENDANTS FAIL TO SUPPORT THEIR CHALLENGE TO DJPC'S PRIVACY PROTECTION ACT CLAIM.

In their introduction to the Motion, the Moving Defendants contend, without citing any legal authority, that DJPC has failed to state a claim against the City of Golden under the Privacy

[4] The Moving Defendants make the puzzling assertion that "[n]o causal connection exists between execution of this state court search warrant and any asserted rights of Plaintiff DJPC, and any effort to return any material seized at the direction of the state court." Motion at 3. DJPC has expressly pleaded that the search and seizure violated DJPC's First and Fourth Amendment rights, entitling DJPC to relief from this Court, including return of its membership lists and other papers. See Complaint ¶¶ 94-101; 104-05.

Protection Act. See Motion at 3. Because this argument is not mentioned again, it appears that the Moving Defendants have abandoned it. Such a course is wise, as DJPC has clearly alleged a claim against the City of Golden under the Privacy Protection Act. Complaint, ¶¶ 83-92, 103-06.

Congress enacted the Privacy Protection Act in reaction to the Supreme Court's decision in Zurcher, which reversed a District Court decision that extended special protection from search warrants to the news media and to other innocent third parties who were not suspected of crime. The Court acknowledged in Zurcher that Congress was free to establish by statute the protections that the Court declined to find in the Constitution. Id. at 567. Congress quickly accepted the invitation. Within a few weeks of the decision, both the Senate and the House of Representatives had begun subcommittee hearings on the protection of third parties' First and Fourth Amendment rights,[5] and the proposed remedial legislation had been introduced in the Senate.[6] The measure eventually adopted aimed to "afford[ ] the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment." S. Rep. No. 874, 96th Cong., 2d Sess., reprinted in 1980 U.S.C.C.A.N. 3950, 3950. President Carter signed the "Privacy Protection Act of 1980" into law on October 13, 1980, two years after the Zurcher decision. Privacy Protection Act of 1980, 42 U.S.C.A. § 2000aa (2001) ("Privacy Protection Act" or "Act").

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[5] See Justice Department Policy Concerning News Media Search Warrants: Hearing Before a Subcomm. of the House Comm. on Gov't Operations, 95th Cong. 208-15 (1978); Hearings on S. 3162 and S. 3164 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong. 129-30 (1978).

[6] See, e.g., S. 2164, 95th Cong., 2d Sess., 124 Cong. Rec. S8557 (daily ed. June 5, 1978); S. 3222, 95th Cong., 2d Sess. 124 Cong. Rec. S9452 (daily ed. June 22, 1978).

The Act supplements the First and Fourth Amendment protections discussed in the previous section by limiting the power of government officials to search for and to seize materials from persons and organizations that, like DJPC and the newspaper in Zurcher, are engaged in dissemination of information to the public. See 42 U.S.C. § 2000aa(a) ("a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication"); Steve Jackson Games, Inc. v. United States Secret Service, 816 F. Supp. 432, 434 n.1 (W.D. Tex. 1993) (electronic bulletin board operated by private business producing books, magazines, and box games protected by Privacy Protection Act). The Act protects "documentary materials" and "work product materials." 42 U.S.C. § 2000aa-7. The Act forbids government officials to search for or to seize such materials in the absence of certain limited exceptions. Id. §§ 2000aa(a)(1); (b)(1)-(4). When the Act applies, it requires that government investigators rely on a subpoena rather than on a search warrant.

DJPC is involved in disseminating information to the public and is therefore protected by the Privacy Protection Act. Complaint ¶ 84. Defendants knew or should have known of DJPC's protected activities. Id. ¶ 85. Without attempting first to obtain the materials by subpoena, Id. ¶ 87, defendants carried out a search and confiscated both work product materials and documentary materials. Id. ¶ 86. None of the exceptions to the Act applies. Id. ¶ 88.

The Act provides that governmental units are liable for violations of the Act carried out by their employees. 42 U.S.C. § 2000aa-6(a)(1). There is no qualified immunity defense for governmental entities in Privacy Protection Act cases, nor can such entities defend by claiming that their employees acted on a reasonable good faith belief that their conduct was lawful. Id. § 6(a)(c). Golden and Denver police officers carried out the illegal search and seizure while

acting within the scope of their employment. Complaint ¶ 89. Accordingly, DJPC has stated an actionable claim against the City of Golden and the City and County of Denver for violation of the Privacy Protection Act.

IV. DEFENDANT PAUTLER IS NOT ENTITLED TO EITHER ABSOLUTE OR QUALIFIED IMMUNITY

As an official seeking absolute immunity, Pautler "bears the burden of showing that such immunity is justified for the function in question." Burns v. Reed, 500 U.S. 478, 486 (1991). In most cases, "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." Id. at 486-87. Here, Pautler has not met his burden of proving that he is entitled to absolute immunity.

The Supreme Court has held that a prosecutor is absolutely immune only for those activities "intimately associated with the judicial phase of the criminal process," such as "initiating a prosecution and presenting the State's case." Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976). In contrast, as shown below, Pautler acted as an investigator in approving the Illegal Search Warrant, rather than as a courtroom advocate. Consequently, the doctrine of absolute immunity cannot protect Pautler. As Judge Miller explained in a recent opinion:

> Absolute immunity does not . . . extend to all prosecutorial functions. On the one hand, when the prosecutor is the advocate in the judicial proceeding he is protected by absolute immunity. On the other hand, when the prosecutor performs investigative services he or she is like a police officer and entitled only to qualified immunity. Therefore, to determine whether or not a prosecutor is absolutely immune depends upon the function performed and not simply his or her title.

Moore v. Gunnison Valley Hosp., 170 F. Supp. 2d 1080, 1084 (D. Colo. 2001) (internal citations and parentheticals omitted).

DJPC alleges that Pautler is liable for having reviewed and approved the affidavit used to obtain the Illegal Search Warrant. In Burns, the Supreme Court squarely held that prosecutors are not entitled to absolute immunity for their role in giving legal advice to the police in the investigative phase of a criminal case. Burns, 500 U.S. at 492-96. The Court has repeatedly reaffirmed that holding. See, e.g., Kalina v. Fletcher, 522 U.S. 118, 126 (1997) ("provision of legal advice to the police during their pretrial investigation of the facts [is] protected only by qualified, rather than absolute, immunity"); Buckley v. Fitzsimmons, 509 U.S. 259, 271 (1993) ("prosecutors are not entitled to absolute immunity for their actions in giving legal advice to the police"); see also Prince v. Hicks, 198 F.3d 607, 615 (6th Cir. 1999) (denying absolute immunity to prosecutor who erroneously advised police that there was probable cause for an arrest warrant); Benavidez v. Gunnell, 722 F.2d 615, 617 (10th Cir. 1983) (absolute immunity did not protect prosecutor sued for advising police to take action to retrieve children taken from foster home).

In Burns, the plaintiff accused the prosecutor of having caused her to be wrongfully arrested without probable cause. The investigating officers had consulted with the prosecutor about whether they had sufficient evidence for the arrest. When the prosecutor told the police they "probably had probable cause" for an arrest, they took the plaintiff into custody. Burns, 500 U.S. at 481-83. In rejecting the prosecutor's claim of absolute immunity, the Supreme Court said, "[w]e do not believe . . . that advising the police in the investigative phase of a criminal case is so 'intimately associated with the judicial phase of the criminal process' that it qualifies for absolute immunity." Id. at 493, quoting Imbler, 424 U.S. at 430. The Court noted that it would be "incongruous to allow prosecutors to be absolutely immune from liability for giving

advice to the police, but to allow police officers only qualified immunity for following the advice." Id. at 495.

The holding of Burns controls this case. Like the police officers in Burns, Kreutzer consulted a prosecutor (Pautler) for advice on whether his affidavit contained sufficient facts to meet the legal standard. Just as the prosecutor in Burns advised the police that they had probable cause to make an arrest, Pautler advised Kreutzer that his affidavit provided probable cause and sufficient legal grounds to seize the membership lists and expressive materials at issue here. Like the prosecutor in Burns, Pautler is at most entitled to claim only qualified immunity, not absolute immunity, for the acts and omissions involved in advising the police in the course of their investigation.

Pautler misstates the holding of Kalina v. Fletcher, 522 U.S. 118 (1997), which he cites erroneously for the proposition that a prosecutor is absolutely immune "for supporting an application for a search warrant." Motion at 19. First, the Kalina case had nothing to do with a search warrant. Second, the Kalina court held only that a prosecutor was absolutely immune for filing a charging document in court along with a motion for the issuance of an arrest warrant. In both cases, the prosecutor was acting in the role of advocate, carrying out activities that are "intimately associated with the judicial phase of the criminal process." Kalina, 522 U.S. at 125, quoting Imbler, 424 U.S. at 430. Rather than support the Moving Defendants' contentions, the Kalina decision reaffirmed the holding of Burns that "provision of legal advice to the police during their pretrial investigation of the facts was protected only by qualified, rather than absolute, immunity." Kalina, 522 U.S. at 126, citing Burns, 500 U.S. at 492-96.

Not only has Pautler failed to prove entitlement to absolute immunity, but his defense of qualified immunity fails for the same reason it fails for the officers who obtained and executed the Illegal Search Warrant on the basis of Pautler's advice. As explained in Section II above, a reasonably well-trained official would have known that the affidavit failed to provide legal grounds to justify the seizure of the membership lists and the additional expressive materials specified in the Illegal Search Warrant. See Malley v. Briggs, 475 U.S. 335, 345 (1986) (officer liable if "a reasonably well-trained officer . . . would have known that his affidavit failed to established probable cause and that he should not have applied for the warrant"); Nat'l Commodity & Barter Ass'n v. Archer, 31 F.3d 1521, 1533 (10th Cir. 1994) (clearly established law regarding seizure of membership list and other protected materials from organization advocating unpopular political views); Pleasant v. Lovell, 876 F.2d 787, 795 (10th Cir. 1989) (clearly established law required "overriding and compelling" state interest to justify forcing advocacy organization to disclose its membership).[7]

[7] In addition, Thomas is incorrect in asserting that DJPC failed to state a claim against him because it did not allege that a "policy or custom" of his office resulted in the violation of DJPC's constitutional rights. See Motion at 20. The "policy or custom" analysis on which he relies applies only to claims against municipalities. See Monell v. Dep't of Social Servs., 436 U.S. 658, 659 (1978). As a Colorado District Attorney, Thomas is a state officer. See Anderson v. County of Adams, 41 Colo. App. 441, 443, 592 P.2d 3, 4 (1978). Pursuant to the doctrine of Ex Parte Young, 209 U.S. 123, 167 (1908), DJPC seeks prospective relief against Thomas in his official capacity as an officer of the State of Colorado. See Roe #2 v. Ogden, 253 F.3d 1225, 1233 (10th Cir. 2001) (Eleventh Amendment and Section 1983 permit suit for prospective relief against state officer named in his official capacity). Accordingly, DJPC is not required to plead a "policy or custom" to assert a section 1983 claim against Thomas.

V. THIS COURT MUST EXERCISE ITS JURISDICTION AND REJECT THE MOVING DEFENDANTS' BASELESS CLAIM THAT ABSTENTION IS APPROPRIATE.

"Abstention 'is the exception, not the rule.'" Roe #2 v. Ogden, 253 F.3d 1225, 1232 (10th Cir. 2001), quoting Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992). Abstention "should be 'rarely . . . invoked, because the federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them.'" Id. The Moving Defendants fail to establish that this case presents one of the rare occasions in which a federal court should refuse to perform its adjudicative function.

The Moving Defendants argue that the pendency of a criminal prosecution against Bohm, in which DJPC is neither a party nor has any stake, somehow requires this Court to abstain from deciding the issues raised in DJPC's Complaint. The Moving Defendants' argument, however, is based on a series of misstatements of fact and misrepresentations of the legal issues involved in the two proceedings. Contrary to the Moving Defendants' assertion, neither Younger nor Colorado River abstention is appropriate.

A. The Moving Defendants' Abstention Argument Rests on Distortions.

The Moving Defendants' abstention argument rests on two false premises. First, the Moving Defendants erroneously suggest that adjudication of this action would somehow interfere with the State of Colorado's ability to prosecute Bohm. Second, the Moving Defendants contend, also erroneously, that the issues raised in this case will be resolved or could be resolved in the course of the criminal prosecution of Bohm. As explained below, the Moving Defendants' abstention argument collapses because both assumptions are false.

1. Adjudication of DJPC's Claims in this Court Would Not Interfere with the Pending State Court Prosecution of Bohm.

Without citation or authority, the Moving Defendants assert that the materials illegally seized from DJPC are "in the custody of" the state court, see Motion at 7 n.2, and that the state court has "exclusive jurisdiction" of them. See id. at 10, 12. These statements contradict the factual allegations of the Complaint, which state that the illegally seized materials are in the custody and control of the City of Golden and Thomas. Complaint ¶ 104. Moreover, there is no information before the Court to suggest that the illegally seized materials, which are not probative of any criminal activity, have been or will be introduced into evidence or otherwise filed in the state court. Under Colorado law, officers executing a search warrant are required to file only a return and an inventory of the materials seized -- not the materials themselves. See Colo. R. Crim. P. 41(d)(5)(VI); (f).

Moreover, returning the materials illegally seized from DJPC could not, as the Moving Defendants contend, "disrupt and undermine" the prosecution of Bohm. Id. at 10. Nothing in the relief requested in this action would prevent the prosecution in the Bohm matter from exercising its power, in an appropriate manner, to obtain by subpoena documents and other materials from DJPC (assuming that such materials could have any relevance to the prosecution of Bohm). Proceeding by subpoena would ensure that DJPC receives the procedural protections guaranteed under the Privacy Protection Act. See Section III above.

2. Contrary to the Moving Defendants' Contentions, the Factual and Legal Issues in the Two Cases Have No Similarity or Connection.

The Motion is riddled with blatantly erroneous assertions about the purported similarity of the factual and legal issues in this case and in the Bohm criminal prosecution. For example,

the Moving Defendants erroneously state that DJPC's claims depend "on determinations that can be made in the course of the state court proceedings," see Motion at 7; that determining whether Bohm is guilty "is critical to the resolution of the instant lawsuit," id. at 12; and that a possible conviction of Bohm would somehow resolve DJPC's claim of an illegal search and seizure. Id. at 13. The Moving Defendants conclude with the bald and baseless contentions that this action and the state court criminal proceeding "involve[ ] substantially the same issues" and that "[t]he ultimate determinations of whether or not Bohm is guilty of criminal mischief and conspiracy is [sic] central to resolution of the instant lawsuit." Id. at 14.

To the contrary, Bohm's guilt or innocence has no bearing on DJPC's illegal search and seizure claims. The issue in the state court criminal case is whether Bohm entered the Kohl's store and vandalized merchandise. The issues in this case turn on whether Kreutzer's affidavit contained sufficient facts to justify seizing DJPC's membership list and the other expressive materials that are vaguely described in the Illegal Search Warrant; whether the warrant was invalid on its face; and whether the police seized items that were not even listed in the already-overbroad warrant. A conviction or guilty plea cannot cannot retroactively confer legitimacy on a challenged search and seizure, which must be analyzed in light of the facts known at the time. The Moving Defendants' argument smacks of an "ends justifies the means" approach to illegal police conduct.

Moreover, the legality of the search and seizure at DJPC's office could not possibly become an issue in the pending state criminal proceeding. Even if, despite the lack of relevance or probative value, the prosecution did seek to use DJPC's materials as evidence against Bohm, he would lack standing to contest the legality of the seizure. In a motion to suppress, a criminal

defendant can argue only that his own Fourth Amendment rights were violated, not those of a third party. See Rakas v. Illinois, 439 U.S. 128, 134 (1978); People v. Spies, 200 Colo. 434, 439-40, 615 P.2d 710, 714 (1980).

B. Two Critical Elements of the Younger Abstention Doctrine Are Missing in this Case.

The abstention doctrine articulated in Younger v. Harris, 401 U.S. 37 (1971), cannot apply to this case because the first and third prongs of Younger are not satisfied. "Younger abstention is appropriate only if (1) a party asserts federal claims that have been or could be presented in ongoing state proceedings, (2) the state proceedings implicate important state interests, and (3) the state proceedings afford an adequate opportunity to raise federal claims. In all other cases, Younger abstention is not appropriate." Roe #2 v. Ogden, 253 F.3d 1225, 1232-33 (10th Cir. 2001).

1. Younger Does Not Apply Because DJPC Is Not a Party to an Ongoing State Court Proceeding that Could Resolve DJPC's Federal Law Claims.

Younger abstention is not appropriate here because DJPC is not involved in any pending state court proceeding, let alone one that would provide DJPC with an adequate forum for resolution of its claims arising from the illegal search and seizure. Younger applies only when the federal court plaintiff is a party to a state court proceeding — almost invariably a criminal prosecution or a quasi-judicial enforcement proceeding. Because the rationale for Younger abstention is preventing federal interference with state court proceedings, in almost every case in which Younger abstention has been upheld, the pending state court proceeding is "an enforcement action against the federal court plaintiff." Green v. City of Tucson, 255 F.3d 1086,

1094 (9th Cir. 2001) (en banc) (emphasis added).[8] In this case, Younger abstention is not appropriate because DJPC is not a defendant in any state court proceeding.

The Moving Defendants' abstention argument cannot be squared with the Supreme Court's decision in Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), limiting the Younger abstention doctrine to cases in which the plaintiff in the federal court action is also a party to a pending state proceeding.[9] Id. at 929-31. In Doran, three bar owners sought an injunction in federal court against the operation of a local ordinance prohibiting topless entertainment in bars. Although two of the owners had complied with the ordinance, the third owner violated it and was prosecuted in state court. See id. at 924-25. The Court held that Younger did not bar the former two plaintiffs, who were not defendants in any state court case, from pursuing their federal case. Id. at 928-29.

Other courts have similarly declined to apply Younger where the plaintiff in the federal action, as here, was a stranger to the state court proceeding. See, e.g., Robinson v. Stovall, 646 F.2d 1087, 1088-91 (5th Cir. 1981) (in federal court challenge to ordinance regulating public marches that had resulted in pending state court prosecution of several hundred supporters of an

[8] The single exception cited in Green, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987), is, in fact, consistent with the requirement that the federal plaintiff be a party to the pending state court case. Although there was arguably no state enforcement proceeding yet pending in the Pennzoil case, the federal court plaintiff was a party to the pending state court action, and the issue raised in the federal case also arose in the state proceeding. Id. at 4-7.

[9] Although the Supreme Court recognized that there are narrow circumstances under which the connection between the parties in the federal and state court proceedings is so close that Younger may apply, see Hicks v. Miranda, 422 U.S. 332, 348-50 (1975), such circumstances are not present in this case, as explained more fully below.

advocacy group, Younger did not bar the federal action of those members who had not been arrested); Grandco Corp. v. Rochford, 536 F.2d 197, 205-06 (7th Cir. 1976) (the Younger abstention doctrine does not apply to plaintiff who was not subject to a state criminal or quasi-criminal judicial proceeding); Ellwest Stereo Theatres, Inc. of Texas v. Byrd, 472 F. Supp. 702, 705 (N.D. Tex. 1979) (Younger did not apply to Section 1983 case involving unconstitutional taking of property where no prosecutions had been brought against plaintiffs, even though there were ongoing criminal prosecutions involving the same issues); LaBauve v. Louisiana Wildlife & Fisheries Comm'n, 444 F. Supp. 1370, 1376 (E.D. La. 1978) (Younger abstention does not apply to a plaintiff's federal claims when plaintiff was not the subject of state prosecution); Show-World Center, Inc. v. Walsh, 438 F. Supp. 642, 650 (S.D.N.Y. 1977) ("[s]ince Show-World neither is, nor ever was, a party to either State court action, and since there was no pending state court proceeding . . . to which the federal court should give deference, the Younger abstention is inapplicable").

Although Doran recognized that there "may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the Younger considerations which governs any one of them," Doran, 422 U.S. at 928, those narrow limited circumstances are not present here. In Hicks v. Miranda, 422 U.S. 332 (1975), state officials raided an adult movie theater, charged two employees with violating the state obscenity statute, and seized films as evidence. While the state court criminal case was pending, the theater owner filed suit in federal court seeking return of the films and an injunction against enforcement of the obscenity statute.

The Hicks Court explained that Younger applied because the owners' interests were so closely intertwined with those of their employees. Id. at 348.[10]

Unlike the tight relationship between the employer and employees in Hicks, DJPC has no interest in the prosecution of Bohm.[11] Unlike in Hicks, none of DJPC's employees faces criminal prosecution as, in effect, a proxy for DJPC. There is no prospect that DJPC would ever be prosecuted for the alleged criminal actions of Bohm. Bohm was neither an employee, an agent, nor even a member of DJPC. DJPC not only lacks a "substantial stake" in the case against Mr. Bohm, DJPC has no stake in the state court prosecution.

2. Younger Does Not Require DJPC to Initiate a Rule 41(e) Motion in State Court, Nor Would Such a Proceeding Provide an Adequate Forum for DJPC's Federal Claims.

This case does not satisfy the third condition of the Younger abstention doctrine, which, as noted above, requires that the pending state court proceeding afford the federal court plaintiff an adequate opportunity to litigate its federal claims. See Roe #2, 253 F.3d at 1232. The Moving Defendants distort the abstention doctrine in arguing, without any authority, that a federal court must abstain under Younger where the federal plaintiff could theoretically intervene in a pending state case to which it is not a party. Sitting en banc, the Ninth Circuit recently

[10] Furthermore, unlike in this case, the owners of the adult theater were named as defendants in the criminal case before the Supreme Court decided the case, thus reinforcing that the owners all along had possessed a significant stake in the outcome of the state court criminal prosecution against their employees. See id. at 348-49.

[11] The Moving Defendants falsely assert that "Plaintiffs may be asserting that Mr. Bohm ought not to face criminal charges derived from any evidence seized from DJPC's offices and that such evidence is unrelated to proof of criminal behavior." Motion at 13. DJPC makes no such argument.

considered and squarely rejected this proposition, holding that Younger applies only when the federal court plaintiff is already a party in a state court proceeding, and only when the federal court action would interfere with the state court case. See Green, 255 F.3d at 1099, 1103. Even if the federal court plaintiff could intervene in a pending state court proceeding that raises similar issues, which is not the case here, the Younger doctrine does not apply. See Green at 1103 ("a federal plaintiff has no obligation to intervene in state court litigation raising issues similar to those that the plaintiff wishes to raise in federal court").

Moreover, even if DJPC followed the Moving Defendants' suggestion and filed an action under Rule 41(e) to request return of the illegally-seized materials, DJPC would be unable to raise all of its federal claims, and the Jefferson County criminal court would be unable to provide DJPC with full relief. A state court proceeding under Rule 41(e) cannot provide DJPC with the declaratory judgment, damages, and reasonable attorney's fees that it seeks here pursuant to 42 U.S.C. § 1983 and the Privacy Protection Act.

C. The Colorado River Abstention Doctrine Does Not Apply Because this Case and the Bohm Criminal Prosecution Involve Different Parties, Issues, and Available Relief.

The Moving Defendants' reliance on Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), is equally misplaced. In Colorado River, the Supreme Court ruled that, in certain limited cases, a federal court may abstain where a parallel state court proceeding is pending. Id. at 815. Colorado River, however, applies only where the parties, issues, and available relief in the two cases do not significantly differ. I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F.2d 1541, 1551 (11th Cir. 1986). The courts look "for a substantial likelihood that the state litigation will dispose of all claims presented in the federal case."

Lumen Constr., Inc. v. Brant Constr. Co., 780 F.2d 691, 695 (7th Cir. 1986). As the Supreme Court has made clear, abstention under Colorado River is clearly improper "if there was no jurisdiction in the concurrent state actions to adjudicate the claims at issue in the federal suits." Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 559-60 (1983).

The Colorado River abstention doctrine does not apply to this case. As noted above, the parties, issues, and available relief in this case are significantly different from those in the Bohm case. DJPC is not a party to the Bohm prosecution, and Mr. Bohm is not a party in the case before this Court. None of the issues involved in the Bohm criminal case is present in this civil action. In the state criminal case, the key issue is whether Mr. Bohm is guilty of criminal mischief. That question has no bearing on the search and seizure issues before this Court. Similarly, the search and seizure issues in this case are not at issue in the state court criminal case. More importantly, as set forth above, the state court case could not possibly dispose of the claims that DJPC presents here. Even if DJPC were to file a Rule 41(e) motion in the state court case, the state court would lack jurisdiction to award the declaratory judgment, damages, and attorney's fees sought here. Accordingly, abstention is not appropriate under any theory.

VI. DJPC IS NOT REQUIRED TO MEET AN IMPOSSIBLE STANDARD OF PLEADING SPECIFIC FACTS SOLELY WITHIN DEFENDANTS' POSSESSION.

The Moving Defendants ask this Court to require DJPC to assert facts exclusively within defendants' possession. Few civil rights cases could survive a motion to dismiss if plaintiffs were required to know all facts prior to any discovery.

The Moving Defendants concede that motions for more definite statement are disfavored. See Motion at 16-17. The Federal Rules of Civil Procedure do not require detailed pleadings.

Conley v. Gibson, 355 U.S. 41, 47 (1957); see Fed. R. Civ. P. 8(a) (claims need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief"). The pleader need only place the opposing party on notice of the claims at issue and the basis for such claims. Conley, 355 U.S. at 47. Indeed, this type of notice pleading is possible because of liberal discovery rules and other pretrial procedures that allow the parties, after the pleading stage, to discover the details of the claims, and to narrow any disputed facts and issues. Id. at 47-48.

Rule 12(e) requires the filing of a more definite statement only "if a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading . . . ." FDIC v. Wise, 758 F. Supp. 1414, 1418 n.5 (D. Colo. 1991) (internal citations omitted) (Rule 12(e) motions properly granted only where "the complaint is so unintelligible that defendants cannot understand the allegations and are unable to respond"). A motion for definite statement fails where the complaint provides notice of the substance of the plaintiff's claims, and is sufficient to allow the opposing party to respond adequately. Id. at 1418. DJPC has pleaded, with as much specificity as possible given the information available to it, the role of each defendant in obtaining and executing the Illegal Search Warrant, and has described each resulting constitutional violation. No further allegations are required.

This is especially true, where, as here, the information that the Moving Defendants demand is exclusively within their control. Courts recognize that plaintiffs cannot be expected to know or to plead information within the control of an opposing party. See Anderson v. Cornejo, No. 97 C 7556, 1999 WL 35307, at *4 (N.D. Ill. Jan. 11, 1999) ("plaintiffs cannot perform the impossible" by identifying the conduct of each Customs Service agent who illegally searched 46

African-American women; plaintiffs need only identify, to the extent of their knowledge, which defendants were involved with each plaintiff and on what date). Courts are particularly reluctant to grant motions for a more definite statement in cases such as this, where the relevant information can readily be obtained through discovery. See Anderson, 1999 WL 353307, at *4 ("if further facts are necessary in order to raise the qualified immunity defense, defendants will have to wait until after sufficient discovery in order to raise qualified immunity on summary judgment or at trial").

The Moving Defendants mistakenly rely on Crawford-El v. Britton, 523 U.S. 574 (1998), where the Court in dicta raised the possibility that courts might require plaintiffs in certain civil rights cases to provide a more definite statement. Id. at 597-98. The Crawford-El dicta applies only "[w]hen a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive." Id. at 597. In this case, however, none of DJPC's claims requires proof of wrongful motive.

Crawford-El involved a claim that a prison official had retaliated against an inmate for the inmate's exercise of his First Amendment rights. Id. at 577-80. The inmate was required to demonstrate improper motive because the subjective motive for the retaliation was an essential element of the claim. Other types of cases involving an official's motive include "claims of race and gender discrimination in violation of the Equal Protection Clause, cruel and unusual punishment in violation of the Eighth Amendment, termination of employment based on political affiliation in violation of the First Amendment, and retaliation for the exercise of free speech or other constitutional rights." Id. at 587. In contrast, none of the claims in this action requires proof of the subjective motivation of any government officials. Instead, analysis of the claims in

which any defendant asserts qualified immunity focuses on whether the defendants' actions were objectively reasonable under the appropriate Fourth Amendment standard. Malley v. Briggs, 475 U.S. 335, 344-45 (1986). The cited dicta in Crawford-El therefore has no bearing here.

CONCLUSION

DJPC respectfully requests that the Court deny the Motion in its entirety.

Dated: July 5, 2002