<table>
<tr><td>COURT OF APPEALS,
STATE OF COLORADO

Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, Colorado 80203

Appeal from Mesa County District Court Judgment of Conviction and Sentence.
Honorable Matthew D. Barrett.
Case Number 22CR371</td><td rowspan="2"></td></tr>
<tr><td>Plaintiff-Appellee:
PEOPLE OF THE STATE OF COLORADO

v.

Defendant-Appellant
TINA PETERS</td></tr>
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<tr><td colspan="2">APPELLANT'S MOTION FOR BOND PENDING APPEAL - C.A.R. 9(b)</td></tr>
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Pursuant to C.A.R. 9(b) and C.R.S. §16-4-201.5, Appellant Tina Peters respectfully moves for release pending this Court's review of her conviction of four felony counts and three misdemeanors in the Mesa County District Court.

The attached Appendix contains documents from the district court record that support this motion, beginning with the transcript of the hearing October 3, 2024, at which the district court imposed sentence and orally denied bond pending appeal. References to the Appendix are cited "App. *"[1]

The district court sentenced Appellant to nine years of incarceration.[2] The court went on to deny orally her motion for bond pending appeal,[3] followed by a written order denying bond.[4] Appellant's convictions are for nonviolent offenses, she qualifies for bond under article II, section 19(2.5) of the Colorado Constitution, and she meets all criteria for bond listed in C.R.S. §16-4-202. [5] Defense counsel requested

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[1] Many of the district court rulings at trial were made during bench conferences which the court reporter at trial was unable to hear. Thus, rulings during bench conferences are not included in the Appendix.

[2] App. 108-109

[3] App. 100:15-24

[4] App. 110

[5] See Appellant's motion filed in the district court for Bond Pending Appeal supported by Exhibits A-E (App. 114-190); D.A. Response (App. 191-195); and Appellant's Reply (App. 196-198).

a brief stay of the sentence until the Court of Appeals could rule on Appellant's motion for bond, but the district court denied this request as well.[6]

Appellant asks this Court to reinstitute the bond in the amount of $25,000 cash or surety under which she had been released during the proceedings below.

PRELIMINARY STATEMENT

A. The criminal charges at issue were levelled against Appellant for her response as then-Clerk and Recorder of Mesa County to a software "upgrade" to the County's computer voting system mandated by Colorado's Secretary of State. Appellant engaged a cybersecurity expert, Conan Hayes, to make forensic images of the election management server (EMS) hard drive before and after the installation of the upgrade. Making the forensic images was not a crime, did not violate any state regulation, and did not cause any harm to the voting system hardware or software. Instead, the government teased its charges out of the fact that Appellant concealed Mr. Hayes' identity and brought him into the clerk's secure facility that housed the voting system.

Three of the Class 4 felony counts charged violations of C.R.S. §18-8-306 (attempting to influence any public official by "deceit … with the intent thereby to alter or affect the public servant's decision, vote, opinion, or action") with respect to

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[6] App. 104:14-18

two employees of the Secretary of State, and a Mesa County IT employee. The remaining felony charged Appellant with conspiring to commit criminal impersonation in violation of C.R.S. §§ 18-5-113(1)(B)(1) and 18-2-201. Appellant was convicted of three misdemeanors: official misconduct "to obtain a benefit … or maliciously cause harm to another" pursuant to C.R.S. § 18-8-404(1); failure to perform her duty under C.R.S. § 1-13-107(1); and a failure to comply with the Secretary of State's rules under C.R.S. § 1-13-114.[7]

B. By an order issued on October 3, 3024, the district court denied the Appellant's motion for bond pending appeal "[f]or the reasons stated on the record during today's proceedings, and for the additional reasons stated in the response."[8] In those proceedings, the district court made it clear that the central reason driving his refusal to continue Appellant's bond pending appeal was that he believed that she was a danger to the community because of statements she made about the vulnerabilities of the computer voting system:

> [Y]ou are a charlatan and you cannot help but lie as easy as it is for you to breathe. You betrayed your oath for no one other than you. And this is what makes Ms. Peters such a danger to our community. It's the position she held that has provided her the pulpit from which she can preach these lies, the undermining of our democratic

[7] *See* Notice of Appeal, at 6 (App. 242)
[8] App. 110

> process, the undermining of the belief and confidence in our election systems.[9]

But the district court did not stop there, continuing:

> So the damage that is caused and continue to be caused is just as bad, if not worse, than the physical violence that this court sees on an all too regular basis. And it's particularly damaging when those words come from someone who holds a position of influence like you. Every effort to undermine the integrity of our elections and the public's trust in our institutions has been made by you. You've done it from that lecturn. The voting public provided you with everything you've done has been to retain control influence. The damage is immeasurable. And every time it gets refuted, every time it's shown to be false, just another tale is weaved.[10]

With a final flourish, the district court concluded:

> [P]rison is for those folks where we send people who are a danger to all of us, whether it be by the pen or the sword or the word of the mouth.[11]

C. There is no allegation that Appellant benefited financially from her actions. Nor is there evidence that some other benefit motivated Appellant's conduct, notwithstanding the district court's over-the-top characterizations. Strikingly, the conduct on which the charges against Appellant are based are inexplicable, if not

[9] App. 99:18-24

[10] App. 100:4-14.

[11] App. 101:14-16.

bizarre, because, on the record formed by the district court, there is no rationale for her conduct.

But there is an elephant in the room. Or, more correctly, an elephant the district court vigilantly kept out of the room. That elephant is an important federal duty imposed on Appellant, then serving as the County Clerk and Recorder of Mesa County, and, as a result, the "chief election official for the county," C.R.S. § 1-1-110(3), and custodian of the county's voting system. C.R.S. § 1-5-605.5. That duty was unambiguous: "[e]very officer of election shall retain and preserve" for 22 months after an election for federal office "all records and papers … relating to any application, registration, payment of poll tax, or other act requisite to voting in such election." 52 U.S.C. § 20701.[12] The Justice Department understands this statute to require that covered election records be personally retained by election officials like Appellant or be kept secure by staff under their personal supervision.[13] Such records

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[12] App. 251

[13] The U.S. Department of Justice has underscored the importance of the federal records-retention statute, which was originally enacted in the Civil Rights Act of 1960: The Act protects the right to vote by ensuring that federal elections records remain available in a form that allows for the Department to investigate and prosecute both civil and criminal elections matters under federal law…. [T]he detection, investigation, and proof of election crimes – and in many instances Voting Rights Act violations – often depend[s] on documentation generated during the voter registration, voting, tabulation, and election certification processes.

include software and digital data generated during an election. "Jurisdictions must therefore also retain and preserve records created in digital or electronic form."[14]

Representatives of the computer vendor and the Secretary of State advised Appellant that the upgrade directed by the Secretary of State would delete a QR code program from the Dominion software. Deletion of the QR code would make it impossible to verify the results of the November 3, 2020 election and the April 6, 2021 Grand Junction municipal election.[15] Acting on what she reasonably believed to be her duty to preserve these election records under federal law, Appellant asked the Mesa County IT Department to oversee the installation of the upgrade, but they declined because they had no experience or training in the equipment involved.[16] Appellant replied that she would look elsewhere for help, and she engaged Mr. Hayes to make, under her supervision, forensic images of Mesa County's EMS hard drive before and after the software upgrade performed by employees of the Secretary.

Hayes also attended the voting system upgrade on May 25, 2021. At the time, there was no election rule or statute that prohibited a consultant selected by Appellant

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U.S. Department of Justice, *Federal Law Constraints on Post-Election "Audits,"* at 2 (July 28, 2021) (App. 252-259)

[14] App. 254.

[15] Declaration of Tina Peters, ¶¶ 7,8 (March 28, 2024) (App. 279)

[16] *Id.*, ¶ 15 (App. 280)

from attending the installation. Under Election Rule 20.5.3(b),[17] Appellant was entitled to have Hayes or whomever she chose attend the installation so long as she or a member of her staff supervised the individual.

The Secretary of State sent an email April 30, 2021, advising that only the clerk and two staff members could attend the software modification. The Appellant, as Clerk and Recorder, had legal control and responsibility for the premises and the computer equipment that was leased by Mesa County. The Secretary's email was advisory. It was not a lawfully promulgated election rule, statute, or official order of the Secretary of State.

As Clerk and Recorder, Appellant had authority to control the premises, and to decide who could attend the software modification. The jury should have been instructed that Appellant was justified in bringing Hayes into the room to observe what SOS employees did to County computers for which she was responsible, and that Appellant was not obligated to identify Hayes to enable him to attend the installation or to make the forensic images. The jury was not so instructed. The four felony convictions that are based solely on the misidentification of Hayes must be reversed.

[17] See Election Rule 20.5.3(b) that was in effect May 25, 2021, App. 283

Hayes insisted that his identity not be disclosed because he claimed he was hunted by criminal cartels for his role as a federal informant in taking down Back Page, which was an internet-based child trafficking operation. To protect Hayes' identity, Appellant arranged for a computer contractor named Gerald Wood to apply for and obtain a Mesa County keycard that would allow him access to the room where voting system equipment was stored. After Wood obtained the keycard from the County, he returned it to Appellant's deputy Belinda Knisley. Hayes then used Wood's keycard with Wood's consent. Hayes "badged in" to the room, but he did not disrupt or interfere with the work of SOS employees performing the software modification. He merely observed what happened. The district court excluded evidence of Hayes' involvement as a federal informant.

During the software modification, Appellant made a video recording and took photographs on her cell phone. Representatives from the Secretary's office and the vendor were aware that she was filming and did not object. No statute or regulation prohibited Appellant from making the video or taking pictures with her cellphone.

i. The Code Monkey Z video that prompted the investigation

In early August of 2021, without Appellant' knowledge or consent, an internet blogger using the name "Code Monkey Z" published part of the video and a photograph that showed partially redacted BIOS passwords that the government

claimed were used on Mesa County voting system computers. Publication of the video and photograph was not prohibited by law.

Witnesses from the Secretary of State, Dominion and the District Attorney's office told the jury that the release of the Code Monkey Z video on the internet was a "security breach" that precipitated the investigation of Appellant and led to her being charged. The District Attorney's lead investigator admitted that his investigation focused initially on whether release of the video constituted a cyber-crime (it did not). Defense experts who saw the video and the photograph testified they showed partially redacted passwords that could not be used to open the BIOS system, therefore the internet disclosure did not compromise the security of the voting system. The district court refused to allow the jury to see the Code Monkey Z video, or the redacted passwords. Because the jury was not permitted to see the real evidence, it had no way to evaluate the plausibility of the government's bogus claim that Appellant's conduct resulted in an internet "security breach."

ii. The forensic images made by Hayes

The forensic images made by Mr. Hayes (which did not disclose the votes of individual voters, nor any other confidential information) were submitted to cybersecurity experts for analysis. Their three detailed and voluminous reports confirmed that: (1) digital records that federal and state law required to be preserved of the 2020 presidential election and the April 2021 municipal election had been

deleted by the Secretary of State during the software modification; (2) unexpected databases had been created in both recent elections which masked the results of ballot tabulation and made it impossible to audit either election; and (3) Dominion voting system computers leased to Mesa County were equipped with 36 wireless devices that were capable of connecting to the internet during an election (It is illegal to connect a voting system to the internet during an election). The experts' forensic examination determined that the County's computerized voting system did not meet Colorado's certification requirements, and should not have been used in the election.[18] The district court precluded the experts from testifying.

Appellant submitted all three reports to the Board of County Commissioners and to District Attorney Rubinstein. In her cover letter submitting the first report to the Board, Appellant explained her actions:

> Enclosed is the first report from the cybersecurity experts who have analyzed thoroughly the two forensic images of the drive of the DVS Democracy Suite Election Management System in my office which we used for the management of the 2020 election. Because the report documents a substantial amount of data destruction during the May 25 "Trusted Build" conducted by the Secretary of State's office and the vendor, I wanted to get this in your hands immediately.

[18] *See Mesa County Colorado Voting Systems Report #1 with Forensic Examination and Analysis* (Sept. 17, 2021) (App. 284-365); *Mesa County Colorado Voting System Report #2: Forensic Examination and Analysis Report* (Feb. 28, 2022) (App. 369-512); *Mesa County Colorado Voting Systems, Report #3 Election Database and Data Process Analysis* (March 19, 2022) (App. 513-599)

> As you know, the legal duty to preserve election records falls solely to me and my office. "Extensive" amounts of data required to be preserved were instead destroyed, and done in a way that was totally beyond my control or knowledge. Among other things, these deletions would preclude a forensic audit of the last election. Thanks to the pre-Trusted Build image I had commissioned in May, these data have been preserved, in full compliance with my obligations under federal and state law, preserving the integrity of our county's election record archive and permitting a forensic audit if one were conducted.
>
> According to this report, the forensic examination has determined that this system and procedures "cannot meet the certification requirements of the State of Colorado and should not have been certified for use in the state." Obviously, this is highly relevant to any decision whether to continue to use these systems in our county.[19]

No law enforcement agency investigated the destruction of election records by the Secretary of State, even though destroying such records is a crime under federal and state law. Instead, the Department of Justice, FBI, the Colorado Attorney General (who provided two assistant attorneys general to lead the prosecution of Appellant as "deputies" of the Mesa County District Attorney), the Colorado Secretary of State, and District Attorney Dan Rubinstein used their overwhelming resources to prosecute and convict Appellant because she publicly questioned the security and reliability of the current voting system.

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[19] App. 284

D. The district court refused to allow Appellant to present any evidence as to why she took the actions she did or to discuss her understanding of her duty under federal law, evidence going directly to her *mens rea.* The court prohibited the jury from seeing 52 U.S.C. §20701, and it refused to instruct the jury on the duty which the statute imposed on Appellant. The district court barred Appellant from showing the jury the expert analyses she had obtained, and her sober submissions to the Board and DA, raising concerns about the vulnerability and integrity of the County's voting system, and whether it made sense to continue to use it in the future. (Appellant did not claim the results of the 2020 election were wrong or should in some way be overturned.) The district court refused to let Appellant raise Colorado's statutory affirmative defense that she acted in the lawful execution of a public duty. C.R.S. § 18-1-701. Similarly, the district court rejected Appellant's claim to immunity under the Supremacy Clause. *See Wyoming v. Livingston,* 443 F.3d 1211 (10th Cir. 2006).

The trial was completely one sided. The district court excluded almost all defense evidence, so the jury heard only the government narrative. During the prosecutor's opening statement, he referred to Hayes as a "cyber mercenary."[20] During the trial, Appellant attempted to rebut the prosecutor's negative characterization of Hayes by offering evidence that Hayes was a cybersecurity expert

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[20] App. 607:7

with a security clearance who had worked for government agencies. The court refused to allow the jury to hear this evidence.

The prosecutor also told the jury that Appellant formed a conspiracy to commit the crimes alleged at a meeting in her office on April 23, 2021. The prosecutor told the jury they would hear a 10 minute audio recording of a portion of the meeting that Stephanie Wenholz, who worked in the clerk's office, had secretly recorded during the meeting. The prosecutor told the jury that the Wenholz recording showed "the genesis of the conspiracy."[21] The jury listened to the Wenholz recording. Unbeknownst to the prosecutor, a recording had been made of the entire meeting, which included statements by Appellant that everyone must follow the law. When Appellant offered the properly authenticated exculpatory recording of the entire meeting into evidence, the district court refused to allow the jury to hear it or see a transcript.

After the jury rendered its verdict, one of the jurors told a defense investigator that someone had cut the phone lines to the juror's business on the first Friday of trial, which cost the juror $4,000. The juror wondered throughout the trial if Appellant had "targeted" the juror. The juror did not find out until after she voted to convict Appellant that it was a vagrant who cut her phone lines. The juror never

[21] App. 605:12-13

disclosed this information to the court or counsel. Based on the newly discovered evidence of probable juror bias, Appellant filed a timely post-trial brief requesting an evidentiary hearing, with a copy of the investigator's report and a transcript of the juror interview.[22] The district court denied Appellant's request for a hearing,[23] just as throughout the case it denied 39 other motions filed by Appellant's counsel.[24]

To be sure, these are all matters we will raise on the merits of this appeal. But we preview them here because, as we will detail below, nothing Appellant did warrants her continued incarceration while this appeal proceeds. The district court foreclosed Appellant from presenting all this evidence in her defense – which violated the most elementary right of a criminal defendant to explain why she did what she did. In doing so, the district court excluded the evidence that showed his intemperate remarks at sentencing were baseless.

JURISDICTION

"Colorado's appeal bond statutes authorize appeal bonds for all courts." *People v. Lewis* 555 P.3d 576, 579 (Colo. 2024). Once a trial court has refused release pending appeal and the case has been appealed, as is the case here, C.A.R. 9 (b) provides that "a motion for release . . . pending review may be made to an appellate court." The

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[22] See Suppressed Appendix 1-8

[23] See Suppressed Appendix at 9-10

[24] The list of 40 defense motions denied by the district court is at App. 608-609

motion is "determined promptly" on the record the parties present to the appellate court. *Id.*

RELIEF REQUESTED

Appellant asks this Court to reinstitute the bond in the amount of $25,000 cash or surety under which she had been released for 31 months during the proceedings below. Appellant respectfully requests that bond conditions include that Appellant may remain in her home in Grand Junction, continue her employment, travel outside the state for business purposes, and visit Appellant's 95 year old mother in Virginia.

ARGUMENT

1. The district court erred as a matter of law when it found that Appellant's statements made her a danger to the community.

The government may not prohibit or punish speech unless it contains a true threat of violence, or is directed to inciting imminent lawless action and is likely to incite or produce such action. *Counterman v. Colorado,* 600 U.S. 66, 72-73 (2023); *Brandenburg v. Ohio*, 395 U.S. 444, 447, (1969) (*per curiam*). Likewise, a court may not deny bond pending appeal based on statements that do not incite imminent lawless action. *Leary v. United States*, 431 F.2d 85 (5th Cir. 1970).

A jury convicted Timothy Leary of importing marijuana. The trial court imposed a ten-year sentence and denied Leary bond pending appeal. The trial judge found that Leary's advocacy made him a danger to the community:

> I think under section 3148 of Title 18 I would deny bond during the course of appeal. I have no doubt that the defendant would appear, but I have reason to believe that he, if at large, would pose a danger to other persons or to the community. I think his conduct over the past years, particularly since the time that he was tried here before, has been such as to lead me to believe, at least, that he has openly advocated a violation of these laws. He has preached it the length and breadth of the land, and I am inclined to the view that he would pose a danger to the community if released.

Id., at 86. The federal bond statute allowed the trial court to deny Leary bond on appeal if he posed a danger to the community. The Fifth Circuit held that the word "danger" must be construed to mean conduct, not advocacy which falls short of incitement to imminent unlawful conduct. *Id* at 89.

Here, as in *Leary*, the district court erroneously denied bond on appeal based on Appellant's advocacy, without any evidence that her statements incited imminent lawless action, and were likely to produce such action. For this reason alone, the order of the district court denying bond pending appeal must be reversed.

2. **The district court abused its discretion by concluding that Appellant "lied" about the risk of computer manipulation.**

The district court abused its discretion in denying Appellant's motion for bond pending appeal by basing its decision solely on its conclusion that Appellant had "lied" about the risk of computer manipulation in elections conducted by Mesa County, that this "lie" was somehow dangerous, and that Appellant posed a danger to the community because she was likely to continue expressing that view. It is elementary in our constitutional order that the government may not punish a person for harboring and advocating ideas, even ideas that most people consider dangerous. When there is legitimate debate about a subject, it is not a lie to assert either side of the debate. All statements are entitled to First Amendment protection unless those statements "convey a real possibility that violence will follow." *Counterman,* 600 U.S. at 74.

Danger to the-community is not among the factors in C.R.S. §16-4-202, but is a factor that a court must consider pursuant to Art. II, § 19(2.5)(b)(I) of the Constitution of Colorado in deciding whether to grant bail pending appeal. Appellant simply expressing her opinion about the lack of election security was not a "lie," and stating such an opinion does not and could not constitute a danger to the community.

Appellant's opinion concerning the unreliability of the computerized Mesa County voting system is supported by respected experts in the field of cyber security, including the three experts who analyzed the forensic images of the EMS server made by Hayes. The concern about the risk of computerized voting has been expressed by other responsible experts for decades. The Government Accountability Office published a report in September 2005 which concluded that all electronic voting systems had inherent security problems that "could allow unauthorized personnel to disrupt elections or modify data and programs that are critical to the accuracy of the voting process."[25]

In 2018, the National Academy of Sciences, in a "Consensus Study Report," recounted the scope of the risks of manipulation of election computer systems:

> Election tallies and reporting may . . . be affected by malicious actors.[26]

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[25] GAO, *Federal Efforts to Improve Security and Reliability of Electronic Voting Systems are Under Way, but Key Activities Need to Be Completed,* GAO-05-956, at 26 (Sept. 21, 2005).

[26] The National Academies of Sciences, Engineering, and Medicine, Securing the Vote: Protecting American Democracy, at 9 (2018), *available at* https://nap.nationalacademies.org/catalog/25120/securing-the-vote-protecting-american-democracy. This Consensus Study Report was a joint effort of the Committee on the Future of Voting: Accessible, Reliable, Verifiable Technology (co-chaired by Lee Bollinger, President of Columbia University, and Michael McRobbie (President of Indiana University), the Committee on Science, Technology, and Law (co-chaired by David Baltimore, President emeritus of the California Institute of Technology, and Judge David Tatel, U.S. Court of Appeals for the District of Columbia), and the Computer Science and Telecommunications Board (chaired by Farnam Jahanian of Carnegie Mellon University).

> Malware---malicious software that includes worms, spyware, viruses, Trojan horses, and ransomware---is perhaps the greatest threat to electronic voting.[27]
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> ***
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> Malware can be introduced at any point in the electronic path of a vote---from software behind the vote-casting interface to the software tabulating votes---to prevent a voter's vote from being recorded as intended.[28]
>
> ***
>
> Malware can also be used to disrupt auditing software.[29]
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> ***
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> Election administrators face a daunting task in responding to cyber threats, as cybersecurity is a concern with all computer systems.[30]
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> ***
>
> [T]here is no realistic mechanism to fully secure vote casting and tabulation computer systems from cyber threats.[31]
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> ***
>
> Complicated and technology-dependent voting systems increase the risk of (and opportunity for) malicious manipulation.[32]

The most definitive support for Appellant's statements can be found in the opinions of United States District Judge Amy Totenberg in *Curling v. Raffensperger*, who received testimony from several leading cyber experts on the vulnerabilities of Dominion computer election equipment. In her October 11, 2020, opinion, Judge Totenberg stated that

> [a] broad consensus now exists among the nation's cybersecurity experts recognizing the capacity for the unobserved injection of malware into

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[27] *Id.,* at 86.
[28] *Id.,* at 86-87.
[29] *Id.,* at 87.
[30] *Id.,* at 88.
[31] *Id.,* at 91.
[32] *Id.,* at 100.

> computer systems to circumvent and access key codes and hash values to generate fraudulent codes and data.

493 F.Supp.3d 1264, 1280 (N.D.Ga. 2020).

Judge Totenberg's opinion went on to conclude that "[t]he Plaintiffs' national cybersecurity experts convincingly present evidence that this is not a question of 'might this actually happen?'---but 'when it will happen." *Id.,* at 1342.

The district court abused its discretion by concluding that Appellant "lied" when she advocated a position shared by leading experts on the subject, and also shared by Judge Totenberg. The district court further abused its discretion when it denied Appellant's motion for bond pending appeal based on the conclusion that repeating such a "lie" constituted a danger to the community.

3. Because Appellant meets the constitutional and statutory criteria for granting bond pending appeal, the Court of Appeals should grant bond.

A. Constitutional provisions governing bond pending appeal.

Article II, section 19 (2.5)(a) of the Colorado Constitution authorizes a court to set bail pending appeal of a conviction pursuant to the terms enacted by the General Assembly, but it expressly prohibits bail for murder and other violent crimes. Appellant's conviction for non-violent crimes does not trigger this prohibition. Therefore, Appellant is eligible for bond under subsection (2.5)(a).

Section 19 (2.5)(b) goes on to set out a two-part threshold that must be met for bond to be granted. First, a court must find that the defendant is unlikely to flee and does not pose a danger to the community. Second, the court must find that the appeal is not frivolous or being pursued simply for delay.

The district court did NOT find that Appellant is likely to flee, and uncontradicted evidence shows that she is unlikely to flee. Appellant was released on bond for 31 months and appeared faithfully for every pretrial hearing, for trial, and for sentencing. While on bond, she complied with the district court's order to notify the court and counsel in advance of every trip she took outside the state of Colorado, which were many. Nor is there any evidence that Appellant's appeal is frivolous or a delaying maneuver, and the district court did not claim that it was.

Rather, in denying bail the district court focused exclusively on the purported danger of Appellant's statements to the safety of the community, venturing into an area of extraordinary First Amendment sensitivity, as we discussed above. Bounded by the safeguards of the First Amendment, for the district court's "dangerous speech" approach to pass muster as a justification for the continued incarceration of Appellant, the district court would need evidence that her statements incited imminent violence or unlawful action. *Counterman* 600 U.S. at 76; *Brandenburg*, 395

U.S. at 447; *Leary* 431 F.2d at 86. There is no such evidence.[33] The district court identified not one single statement made by Appellant that threatened any person, or incited others to commit imminent unlawful action. This is hardly surprising given that Appellant's speech, as described above, concerned vulnerabilities in Colorado's computer-based election system identified by cybersecurity experts that Appellant sought out to examine the facts. Appellant's statements – and the submissions she made to the County Board – were measured and consistent with her responsibilities as County Clerk.

The district court's rationale for denying bond pending appeal to Appellant does not pass muster under the principles of the United States and Colorado Constitutions. Appellant is eligible for release pending appeal, and there is no justification for continuing her incarceration during this Court's review of her case.

[33] At the sentencing hearing October 3, 2024, Matt Crane, who is the executive director of the Colorado County Clerks Association, claimed that "In a real and specific way, her actions have led directly to death threats and general threats to the lives of the families of the people who work in our election. She has knowingly fueled the fire within others who choose threats as a means to get their way. . . . In my role, I have received death threats and most painfully have had individuals motivated, at least in part by Tina's actions, threatening the lives of my wife and my children." (App. 53:18-54:7). Mr. Crane's allegations, even if true (which they are not), do not identify any specific statements of Appellant, much less any statement that would survive the test of *Brandenburg* (statements capable of inciting others to commit imminent unlawful action) or *Counterman* (statements that convey a real possibility that violence will follow).

B. Statutory provisions governing bond pending appeal.

C.R.S. §16-4-201.5 codifies the constitutional provisions of Article II, section 19(2.5). Appellant was not convicted of any of the offenses listed in subsection (1) of the statute. She is unlikely to flee, and she does not pose a danger to the safety of any person or the community, so she is eligible for bond under subsection (2)(a) of the statute. Her appeal is not frivolous or pursued for purpose of delay, so she is eligible for bond under subsection 2(b).

C.R.S. § 16-4-202 requires the court to consider nine factors for granting bond on appeal. We address the factors in order.

a. The nature and circumstances of offense and sentence imposed

As we explained in the Preliminary Statement, this is an appeal by an elected county clerk and recorder who believed she was obeying federal and state law when she investigated the destruction of digital election records on the county voting system for which she was responsible.

All seven felony charges arose out of Appellant's misrepresenting Hayes' identity as part of her investigation into the destruction of digital election records. The district court ruled that Appellant had no authority to investigate.[34] The court refused to instruct the jury on Appellant's affirmative defense of execution of a public

[34] App. 98:15-17

duty and excluded most of Appellant's proffered evidence that supported the affirmative defense.

Appellant was convicted of three counts of attempting to influence a public servant by deceit (F4), and one count of conspiracy to commit criminal impersonation (F6). For the felony counts, the district court sentenced Appellant to a total of 8.5 years. On the misdemeanor counts, the court sentenced Appellant to a total of six months in the Mesa County Detention Facility. The total sentence is nine years.

b. and c. Family, character, reputation, employment, mental condition, and ties to community

Appellant is 69 years of age and has resided in Mesa County for 20 years. The presentence investigation confirmed that she is employed and owns her home. Prior to current employment, she served as County Clerk and Recorder. Before winning election to that office, she and her late husband of 35 years operated a construction business. Prior to that, she worked as a flight attendant. She is the gold star mother of a Navy SEAL who died tragically on Memorial Day, 2017.

Studies published by the National Institute of Corrections and the Journal of Gerontological Nursing show that persons who are incarcerated above age 55 suffer

accelerated aging and die more rapidly.[35] How can it be fair to leave a 69 year old woman, with no prior criminal history, who is still being monitored for lung cancer and is being treated for fibromyalgia,[36] and whose convictions likely will be reversed on appeal, to die or languish in prison, while her appeal is being considered? See *Smalldone v. People*, 385 P.2d 127, 128 (Colo. 1963), holding that the district court abused its discretion by denying bond pending appeal when there were serious questions involving the defendant's constitutional rights, and the denial of bond necessarily required defendant to serve his sentence before the appellate court would be able to decide the merits of his appeal.

d. Past criminal record and record of appearance at court proceedings

Appellant was released on $25,000 surety bond on March 10, 2022. For the next 31 months, Appellant faithfully appeared for all pretrial hearings, trial, and sentencing. While on bond, Appellant provided the district court and prosecutors advance notice of all out of state travel. The surety consented to continuation of bond pending appeal, as required by C.R.S. §16-4-201(1)(c).[37]

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[35] https://nicic.gov/resources/Aging in Prison | National Institute of Corrections; https://doi.org/10.3928/00989134-20230209-02
[36] See letter of Scott Rollins, M.D. (App. 137)
[37] App. 120

e. Any intimidation of witnesses or likelihood of future harm or threats to participants in her trial

There was no evidence of intimidation or harassment of witnesses or of any likelihood that it would occur in the future.

f. Any other charges against Appellant and potential sentences should she be convicted

On February 7, 2022, Appellant attended a pretrial hearing for a co-defendant, Belinda Knisley. The district attorney, Dan Rubinstein, personally accused Appellant in open court of recording the hearing on her iPad.[38] Appellant denied using her iPad to record the proceedings.[39] The district attorney brought a contempt proceeding based on allegations that Appellant recorded part of the judicial proceeding on her iPad and then lied to Judge Barrett when she denied it. In his deposition, the district attorney admitted that he had "no idea" whether the iPad was recording or not.[40]

On February 8, 2022 the district attorney obtained a warrant to seize the iPad. Appellant was convicted by a jury of obstructing police officers during their seizure of

[38] App. 122:7-8
[39] App. 122:12-17
[40] App. 124:13-15

the iPad. She was sentenced to four months of home detention, with which she complied fully.[41]

The government kept the iPad for 15 months, but never searched it to see if it contained a recording of the judicial proceeding. After the contempt hearing, the government returned the iPad to Appellant's counsel, who submitted the iPad to forensic experts. The experts examined the iPad, and determined that it contained no recording of a judicial proceeding on February 7, 2022, and that no such recording had been deleted from the iPad.[42] The contempt adjudication is on appeal in case number 2023CA1073 and is scheduled for oral argument December 3, 2024. Appellant appeared for all proceedings in the contempt case.

g. The circumstances of any sentence that has been stayed pending appeal

There are no sentences that have been stayed pending appeal.

h. The likelihood that Appellant will commit new crimes during the pendency of appeal

There is no likelihood that Appellant will commit crimes while this appeal is pending. The convictions in this case are for acts committed by Appellant in her official capacity as the elected Clerk and Recorder of Mesa County. She no longer

[41] PSI at 7 (App. 207)
[42] Archer Hall Report of Forensic Examination (App. 125-136)

holds that office, so she cannot re-offend. She had never been accused of any crime prior to the dates of offenses alleged in this case. The district court acknowledged that Appellant had "low LSI scores," meaning low probability of committing new offenses.[43] Appellant is gainfully employed and financially responsible. The presentence investigation included five letters from family members and friends who attested to Appellant's good character and asked for leniency.[44] Fifty other people wrote letters to the district court vouching for her integrity.[45]

i. Appellant's likelihood of success on appeal

A primary basis of Appellant's appeal is that the district court denied her due process of law by refusing to allow her a meaningful opportunity to present a complete defense. *California v. Trombetta,* 467 U.S. 479, 485 (1984). Appellant relies on several individual rulings by the district court, each of which justify reversal of her conviction, but she also relies upon the cumulative effect of those rulings as denying her right to present a complete defense to the jury. *See Chambers v. Mississippi,* 410 U.S. 284, 294 (1973). The district court acknowledged that this appeal may result in reversal.[46]

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[43] App. 101:5. See pre-sentence investigation report at 3, (App. 203)
[44] App. 228-236
[45] App. 137-190
[46] App. 100:19

Appellant was denied the right to have the jury instructed that she was executing a public duty, which is an affirmative defense provided by Colorado statute. C.R.S. §18-1-701. At the time of the actions for which she has been convicted, she was an elected public officer of Mesa County---the County Clerk and Recorder, as well as the designated election official of the County---responsible under federal and Colorado statutes for preserving the records of elections. 52 U.S.C. §20701; CRS §1-7-802.

As Appellant argued, *supra,* the lack of a legally authorized requirement that Appellant identify individuals who had access to the secure election area, the four felony convictions based on the misidentification of Hayes must be set aside.

The district court concluded even before trial:

> So whether the machine worked or not doesn't really matter. Whether the image taken was accurate or not doesn't really matter. Whether she had a duty to take the image, make the image in the first place doesn't really matter when it relates to the charges here…. [I]t's the acts that led up to the taking of the image that matters as it relates to the criminal intent.[47]

The jury was entitled to see 52 U.S.C. §20701, which imposes a duty on all election officials, including both Appellant and the Secretary, to preserve election records. The district court ruled that the jury could not see a copy of the statute, and it refused

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[47] July 19, 2024, hearing, at 33 (App. 603:1-15)

to instruct the jury on the federal duty to preserve records. The district court also rejected Appellant's attempt to submit a declaration of Conan Hayes that explained why Appellant was protecting his identity. The court's rulings prevented the jury from knowing that Appellant was acting pursuant to a duty imposed by law. The jury should have been allowed to see the full picture and to understand Appellant's motivation—her *mens rea*. By arbitrarily excluding evidence of intent, the district court denied Appellant her due process right to present a complete defense.

The denial of Appellant's introduction of the three reports by certified cyber experts was particularly telling. These demonstrated that the Secretary of State deleted election records in violation of law, that Appellant's concern about the security of the Dominion computerized voting system was valid, and that her actions to monitor the actions of the Secretary and Dominion personnel during the entire process were legally justified.

The district court ruled, "Your position as a clerk and recorder, a constitutional position, does not provide you with a means to do your own investigation."[48] Appellant asserted her right to investigate in these circumstances. *See Irizarry v. Yehia,* 38 F.4th 1282, 1289-92 (10th Cir. 2022) (First Amendment right to film and record governmental activities). She also asserted the right to use deception in conducting

[48] App. 98:15-17

her investigation, as the law has long permitted.[49] See *Lewis v. United States,* 385 U.S. 206, 210 (1966); *People v. Morley,* 725 P.2d 510, 515 (Colo. Sup. Ct. 1986) (*en banc*) ("While the undercover operation was itself built on deceit, governmental activity in the pursuit of crime 'is not confined to behavior suitable for the drawing room.'"); *United States v. Murphy,* 768 F.2d 1518, 1529 (7th Cir. 1985) ("In many categories of cases it is necessary for the agents to commit acts that, standing by themselves, are criminal."). The use of deception to investigate criminal and other illegal activity is permitted to individuals other than traditional police officers and undercover agents. *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 373 (1982) (Private testers who had no intention of buying or renting property, and who approached real estate agent posing as potential buyers or renters for the purpose of investigating racial discrimination, were permitted to sue.); *Gidatex, S.r.L. v. Campaniello Imports, Ltd.,* 82 F.Supp. 2d 119, 122 (S.D.N.Y. 1999) (private investigators posing as consumers, who recorded telephone conversations with defendant's employees, deemed engaged in an accepted investigative technique, not misrepresentation).

It was reversible error for the district court to reject Appellant's motion to dismiss on the grounds that she had a right not to be tried by the Mesa County District Court based on her immunity under the Supremacy and Privileges or

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[49] Partial transcript August 9, 2024 (App. 603:1-25)

Immunities Clauses of the United States Constitution. ***Cunningham v. Neagle,*** 135 U.S. 1, 75 (1890); ***Wyoming v.*** *Livingston,* 443 F.3d 1211, 1213 (10th Cir. 2006).

The court clearly erred by excluding the evidence of the federal statutory obligation imposed on Appellant by 52 U.S.C. §20701, but her duty under that statute was inescapable. It was a duty expressly imposed on all election officials, including the Colorado Secretary of State. In executing that public duty, Appellant not only had the right to assert the affirmative defense provided by C.R.S § 18-1-701, but also had the right not to be tried in a Colorado court based on her federal immunity under the United States Constitution for actions that are reasonably necessary to carry out their federal duty. ***Livingston,*** 443 F.3d at 1227-28; ***United States v. Moll,*** 2023 WL 2042244, at *7 (D. Colo. Feb. 16, 2023). Appellant moved to dismiss the indictment claiming immunity pursuant to the Supremacy and Privileges or Immunities Clauses,[50] but the court denied that motion.[51]

"It is the right and duty of the national government to have its Constitution and laws interpreted and applied by its own judicial tribunals." *Mayor & Aldermen of the City of Nashville v. Cooper,* 73 U.S. 247, 253 (1867). The district court erroneously concluded that Appellant was not entitled to federal immunity because she was not a

[50] App. 260-277

[51] App. 278

federal officer or employee.[52] Immunity is predicated on whether a federal duty has been imposed on the individual claiming immunity, not on their employment status. Private citizens have been held to enjoy such immunity. *E.g., Hunter v. Wood,* 209 U.S. 205, (1908); *Brown v. Nationsbank Corp.,* 188 F.3d 579, (5th Cir.1999); *Connecticut v. Marra,* 528 F.Supp. 381, 385 (D.Conn. 1981); *Ex parte Conway,* 48 F. 77, (C.C.D.S.C.1891).

The above summary, and the numerous errors of the district court listed in the Preliminary Statement, show that Appellant is likely to succeed on appeal.

CONCLUSION

Appellant meets the constitutional and statutory criteria for being granted bond pending appeal. The district court acknowledged that Appellant may succeed on appeal.[53] The only reason given by the district court for denying bond was that Appellant's statements on a matter of public concern made her a danger to the community. This was an abuse of discretion, unsupported by the record, and an error of constitutional dimension.

For the reasons stated above, Appellant asks the Court of Appeals to enter the following findings and order based on the record included in the Appendix, pursuant

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52 *Id.*

53 App. 100:19

to Article II, section 19 (2.5) of the Colorado Constitution, and C.R.S. §§16-4-201 and 16-4-201.5:

1. Appellant is unlikely to flee if she is granted bond on appeal;

2. Appellant does not pose a danger to the safety of any person or the community;

3. Appellant's appeal is not frivolous and is not pursued for the purpose of delay.

4. The surety for Appellant's $25,000 surety bond in the district court consented to continuation of that bond on appeal, as required by C.R.S. §16-4-201(1)(c).

5. Appellant meets the statutory criteria of C.R.S. §16-4-202 (1)(a) through (i) for release on bond pending appeal.

6. During the pendency of this appeal, Appellant shall be released on bond, by continuing the $25,000 surety bond that Appellant posted in the district court.

7. Bond conditions shall expressly include permission for Appellant to remain in her home in Grand Junction, continue her employment, travel outside the state for business purposes, and visit Appellant's 95 year old mother in Virginia.

Dated November 17, 2024.

Respectfully submitted,

s/John Case
John Case #2431

CERTIFICATE OF SERVICE

I certify that on November 17, 2024, I filed and served the foregoing document via CCEF to the following:

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