No. _____

In The Supreme Court of the United States

WILLIAM M. TURNER,

Petitioner,

v.

MIDDLE RIO GRANDE CONSERVANCY DISTRICT; SUBHAS SHAH, Former Executive Director of the Middle Rio Grande Conservancy District ("MRGCD") and Former Chief Engineer and Former Chairman of the New Mexico Board of Licensure for Professional Engineers and Professional Land Surveyors; DENNIS DOMRZALSKI, Former MRGCD Public Information Officer; EDUARD YTUARTE, Former Executive Director, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; JOHN T. ROMERO, Former Chair of the Engineering Committee, New Mexico Board of Licensure for Professional Engineers and Land Surveyors; MARY SMITH, New Mexico Assistant Attorney General,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

WESTERN AGRICULTURE, RESOURCE AND BUSINESS ADVOCATES, LLP
A. BLAIR DUNN
400 Gold Ave. SW, Suite 1000
Albuquerque, NM 87102
(505) 750-3060
abdunn@ablairdunn-esq.com
Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Whether the Tenth Circuit erred in finding that Appellant's 1983 and 1985 claims are barred by the Statute of Limitations.

Whether the Tenth Circuit erred in failing to apply the principle underlying in *Heck v. Humphrey* in this case.

Whether the Tenth Circuit erred in finding that the Statute of Limitation (SOL) of Appellant's malicious prosecution claim accrued on February 26, 2010 on which the New Mexico Board of Licensure for Professional Engineers and Land Surveyors (BOL) entered a decision against the Appellant.

Whether the Tenth Circuit erred in finding that Appellant's federal claims could have been dismissed under *Younger* Abstention.

Whether the Tenth Circuit erred in finding that the "continuing wrong doctrine" is inapplicable to Appellant's federal claims.

PARTIES TO THE PROCEEDINGS BELOW

- Petitioner William M. Turner represented by A. Blair Dunn; 400 Gold Ave. SW, Suite 1000, Albuquerque, NM 87102.
- Respondents Middle Rio Grande Conservancy District, Subhas Shah, and Dennis Domrzalski represented by Jeffrey Baker and Renni Zifferblatt; 20 First Plaza, Suite 402, Albuquerque, NM 87102.
- Respondents Mary Smith, John T. Romero and Eduard Ytuarte represented by Alfred A. Park and Lawrence M. Marcus; 6100 Uptown Blvd., NE Suite 350, Albuquerque, NM 87110.
- John Does, Members or Former Members of the New Mexico Board of Licensure for Professional Engineers and Land Surveyors were originally listed as Defendants in the District Court pleadings, but none were found.
- Defendant KOB-TV and John Doe KOB-TV Defendants were represented by Foster, Rieder & Jackson, P.C., 201 Third Street NW, Suite 1500, Albuquerque, NM 87103-1607 in the District Court proceedings; however, the 10th Circuit Court of Appeals proceedings do not include these Defendants.

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The Unpublished Opinion of the United States Court of Appeals for the Federal Circuit in *Turner v. Middle Rio Grande Conservancy District, et al.*, Docket No. 17-2105 decided December 12, 2018, affirming the District Court's order dismissing Plaintiff's claims with prejudice is set forth in the Appendix hereto. (App. 1-12).

The Unpublished Opinion of the United States District Court for the District of New Mexico in *Turner v. Middle Rio Grande Conservancy District, et al.*, Docket No. 1:15-cv-00339 RB/SCY filed February 24, 2017, dismissing Plaintiff's claims against the MRGCD Defendants is set forth in the Appendix hereto. (App. 15-26).

The Unpublished Opinion of the United States District Court for the District of New Mexico in *Turner v. Middle Rio Grande Conservancy District, et al.*, Docket No. 1:15-cv-00339 RB/SCY filed February 10, 2017 granting Defendant Eduard Ytuarte's Motion for Judgment on the Pleadings is set forth in the Appendix hereto. (App. 27-42).

The Unpublished Opinion of the United States District Court for the District of New Mexico in *Turner v. Middle Rio Grande Conservancy District, et al.*, Docket No. 1:15-cv-00339 RB/SCY filed February 7, 2017 Granting Defendant John T. Romero's Motion for Judgment on the pleadings is set forth in the Appendix hereto. (App. 43-58).

The Unpublished Opinion of the United States District Court for the District of New Mexico in *Turner v. Middle Rio Grande Conservancy District, et al.*, Docket No. 1:15-cv-00339 RB/SCY filed January 30, 2017 granting Defendant Mary Smith's Motion for Judgment on the pleadings is set forth in the Appendix hereto. (App. 59-71).

The Unpublished Opinion of the United States District Court for the District of New Mexico in *Turner v. Middle Rio Grande Conservancy District, et al.*, Docket No. 1:15-cv-00339 RB/SCY filed June 1, 2017 denying Plaintiff's Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. Pro., Rule 59 is set forth in the Appendix hereto. (App. 72-85).

JURISDICTION

The judgment of the Court of Appeals affirming the District Court's order dismissing Plaintiff's claims with prejudice was entered on December 12, 2018.

This petition for writ of certiorari by William M. Turner is filed within ninety (90) days of that date. 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article III, Section 1:

> The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . .

United States Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 1291:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1343:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: 1) to recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by an act done in furtherance of any conspiracy mentioned in section 1985 of Title 42; 2) to recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title

> 42 which he had knowledge were about to occur and power to prevent; 3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; 4) to recover damages or to secure equitable or other relief under an Act of Congress providing for the protection of civil rights . . .

42 U.S.C. § 1983:

> Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section . . .

42 U.S.C. § 1985:

> **(2) OBSTRUCTING JUSTICE; INTIMIDATING PARTY, WITNESS, OR JUROR**
>
> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws . . .

NMSA 1978 § 31-19-1:

> A. Where the defendant has been convicted of a crime constituting a misdemeanor, the judge shall sentence the person to be imprisoned in the county jail for a definite term less than one year or to the payment of a fine of not more than one thousand

dollars ($1,000) or to both such imprisonment and fine in the discretion of the judge.

B. Where the defendant has been convicted of a crime constituting a petty misdemeanor, the judge shall sentence the person to be imprisoned in the county jail for a definite term not to exceed six months or to the payment of a fine of not more than five hundred dollars ($500) or to both such imprisonment and fine in the discretion of the judge.

C. When the court has deferred or suspended a sentence, it shall order the defendant placed on supervised or unsupervised probation for all or some portion of the period of deferment or suspension.

NMSA 1978 § 37-1-8:

Actions must be brought against sureties on official bonds and on bonds of guardians, conservators, personal representatives and persons acting in a fiduciary capacity, within two years after the liability of the principal or the person from whom they are sureties is finally established or determined by a judgment or decree of the court, and for an injury to the person or reputation of any person, within three years.

NMSA 1978 § 37-1-12:

When the commencement of any action shall be stayed or prevented by injunction order or another lawful proceeding, the time such

injunction order or proceeding shall continue in force shall not be counted in computing the period of limitation.

NMSA 1978 § 61-23-23.1:

A. The board may investigate and initiate a hearing on a complaint against a person who does not have a license, who is not exempt from the Engineering and Surveying Practice Act and who acts in the capacity of a professional engineer within the meaning of the Engineering and Surveying Practice Act. A valid license is required for a person to act as a professional engineer or to solicit or propose to perform work involving the practice of engineering.

B. If after the hearing the board determines that based on the evidence the person committed a violation pursuant to the Engineering and Surveying Practice Act, it shall, in addition to any other sanction, action or remedy, issue an order that imposes a civil penalty up to seven thousand five hundred dollars ($7,500) per violation.

C. In determining the amount of the civil penalty it imposes, the board shall consider:

(1) the seriousness of the violation;

(2) the economic benefit to the violator that was generated by the violator's commission of the violation;

(3) the violator's history of violations; and

(4) any other considerations the board deems appropriate.

D. A person aggrieved by the board's decision may appeal a decision made or an order issued pursuant to Subsection B of this section to the district court pursuant to Section 39-3-1.1 NMSA 1978.

NMSA 1978 § 61-23-27.15:

E. Failure to pay a fine levied by the board or to otherwise comply with an order issued by the board pursuant to the Engineering and Surveying Practice Act is a misdemeanor and upon conviction the person shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978. Conviction shall be grounds for further action against the person by the board and for judicial sanctions or relief, including a petition for injunction.

NMSA 1978 § 61-23-27.10:

An employee of a business entity who performs only the surveying services involved in the operation of the business entity's business shall be exempt from the provisions of the Engineering and Surveying Practice Act; provided that neither the employee nor the business entity offers surveying services to the public; and provided further that the surveying services performed do not include any determination, description, portraying,

> measuring or monumentation of the boundaries of a tract of land. Performance of surveying on public works projects pursuant to Section 61-23-27.13 NMSA 1978 constitutes surveying services to the public and is not exempt.

STATEMENT OF THE CASE

The basis of this case is the willfully malicious conspiracy prepense and prosecution of Appellant by and between the Executive Director of a quasi-governmental entity, the Middle Rio Grande Conservancy District ("MRGCD"), and its Executive Director and Chief Engineer who was also the Chairman of the New Mexico Board of Licensure for Professional Engineers and Professional Surveyors ("BOL"), and other Defendants and subsequent malicious prosecution using the power and resources of the Municipality to silence a whistleblower alleging in bad faith that the whistleblower practiced "engineering" without a license, made other false and fraudulent claims regarding the validity of its water bank and conflict of interest, threatened the Appellant before his election, and censured the Appellant for visiting MRGCD District Offices and inquiring into the MRGCD finances as an elected Board Member.

Appellant is "an internationally recognized hydrogeologist with more than 40 years of national and international consulting experience in hydrology, geology, and related fields." (App. 06). In June 2005, Appellant was elected to a four-year term on the Board of

Directors of the MRGCD. (*Id.*) During his campaign and throughout his term on the MRGCD Board of Directors, Appellant sought to expose and correct multiple acts of malfeasance perpetrated by Defendant Subhash Shah, Former Executive Director of the MRGCD, and Defendant Domrzalski, Former Public Information Officer of the MRGCD. (*Id.*) On February 27, 2006, Appellant delivered a presentation and report to the MRGCD in which he asserted that it was inappropriate to utilize "un-engineered rip-rap" to reinforce and line ditches within the MRGCD. (*Id.*).

On April 24, 2007, Defendant Domrzalski filed a complaint with the BOL that accused the Appellant of practicing engineering without a license. Defendant Shah was the Executive Director of the MRGCD, as well as the Former Chief Engineer and Chairman of the BOL. (App. 17). Defendant Shah dictated the complaint to Defendant Domrzalski. (*Id.*) Defendants Shah and Domrzalski knew that Appellant was immune from the complaint because he was a Board Member of the MRGCD and they filed the complaint with the intent to harass Appellant and oust him from the MRGCD Board. (*Id.*) Defendant Shah pressured Defendant Eduard Ytuarte, Former Executive Director of the BOL, to hold an administrative hearing to cast negative publicity on the Appellant before the MRGCD Board elections. (*Id.*)

The BOL eventually found Appellant guilty of Practicing Engineering without a license and imposed a fine. Appellant filed an appeal from the decision of the Board and the Second Judicial District Court

granted his appeal and reversed the Case 1:15-CV-00339-RB-SCY decision of the Board. Defendant Shah and the other BOL defendants appealed to the New Mexico Court of Appeals against the decision of the District Court with an intention to continue the harassment of Appellant. The New Mexico Court of Appeals affirmed the decision of the trial court on April 24, 2013 and stated that the Complaint was in violation of Appellant's freedom of speech. Appellant filed his complaint in the Federal District Court of New Mexico on April 23, 2015 within the three years of the date of the New Mexico Court of Appeals' decision in favor of Appellant. The Federal District Court granted Defendants' motions to dismiss because it said his Complaint was filed outside of the period of limitations and entered a final judgment dated February 24, 2017 entirely dismissing all the claims in Appellant's amended complaint. Appellant filed an appeal in the Tenth Circuit Court and the Tenth Circuit affirmed the decision of the District Court.

Appellant seeks to reverse the judgment entered by the Tenth Circuit on December 12, 2018 dismissing Appellant's federal claims finding that Appellant's federal claims were barred by Statute of Limitations with other reasons.

REASONS FOR GRANTING THE PETITION

I. SUMMARY OF THE ARGUMENTS

The Tenth Circuit erroneously held that Appellant's federal claims accrued on February 26, 2010 on which BOL entered a decision against the Appellant by overlooking the underlying principles in *Heck v. Humphrey*, 512 U.S. 477, 483-87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) and *Robinson v. Moruffi*, 895 F.2d 649, 654-55 (10th Cir. 1990) and the essential element of "favorable termination" of malicious prosecution. It was further held in error that Appellant's claims could have been dismissed under *Younger* Abstention. The doctrine of *Younger* Abstention is not applicable to this case. Moreover, the Tenth Circuit found in error that the appeal filed by BOL against the decision of the District Court in favor of the Appellant is not a continuing violation of Appellant's constitutional rights. The appeal filed by BOL was a continuing violation of malicious prosecution.

II. TENTH CIRCUIT ERRED IN FINDING THAT APPELLANT'S FEDERAL CLAIMS UNDER 42 U.S.C. 1983 AND 42 U.S.C. 1985 WERE BARRED BY STATUTE OF LIMITATIONS

The Tenth Circuit's finding that the statute of limitation of Appellant's claims under 42 U.S.C. § 1983 for malicious prosecution accrued when the BOL decision issued on February 26, 2010 is clearly erroneous.

The Tenth Circuit found that *Heck v. Humphrey*, 512 U.S. 477, 489-90, 114 S. Ct. 2364, 2369, 129 L. Ed. 2d 383 (1994) is inapposite which involves civil fines and not detention. The court further held that *Heck* is applicable only when the Plaintiff is in custody. It is submitted that the Tenth Circuit's findings are erroneous and liable to be reversed.

The Tenth Circuit and the Federal District Court missed the essential element of a 1983 malicious prosecution claim that the proceeding, whether it is criminal or civil, must finally terminate in Plaintiff's favor. This is the basis of the controlling law related to the accrual of a 1983 malicious prosecution cause of action. The Tenth Circuit applied this Rule in *Robinson v. Moruffi*, 895 F.2d 649, 654-55 (10th Cir. 1990) and the Plaintiff has cited this case and clearly argued this point in his response to Defendant's motions to dismiss and in the Opening Brief, (App. 103-106) but the District Court as well as the Tenth Circuit Court overlooked the point. The Tenth Circuit has followed the precedents from other circuits in *Rose v. Bartle*, 871 F.2d 331, 348-49 (3d Cir. 1989); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988); *Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983); *Singleton v. City of New York*, 632 F.2d 185, 194-95 (2d Cir. 1980), *cert. denied*, 450 U.S. 920, 101 S. Ct. 1368, 67 L. Ed. 2d 347 (1981); *Morrison v. Jones*, 551 F.2d 939, 940-41 (4th Cir. 1977); and *Sullivan v. Choquette*, 420 F.2d 674 (1st Cir. 1969), *cert. denied*, 398 U.S. 904, 90 S. Ct. 1691, 26 L. Ed. 2d 62 (1970).

In *Manuel v. City of Joliet*, *Illinois et al.*, 137 S. Ct. 911, 197 L. Ed. 2d 312 (2017), this court stated that "In defining the contours and prerequisites of a § 1983 claim, including its rule of accrual, courts are to look first to the common law of torts. *See ibid.* (explaining that tort principles "provide the appropriate starting point" in specifying the conditions for recovery under § 1983); *Wallace v. Kato*, 549 U.S. 384, 388-90, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007) (same for accrual dates in particular). Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort. *See id.* at 388-90, 127 S. Ct. 1091, 166 L. Ed. 2d 973; *Heck v. Humphrey*, 512 U.S. 477, 483-87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). But not always. Common-law principles are meant to guide rather than to control the definition of § 1983 claims, serving "more as a source of inspired examples than of prefabricated components." *Hartman v. Moore*, 547 U.S. 250, 258, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006); *see Rehberg v. Paulk*, 566 U.S. 356, 366, 132 S. Ct. 1497, 182 L. Ed. 2d 593 (2012) (noting that "§ 1983 is [not] simply a federalized amalgamation of pre-existing common-law claims"). In applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." This court further held in *Manuel* that "An element of that tort is the "termination of the . . . proceeding in favor of the accused"; and accordingly, the statute of limitations does not start to run until that termination takes place. *Heck*, 512 U.S. at 484, 489, 114 S. Ct. 2364, 129 L. Ed. 2d 383. *Manuel*

argues that following the same rule in suits like his will avoid "conflicting resolutions" in § 1983 litigation and criminal proceedings by "preclud[ing] the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution." *Id*. at 484, 486, 114 S. Ct. 2364, 129 L. Ed. 2d 383.

The real question in this case is: what would be the outcome of a 1983 claim if the appellate court had found that Plaintiff has actually practiced "engineering" in violation of the professional code? In *Brummett v. Camble*, 946 F.2d 1178 (5th Cir. 1991), the Fifth Circuit has held that

> "the question remains whether a § 1983 plaintiff should be required to file suit prior to such termination. Although state law supplies the limitations period for § 1983 claims, federal law determines when the cause of action accrues. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-86, 100 S. Ct. 1790, 1794-96, 64 L. Ed. 2d 440 (1980); *Helton v. Clements*, 832 F.2d 332, 334-35 (5th Cir. 1987). In this circuit, a § 1983 claim accrues when the plaintiff "becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Helton*, 832 F.2d at 335 (*citing Rubin v. O'Koren*, 621 F.2d 114, 116 (5th Cir. 1980), on reh'g, 644 F.2d 1023 (5th Cir. 1981), and *Lavellee v. Listi*, 611 F.2d 1129, 1131 (5th Cir. 1980)). Relying on this standard, defendants insist that although a state law malicious prosecution claim does not accrue until the underlying criminal proceeding is

> terminated in the plaintiff's favor, a § 1983 malicious prosecution claim accrues when the plaintiff is indicted.
>
> The perverse result of such a rule is that claimants would have to file § 1983 suits before they even know they have a cause of action, i.e., before a prosecution has ended favorably to them. Why defendants would advocate the filing of premature lawsuits defies our understanding as well as the uniform precedent of other circuit courts. See, e.g., *Robinson v. Moruffi*, 895 F.2d 649, 654-55 (10th Cir. 1990); *Rose v. Bartle*, 871 F.2d 331, 348-49 (3d Cir. 1989); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988); *Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983); *Singleton v. City of New York*, 632 F.2d 185, 194-95 (2d Cir. 1980), *cert. denied*, 450 U.S. 920, 101 S. Ct. 1368, 67 L. Ed. 2d 347 (1981); *Morrison v. Jones*, 551 F.2d 939, 940-41 (4th Cir. 1977); *Sullivan v. Choquette*, 420 F.2d 674 (1st Cir. 1969), *cert. denied*, 398 U.S. 904, 90 S. Ct. 1691, 26 L. Ed. 2d 62 (1970). *See also Wheeler*, 734 F.2d at 254. The cases cited by the defendants and the district court in support of a contrary holding involve § 1983 claims other than those for malicious prosecution. *See*, *e.g.*, *Helton*, 832 F.2d at 332; *Rubin*, 621 F.2d at 116; *Lavallee*, 611 F.2d at 1131.

In this case, Plaintiff has filed his complaint within the limitation period because the New Mexico Court of Appeals confirmed the reversal of the decision of the Board in effect was finally exonerating Plaintiff

from being in jeopardy for an offense. Therefore, the Federal District Court's finding that Plaintiff's claim accrued on February 26, 2010 is erroneous and hence warrants a reversal.

III. THE TENTH CIRCUIT ERRED IN APPLYING THE "PRINCIPLE" UNDERLYING IN *HECK V. HUMPHREY* IN THIS CASE

It is submitted that the Tenth Circuit erred by failing to apply the underlying principle in *Heck v. Humphrey* in Appellant's case and held that *Heck* is inapposite. The Second Circuit held in *Gilles v. Davis*, 427 F.3d 197, 209 (3d Cir. 2005) that "As *Heck* noted, § 1983 "creates a species of tort liability." 512 U.S. at 483. Thus, common law bars to suit apply to claims brought under § 1983. *Id*. In *Heck*, the Court held a § 1983 malicious prosecution claim was subject to the common law requirement that the plaintiff show the prior criminal proceeding terminated in his favor. *Id*. at 484. The purpose of the requirement, the Court explained, is to avoid parallel litigation of probable cause and guilt. *Id*. It also prevents the claimant from succeeding in a tort action after having been convicted in the underlying criminal prosecution, which would run counter to the judicial policy against creating two conflicting resolutions arising from the same transaction. *Id*. Therefore, one of the principles laid down in *Heck* was to prevent the claimant from succeeding in a tort action after having been found guilty in the prosecution. By applying this principle, the Appellant could not have filed a § 1983 action before his prosecution

was finally terminated in his favor, even if that prosecution was essentially civil and not criminal. It is logical for the Tenth Circuit to have applied the principles of *Heck* to this civil prosecution.

IV. THE TENTH CIRCUIT ERRED IN FINDING THAT THE STATUTE OF LIMITATION OF APPELLANT'S MALICIOUS PROSECUTION CLAIM ACCRUED ON FEBRUARY 26, 2010 ON WHICH THE NEW MEXICO BOARD OF LICENSURE FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS (BOL) ENTERED A DECISION AGAINST THE APPELLANT

It is further submitted that the Appellant's malicious prosecution claim did not accrue on February 26, 2010 pursuant to the principles in *Heck*. This Court has held that § 1983 does not provide a cause of action to recover monetary damages for an allegedly unconstitutional conviction or imprisonment if recovery would necessarily imply the invalidity of a criminal conviction. *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994); *Smith v. Holtz*, 87 F.3d 108, 110 (3d Cir. 1996). Addressing the principle in the analogous context of a malicious prosecution claim, the court stated that the rule "avoids parallel litigation over the issues of probable cause and guilt . . . and it precludes the possibility of the claimant [sic] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two

conflicting resolutions arising out of the same or identical transaction." Furthermore, "to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit." *Heck*, 114 S. Ct. at 2371 (quoting 8 S. Speiser et al., *American Law of Torts* § 28:5, at 24 (1991)).

Further, the Circuit Court overlooked the essential element of a favorable termination of the cause of action "malicious prosecution" in holding that Appellant's claim accrued on February 26, 2010. Malicious prosecution claims under § 1983 is based on state law elements. *See Usher v. City of Los Angeles*, 828 F.2d 556, 562 (9th Cir. 1987). The essential elements of malicious prosecution are the same in criminal and civil contexts. The malicious prosecution plaintiff must plead and prove that the prior proceeding, commenced by or at the direction of the malicious prosecution defendant, was: (1) pursued to a legal termination favorable to the plaintiff; (2) brought without probable cause; and (3) initiated with malice. *Villa v. Cole*, 4 Cal. App. 4th 1327, 1335, 6 Cal. Rptr. 2d 644, 648 (1992). To prevail, a malicious prosecution plaintiff "must show that the defendants prosecuted her with malice and without probable cause, and that they did so for the purpose of denying her equal protection or another specific constitutional right." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995). Therefore, the Tenth Circuit's finding that the Appellant's malicious prosecution claim accrued on February 26, 2010 on which Appellant was punished by BOL is erroneous and hence it is liable to be reversed.

V. WHETHER THE TENTH CIRCUIT ERRED IN FINDING THAT APPELLANT'S FEDERAL CLAIMS COULD HAVE BEEN DISMISSED UNDER *YOUNGER* ABSTENTION

The Tenth Circuit found that Appellant's claims could have been dismissed under the doctrine of *Younger* Abstention which is clearly erroneous as the doctrine of *Younger* Abstention is not applicable to Appellant's case as this case is mainly for damages and no state court action is pending currently in any of the state courts. *Younger* originated as a doctrine regarding when federal courts should exercise equitable discretion and abstain from exercising jurisdiction altogether. *See Younger v. Harris*, 401 U.S. 37, 43-44 (1971); Erwin Chemerinsky, *Federal Jurisdiction* 774 (3d ed. 1999). When money damages, as opposed to equitable relief, are sought, it is less likely that unacceptable interference with the ongoing state proceeding, the evil against which *Younger* seeks to guard, would result from the federal court's exercise of jurisdiction. Accordingly, we have held that abstention and dismissal are inappropriate when damages are sought, even when a pending state proceeding raises identical issues and we would dismiss otherwise identical claims for declaratory and injunctive relief, but that a stay of the action pending resolution of the state proceeding may be appropriate. *See Giulini v. Blessing*, 654 F.2d 189, 192-94 (2d Cir. 1981). The Supreme Court has declined to reach the issue whether *Younger* applies to claims for money damages, but has noted that even if it does, the federal suit should be stayed, rather

than dismissed, if the money damages sought could not be obtained in the pending state proceeding, even if the money damages sought could be obtained in a separate state proceeding. *See Deakins v. Monaghan*, 484 U.S. 193, 201-03, 108 S. Ct. 523, 98 L. Ed. 2d 529 (1988); *see also Middlesex*, 457 U.S. at 432 (internal quotation marks and citations omitted) (when "interposition of the constitutional [or federal] claims" in the state proceeding is not possible, abstention is improper). We have also observed in the related context of *Burford* abstention that because "the Supreme Court [has] carefully traced the origin of abstention doctrines to the federal courts' discretion to withhold equitable relief . . . abstention is generally appropriate only in cases where equitable relief is sought," and have thus refused to abstain under *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943), where claims for money damages were at issue. *Tribune Co. v. Abiola*, 66 F.3d 12, 16 (2d Cir. 1995) (citation omitted). *See Kirschner v. Klemons*, 225 F.3d 227 (2d Cir. 2000).

The Tenth Circuit held in *Wilkins v. DeReyes*, 528 F.3d 790 (10th Cir. 2008), that "A 42 U.S.C.S. § 1983 malicious prosecution claim includes the following elements: (1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages". In a recent case – *Sanchez v. Hartley*, 810 F.3d 750 (10th Cir. 2016), the Tenth Circuit affirmed the same.

VI. THE TENTH CIRCUIT ERRED IN FINDING THAT THE "CONTINUING WRONG DOCTRINE" IS INAPPLICABLE TO APPELLANT'S FEDERAL CLAIMS

The Tenth Circuit further found that the "subsequent stay of enforcement and appellate review" of BOL decision is not a continuing violation of Turner's constitutional rights. It is submitted that the subsequent stay and appellate review of the BOL decision was filed by Appellant and it was not a continuing violation. The continuing violation was the appeal filed by BOL against the Second Judicial District Court's decision in New Mexico Court of Appeals that the Appellant did not practice engineering. The appeal filed by BOL was a clear continuation of the prosecution and it is clearly a continuing wrong. The test for determining whether a continuing violation exists is summarized as follows: First, the defendant's wrongful conduct must continue after the precipitating event that began the pattern. Second, injury to the plaintiff must continue to accrue after that event. Finally, further injury to the plaintiff must have been avoidable if the defendants had at any time ceased their wrongful conduct. *Tolbert v. State of Ohio Dep't of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999). *See also Paschal v. Flagstar Bank*, 295 F.3d 565, 572 (6th Cir. 2002). "[A] continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." *Tolbert*, 172 F.3d at 940 (quoting *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991)).

Passive inaction does not support a continuing violation theory. *Id*.; *Paschal*, 295 F.3d at 573.

In evaluating whether the plaintiff has alleged facts sufficient to make out a continuing violation, it is necessary first to consider the contours of the civil rights claims he has asserted. "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty or property' is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.*" *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990) (quoting *Parratt v. Taylor*, 451 U.S. 527, 537, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981)) (emphasis in *Zinermon*). It is undisputed that parents have a fundamental liberty interest in the custody of their children and that state intervention in the relationship between a parent and child must be accomplished by procedures meeting the requisites of the Due Process Clause. *See Smith v. Williams-Ash*, 173 F. App'x 363, 366 (6th Cir. 2005). Even a temporary deprivation of physical custody requires a hearing within a reasonable time. *Id.* Appellant exercised his First Amendment Right to blow the whistle on misfeasant if not malfeasant behavior of the government board on which he served, and for his exercise of liberty earned a malicious prosecution that stretched across years until it was finally concluded by a decision of the New Mexico Court of Appeals agreeing that the government had infringed upon his First Amendment rights. That favorable termination of the continuing abuse of the government's authority highlights the

Tenth Circuit's error failing to recognize the simple facts supporting the continuing action of prosecution until stopped by the decision of the New Mexico Court of Appeals.

CONCLUSION

This case presents a unique opportunity for the Supreme Court to make clear that government persecution through civil prosecutions of persons exercising their liberty to criticize their government should be afforded the same protection as those that suffer malicious prosecutions in the criminal context. The mode of operation chosen by the government should not excuse the same infringement on liberty and this Court should extend the principles of *Heck* to the context of civil prosecutions. Further disparity over statutes of limitations and accrual period cannot begin until an Appellant has litigated his case to finality and administrative courts are no substitute for the judgment of a cause of action where only constitutionally established courts may render final judgment.

Respectfully submitted,

WESTERN AGRICULTURE, RESOURCE AND BUSINESS ADVOCATES, LLP
A. BLAIR DUNN
400 Gold Ave. SW, Suite 1000
Albuquerque, NM 87102
(505) 750-3060
abdunn@ablairdunn-esq.com