IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

THOMAS MINK,
CRYSTAL MINK,

Plaintiffs,

vs.

A.M. DOMINGUEZ, JR., District Attorney for the 19th Judicial District, in his official capacity,
CITY OF GREELEY,
DETECTIVE KEN WARREN, a Greeley police officer, in his individual capacity,
JOHN DOE NO. 1, an Assistant District Attorney working for the Nineteenth Judicial District Attorney's Office, in his individual capacity,

Defendants.

MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiff Tom Mink and his mother Crystal Mink (collectively, "the Minks") submit this Memorandum of Law in support of their Motion for Temporary Restraining Order and Preliminary Injunction.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves satirical speech that the defendants are attempting to squelch through an unconstitutional criminal libel statute, C.R.S. § 18-13-105. Tom Mink is a student at the University of Northern Colorado ("UNC"). Using a computer that he shares with his mother, he has created a website for the purpose of publicizing and

posting a publication known as The Howling Pig ("THP"). He has published three issues of THP, each a page in length, and he intends to publish future issues.

THP speaks out on a number of issues related to the administration of UNC. Its language is strong and colorful. Each issue includes a column by the purported editor of the publication, "Junius Puke." Mr. Puke is an obvious fictional character, as confirmed through satire – through the similarity of his name to that of a real person – UNC Monfort Distinguished Professor Junius W. Peake; through the use of a humorously (and obviously) doctored photograph of Professor Peake; and through the assertion of views that are diametrically opposed to those actually held and freely publicized by Professor Peake. THP spoofs Professor Peake and takes issue with his politics through parody and satire.

Although Professor Peake has been happy to voice his own views on a range of issues with great frequency and fervor, he proved unwilling to bear the heat of the kitchen. Upon learning of THP's satirical references to him, Professor Peake went to the Greeley Police Department and requested that action be taken against the people behind the publication. The Police Department willingly complied. They obtained a broad search warrant for the Minks' shared home and confiscated the Minks' computer. Defendant Ken Warren, a detective employed by the Police Department, warned Tom Mink to stop publishing THP and its website. Counsel for the Minks have been advised that Detective Warren will recommend that the District Attorney's Office pursue criminal libel charges.

As detailed in the Verified Complaint, the Minks face a credible threat of prosecution under a criminal libel statute that is unconstitutional – both facially and as applied in this case. Specifically:

1. In *People v. Ryan*, 806 P.2d 935 (Colo.), *cert. denied*, 502 U.S. 860 (1991), the Colorado Supreme Court held that, under the First Amendment of the United States Constitution, Section 18-13-105 cannot be constitutionally applied in precisely this sort of case, involving a public official and figure and matters of public concern, because it impermissibly permits conviction, without proof of actual malice, for statements about public officials and public figures. Under other Colorado and federal law, the statute is unconstitutional even as applied to statements about a purely private figure, if those statements relate to matters of public concern.

2. The statute facially violates the First Amendment by omitting falsity as an element of the crime of libel, thus permitting conviction for the publication of true statements. The statute is not saved by allowing the defendant to prove truth as an affirmative defense, especially because the statute excludes truth as a defense for certain types of statements.

3. As the statute is likely to be applied in this case – to statements of obvious satire, parody, and opinion – Section 18-13-105 violates the Minks' fundamental constitutional right of free speech.

4. Key language in Section 18-13-105 is impermissibly vague, in violation of the First Amendment as well as the Fourteenth Amendment's due process clause.

Moreover, acting pursuant to the unconstitutional criminal libel statute, defendants undertook an unlawful search of the Minks' shared home, and an unlawful seizure of their computer, software and work product. That search violated the Fourth Amendment because the search warrant failed to meet the constitutional particularity requirement and it was not supported by probable cause. The search also violated the Minks' rights under the Privacy Protection Act of 1980, 28 U.S.C. §§ 2000aa, *et seq*.

Accordingly, the Minks seek a temporary restraining order (1) prohibiting their prosecution under Section 18-13-105, (2) declaring Section 18-13-105 unconstitutional, both facially and as applied in this case, (3) requiring defendants to return the Minks'computer and all proprietary information taken from them, including all computer software and files, and (4) prohibiting defendants from destroying any documents, data or other evidence pertaining to their wrongful conduct.

II. FACTS

A. Plaintiffs Tom and Crystal Mink

Tom Mink is 24 years old, and is just about to complete his studies at UNC. Crystal Mink is Tom Mink's mother. She owns a small machine-embroidery business, and she uses their home computer for personal purposes and in connection with her business. Tom Mink lives with his mother at 310 5th Street, in Ault, Colorado.

B. The Howling Pig

Since the Fall of 2003, Tom Mink has used the home computer to host a website for THP at http://www.geocities.com/thehowlingpig. It consists of a home page, with links to a page for the submission of articles to THP, and to the three issues of THP that

have been published thus far. *See* Exs. A-D to Verified Complaint (all pages from THP website).

The homepage bears the title "The Howling Pig," with the subtitle "Bitch – Moan – Howl – Don't let them get away with anything." It states that THP is a "stop-gap" publication intended to permit people "to vent frustration or post insightful social and political commentary" related to UNC, and that "[t]he value of The Howling Pig is not as a vehicle for change, but as a prod to discussion." The homepage makes clear that THP's creators are "aiming for a combination of satire and commentary," and that "The Howling Pig is satirical in nature," but that contributions will be edited for "libelous" content. It explains the dual bases for the policy of keeping contributors' identities confidential. *First*, "[t]he power of satire is the ring of truth, not the credibility of the source," and thus there is no need for authors to "back up their opinions or observations [with their identities] to provide credibility." *Second*, the publication accepts "[t]he image of a bunch of whining students who do nothing but complain" (the universe of presumed contributors to THP) as "an acceptable tradeoff for faculty, staff, and prominent students who don't want to endanger their jobs, or the departments or organizations with which they are affiliated" (the actual universe of anticipated contributors). The homepage notes that THP will be "[p]rinted on an irregular basis"; that "anyone is free to submit entire columns, ideas, tips, or comments"; and that the publication has "a non-existent copy budget."

The home page introduces Mr. Puke as the supposed editor of THP. It includes a photograph that is an obviously-altered version of a photograph of Professor Peake

available at his UNC faculty website, http://mcb.unco.edu/Facstaffdir/peakej.htm. In the doctored photograph, Mr. Puke resembles a musician from the hard rock band "KISS"; he has dark painted-on hair with an exaggerated widow's peak, white pancake makeup, black paint with curved spikes extending from around his eyes, and an outstretched tongue. *Compare* http://www.kissonline.com/archives/photos/index.php. In addition, he has a small Hitler-like moustache. (By contrast, on his UNC faculty website, Professor Peake has gray hair, no apparent makeup, a smile on his face instead of an outstretched tongue, and a full moustache and beard.)

The homepage describes Mr. Puke as the "founder, spiritual leader, and the inspiration behind The Howling Pig," and explains that he "is taking a break from his well-earned, corporate endowed sinecure at a small western university in order to assist in the publication of The Howling Pig." It describes the photograph as an old one "from Mr. Puke's rebellious days as a roadie for KISS," and "a symbolic return to a time before his days on Wall Street where he managed to luck out and ride the tech bubble of the nineties like a $20 whore and make a fortune." The homepage expressly disclaims any connection between Mr. Puke and Professor Peake:

> The Howling Pig would like to make sure that there is no possible confusion between our editor Junius Puke and the Monfort Distinguished Professor of Finance, Mr. Junius "Jay" Peake. Mr. Peake is an upstanding member of the community as well as an asset to the Monfort School of Business where he teaches about microstructure. Peake is active in many community groups, married and a family man. He is nationally known for his work in the business world, and is consulted on questions of market structure.
>
> Junius Puke is none of those things and a loudmouth know-it-all to boot, but luckily he's frequently right and so is a true asset to this publication.

The homepage states that it will post new issues as they are published and includes an archive section that permits the viewer to download, read and print the first three issues of THP. Each issue includes an editor's note or editorial authored by the supposed Mr. Puke, as well as a small photograph of Mr. Puke, again based on Professor Peake's faculty website photograph, but with three alterations: (a) the inclusion of dark sunglasses; (b) the removal of Professor Peake's beard and full moustache; and (c) the inclusion again of a smaller, Hitler-like, moustache.

In the editor's note in Issue I, Mr. Puke introduces THP as " a subversive little paper" and "a regular bitch sheet that will speak truth to power, obscenities to clergy, and advice to all the stoners sitting around watching Scooby Doo. This will be a forum for the pissed off and disenfranchised in Northern Colorado, basically everybody." Mr. Puke describes himself as "a well-paid, tenured professor at a small western university," and provides other supposedly autobiographical information that might be construed as resembling Professor Peake's actual background, albeit with a highly opinionated and negative slant. For example, Mr. Puke states that he made it in the business and academic worlds "through hard work, luck, and connections all without a college degree," and that he now holds a "cushy, do-nothing, ornamental position."

The editorial column in Issue II, entitled "Puke's Talking Points", questions the elimination of UNC's once-thriving on-campus childcare center. There is no mention of Professor Peake. The only comment related to the supposed Mr. Puke is that Mr. Puke does not normally care much about children because his own children are grown and other people's children give him "the willies." The editorial column in Issue

III, entitled "This Just Makes Me Wanna . . .", challenges the qualifications of UNC Board of Trustees Chair Dick Monfort. It accuses Mr. Monfort of being uninformed regarding higher education funding, of holding his position only as a result of his political contributions, and of various character flaws including public drunkenness, a tendency toward drinking and driving, and sexual harassment.[1] However, it includes no statements at all about Professor Peake, nor about the supposed Mr. Puke.

None of the remaining articles in any of the three issues of THP makes reference to either Professor Peake or the fictional Mr. Puke. Rather, they address a variety of issues related to UNC, including the quality of the official student newspaper, the elimination of the position of Vice President of Multicultural Affairs, capital expenditures, faculty pay cuts, the university's future planning process, administrative appointments, diversity, campus beautification, and limitations on free speech.

C. The Search Warrant

On December 12, 2003, defendant Warren and two other police officers went to the Minks' home. Detective Warren explained that a complaint for "felony libel" had been filed based on THP, and told Tom Mink that he was in "big trouble." Tom Mink readily acknowledged his role in publishing THP.

When Detective Warren finished asking questions of Tom Mink, he announced that he had come to execute a search warrant. He produced a three-page search warrant that is breathtaking in scope, authorizing the seizure of all computer equipment and

[1] The current version of the homepage includes a correction to this editorial, which had confused Dick Monfort with his brother Charlie Monfort, a Trustee of Mesa State College. In the correction, THP "humbly apologize[d] for any harm done," and stated that prints of the inaccurate editorial "will reflect this correction."

electronically-stored data and e-mails and virtually every written and printed document in the Minks' residence, including diaries, correspondence, and "personal memoirs." *See* Ex. E to Verified Complaint. Detective Warren said he needed to take the Minks' computer and anything else that might have been used to write THP. He said that he could take "everything in the house" if he wanted to do so. The police left with the computer.

The overwhelming majority of the files and data on the seized computer have nothing at all to do with THP, much less with the specific statements that purportedly violate the criminal libel statute. The hard drive contains papers written by Tom Mink during his four years as a college student, including the only copies of unfinished drafts of two UNC course papers that he had intended to complete and submit by e-mail on the afternoon of the search. It also contains internal and confidential documents of two public interest groups, Crystal Mink's personal e-mail and correspondence going back several years, and files relating to her work as a seamstress.

With regard to THP, the seized computer contains not only copies of material that already has been published and is available on the Internet, but also work product such as ideas for forthcoming stories and articles, portions of a forthcoming issue with two articles already laid out, and additional research materials gathered to document forthcoming articles.

D. The Impending Criminal Prosecution

On December 23, 2003, counsel for the Minks contacted Detective Warren and learned that he did not plan to return the seized computer any time soon. Detective Warren indicated that his report would soon be completed and would recommend that

the District Attorney file a charge of criminal libel, and that he believed that the computer would be retained as evidence while that prosecution was pending.

On December 23, 2003, the Minks' attorney also spoke with Thomas Quammen, Assistant District Attorney for the Nineteenth Judicial District. Mr. Quammen indicated that he was aware of THP and the criminal libel investigation, as he had referred Professor Peake to the Greeley Police Department to file a complaint. Counsel for the Minks explained to Mr. Quammen that the criminal libel statute could not be applied constitutionally on the basis of statements in THP.

On December 30, 2003, counsel for the Minks obtained the affidavit that Detective Warren submitted to obtain the search warrant. Counsel then faxed a letter to Mr. Quammen and defendant A.M. Dominguez, District Attorney for the Nineteenth Judicial District, outlining the facts and explaining that a prosecution for criminal libel would violate Tom Mink's constitutional rights. The letter requested the immediate return of the computer and an agreement that the District Attorney's office would not file a criminal charge. *See* Ex. G to Verified Complaint. No reply was received.

E. Harm to Tom Mink

The criminal investigation, the search and seizure, and the threatened prosecution have chilled Mr. Mink from exercising his rights to freedom of expression and freedom of the press. The government in effect has implemented a prior restraint by confiscating Mr. Mink's printing press and seizing the only existing copies of articles planned for the next issue of THP. Indeed, when departing with the computer, Detective Warren warned that a resumption of publication would only "make things worse for you."

III. ARGUMENT

A TRO and preliminary injunction will be granted when the plaintiff shows (1) a substantial likelihood of prevailing on the merits; (2) irreparable injury if injunctive relief is denied; (3) the threatened injury outweighs the injury that the opposing party will suffer under the injunction; and (4) an injunction would not be adverse to the public interest. *Utah Licensed Beverage Ass'n v. Leavitt,* 256 F.3d 1061, 1065-66 (10th Cir. 2001) (granting preliminary injunction in First Amendment case). As shown below, the Minks meet each of these elements.

A. There Is a Substantial Likelihood that The Minks Will Succeed on the Merits of All of Their Claims

1. The Minks Have Standing and Their Claims Are Ripe

The Minks' claims clearly fall within this Court's Article III jurisdiction because there is a credible threat of prosecution and the defendants' actions thus far have had a chilling effect on Tom Mink's exercise of his right to free expression.

> A party need not violate the statute and suffer the penalty in order to generate a conflict worthy of standing in federal court. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). In challenges under the First Amendment, two types of injuries may confer Article III standing without necessitating that the challenger actually undergo a criminal prosecution. The first is when "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution." *Id.* Plaintiffs may have standing even if they have never been prosecuted or threatened with prosecution. *Doe v. Bolton*, 410 U.S. 179, 188 (1973). The second type of injury is when a plaintiff "is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences." *N.H. Right to Life [PAC v. Gardner]*, 99 F.3d [8,] 13 [(1st Cir. 1996)]; *Meese v. Keene*, 481 U.S. 465, 473 (1987).

Mangual v. Rotger-Sabat, 317 F.3d 45, 56-57 (1st Cir. 2003) (newspaper reporter who was threatened with prosecution had standing to challenge Puerto Rico criminal libel statute); *see also id.* at 59-60 (applying same analysis to ripeness); *Wilson v. Stocker*, 819 F.2d 943, 950 (10th Cir. 1987) (enjoining prosecution where plaintiff had been arrested but not charged under statute that allegedly violated his First Amendment rights).

2. The Minks Are Likely to Prevail on Their First Amendment Claims

a) Under *Ryan*, the Colorado Criminal Libel Statute Does Not Permit Prosecution of The Minks

Relying on the First Amendment, in *Ryan*, the Colorado Supreme Court held Section 18-13-105 unconstitutional "insofar as it reaches constitutionally protected statements about public officials or public figures on matters of public concern." 806 P.2d at 940. The Court relied on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which held that a defamatory false statement about a public official is not actionable in a civil action for damages unless it was made with "actual malice," and on *Garrison v. Louisiana*, 379 U.S. 64 (1964), which held that the actual malice standard applies to criminal defamation of public officials. 806 P.2d at 938. The Court further noted that the *New York Times* privilege was later extended to publications about public figures as well as public officials. *Id.* at 938 n.7 (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)). Because *Ryan* involved defamation about a private person on purely private matters, a majority of the Court held that Section 18-13-105 could be applied in that case, even though it does not require proof of actual malice. 806 P.2d at 941.

The General Assembly did not amend Section 18-13-105 to add an actual malice standard so as to address the *Ryan* decision. Rather, the statute is as flawed today as it was when the Colorado Supreme Court, in *Ryan*, narrowed the scope of Section 18-13-105 and held that it cannot criminalize statements about public officials or public figures on matters of public concern. Thus, in *People v. Pozarnsky*, Nos. 98JD106 & 97JD702 (Larimer Cty., Colo.) (copy attached in Addendum), the district court relied on *Ryan* in dismissing charges of criminal libel in violation of Section 18-13-105, where the defendant, a student, had published vulgar statements about administrators at his public middle and high schools:

> [I]n *People v. Ryan*, 806 P.2d 935 (Colo. 1001) . . . [t]he statute was held to be unconstitutional insofar as it reached constitutionally protected statements about public officials, or public figures on matters of public concern. With regard to such individuals, the statute is unconstitutional because it does not require proof of malice. . . . [T]he Supreme Court did not engraft a malice requirement on the statute, and find it constitutional in the context of public officials or public concerns. Rather, the Court found the statute as written unconstitutional. It has not been amended and, in the context of public officials [and public figures on matters of public concern], remains unconstitutional.

Id., slip op. at 7. For other decisions holding criminal libel statutes unconstitutional because they do not include an actual malice requirement for statements defaming public officials or figures, *see*, *e.g.*, *Mangual*, 317 F.3d at 65-67; *In re I.M.L. v. State*, 61 P.3d 1038, 1049 (Utah 2002) (citing cases) (Russon, J., concurring).[2]

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[2] In *Phelps v. Hamilton*, 59 F.3d 1058 (10th Cir. 1995), the Tenth Circuit confirmed that *New York Times* and *Garrison* require proof of actual malice "in criminal defamation cases involving matters of public concern." *Id.* at 1073 (footnote omitted). The court declined to hold unconstitutional the Kansas statute at issue in that case, concluding instead that the Kansas Supreme Court would construe the statute as

This case presents the very circumstances in which the Colorado Supreme Court held that Section 18-13-105 cannot be used as a basis for prosecution consistent with the First Amendment. Here, the alleged victim – Professor Peake – is a public official or figure, and the allegedly libelous statements address his official conduct and matters of public concern. Therefore, *Ryan* precludes prosecution of the Minks for any of the statements made in THP.

(1) Professor Peake Is a Public Official or Figure

Whether a purportedly defamed individual is a public official or figure is a question for the Court. *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966). A "public official" includes "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Id.* at 85. He or she holds a position of "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." *Id.* at 86. Public figures include those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes," and those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Hutchinson v. Proxmire*, 443 U.S. 111, 134 (1979).

(cont'd.)..
including an actual malice requirement. *Id.* at 1070-73. Here, by contrast, in *Ryan*, the Colorado Supreme Court already considered Section 18-13-105 and declined to read into the statute the actual malice element that is essential under *New York Times* and *Garrison*.

The courts regularly have deemed public university or college professors to be public officials, figures or both. *See*, *e.g.*, *Gallman v. Carnes*, 497 S.W.2d 47, 50, 254 Ark. 987 (1974) (assistant dean and law professor was a public official); *Abdelsayed v. Narumanchi*, 668 A.2d 378, 380, 39 Conn.App. 778 (1995) (state college professor was public figure for defamation purposes); *Johnson v. Board of Junior College Dist. #508*, 31 Ill.App.3d 270, 334 N.E.2d 442, 447 (1975) (college teachers "clearly had become public figures within the Wilson College community, which was the community served by the [allegedly defamatory] publication"); *Blum v. State*, 255 A.D.2d 878, 680 N.Y.S.2d 355, 357 (1998) (law professor was a public figure concerning his relationship with the school because he had taken "affirmative steps" to attract public attention); *cf.*, *Campbell v. Robinson*, 955 S.W. 2d 609, 612 (Tenn. App. 1997) (public high school teacher was public official).

This court should deem Professor Peake to be a public official or figure. Colorado law recognizes that "public education plays a vital role in our free society." *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1017 (Colo. 1982); *see also Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("education is perhaps the most important function of state and local governments"); *Garcia v. Board of Education*, 777 F.2d 1403, 1408 (10th Cir. 1985) ("Clearly, the governance of a public school system is of the utmost importance to a community . . ."). Colorado's legislative scheme for the creation and operation of the state university system confirms the state's commitment to education as a critical governmental function. C.R.S. §§ 23-20-101 - 111. The United States Supreme Court recently affirmed the vital importance of public

universities to the nation's future and their role in producing a "robust exchange of ideas" that has long been protected by the First Amendment. *Grutter v. Bollinger*, __ U.S. __, 123 S.Ct. 2325, 2336 (2003).

Professors, of course, are central to the educational process. They are the people who teach in and often help administer public universities. They exercise broad authority over the education delivered at their schools. In short, public university professors have "discretionary power in matters of public interest" and thus qualify as public officials and figures for purposes of defamation law. *Grossman v. Smart*, 807 F.Supp. 1404, 1408 (C.D. Ill. 1992) (internal citations omitted). They "occupy positions of such persuasive power and influence," *Hutchinson*, 443 U.S. at 134, that they are also public figures.

If there were any doubt about whether Professor Peake is a public official or figure, he has definitively resolved that question through his own practice of taking affirmative steps to attract public attention and repeatedly injecting himself and his views into public debates and the formulation of public policies. As his own faculty profile, posted at the UNC website, states, the professor "has just completed his 10th year at UNC's Monfort College of Business. . . ."; "is internationally-recognized as an expert in market microstructure—the way financial markets work . . ."; "has consulted on market structure in such varied locales as the former Soviet Union, Ukraine, Latvia, Estonia, China and the Czech Republic . . . [and] has also consulted for the Secretary of the Treasury, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Antitrust Division of the Department of Justice, and the Asian

Development Bank, as well as for US exchanges and broker-dealers"; "has testified many times as an expert before committees of both the House and Senate of the U.S Congress, as well as the Securities and Exchange Commission. . . .[and] has also been called as an expert witness on market structure before Federal, state and administrative law courts"; and "[w]ithin UNC," has "completed two three-year terms on the Faculty Senate, where he served on the Faculty Welfare Committee, as Chairman of the Elections Committee, as a member of the Executive Committee, and still serves on the Joint Honor Code Task Force." *See* http://mcb.unco/edu/Facstaffdir/peakej.htm.

Consistent with his posted profile, Professor Peake has published articles, submitted testimony, written public letters, and otherwise spoken out on a variety of subjects, including education,[3] constitutional law,[4] and financial markets.[5] The

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[3] *See*, *e.g.*, University of California at Berkeley Graduate Assembly Action Alert, Dec. 2003, at http://ga.berkeley.edu/academics/hr3593.html (discussing pending amendments to federal education legislation, including opinions of Professor Peake on need for mental health services for college-level students); Julio Ochoa, "Case against professor at UNC dismissed," GREELEY TRIBUNE, April 30, 2003, at http://gr.us.publicus.com/apps/pbcs.dll/article?AID=2003304300003 (reporting dismissal of federal civil rights case brought by UNC student against Professor Peake, arising out of a newspaper column that he authored against bilingual education); CHRONICLE OF HIGHER EDUCATION, Letters, Feb. 16, 2001, at http://www.edc.org/hec/news/hecnews/0891.html (letter from Professor Peake regarding parental notification of college students' alcohol and drug use); Junius Peake, "Raise the bar for our students," DENVER BUSINESS JOURNAL, July 7, 1997, at http://www.bizjournals.com/Denver/stories/1997/07/07/editorial2.html (proposing tax incentive for parents of school-age children who participate in parenting classes).

[4] *See*, *e.g.*, Junius W. Peake, "Tribune misusing power of Internet," GREELEY TRIBUNE, March 18, 2001, at http://gr.us.publicus.com/apps/pbcs.dll/article?AID=2001103180025 (opinion article by Professor Peake challenging newspaper's anonymous Internet poll regarding performance of UNC's then-president Hank Brown as "an unconscionable abuse of journalistic power" that ignores "the notions of freedom of speech and academic freedom"); Junius Peake, "Do away with 17th Amendment," DENVER BUSINESS J., March 3, 1997, at http://Denver.bizjournals.com/Denver/stories/

professor's propensity for publicly pronouncing his opinions no doubt contributed to him being the target of THP.

In short, Professor Peake is the quintessential public official and figure.

(2) The Allegedly Defamatory Statements Addressed Professor Peake's Official Conduct

The actual malice standard first articulated in *New York Times* extends to all statements about public officials "which might touch on an official's fitness for office," *Garrison v. State of Louisiana*, 379 U.S. 64, 77 (1964). The fact that a criticism may tend to affect the public official's or figure's private, as well as public, reputation is immaterial:

> The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.

Garrison, 379 U.S. at 77.

(cont'd.)..
1997/03/03/editorial3.html (advocating elimination of Seventeenth Amendment of the United States Constitution so as to require state legislatures to elect United States senators).

[5] *See*, *e.g.*, *Marketplace* (NPR radio broadcast, May 20, 2002), at http://www.marketplace.org/shows/2002/05/20_mpp.html (Professor Peake participating in discussion of alleged conflicts of interest by then-chair of the SEC, Harvey Pitt); 68 FED. REG. 62645, 62645-46 & nn. 4, 11, 12 (Oct. 30, 2003) (referencing Professor Peake's comment letter regarding proposed SEC rule changes); Written Testimony of Junius W. Peake Before the United States House of Representatives Subcommittee on Finance and Hazardous Materials, April 10, 1997, at http://www.house.gov/commerce/finance/hearings/041097/peake.pdf (commenting on proposed Common Cents Stock Pricing Act of 1997).

Here, the challenged statements in THP, if they relate to Professor Peake at all, are germane to the performance of his public duties as a UNC professor. To the extent that the articles can be taken as factual (as opposed to opinion or parody), the statements question Professor Peake's business ethics, his qualifications to teach business at the university level, and his performance as a professor. These are issues that undeniably "touch on [the professor's] fitness for office," *Garrison*, 379 U.S. at 77. Thus, they constitute protected speech under the First Amendment.

b) Prosecution of the Minks Would Be Unconstitutional Even If Professor Peake Is Not Deemed a Public Official or Figure

Even if the Court concludes that Professor Peake is *not* a public official or figure, the statute cannot be applied here constitutionally, where all the challenged statements relate to matters of public concern. While *Ryan* held Section 18-13-105 unconstitutional in part, the decision did not go as far as the First Amendment requires. *Ryan* held the statute "invalid only insofar as it reaches constitutionally protected statements about public officials or public figures on matters of public concern." 806 P.2d at 940. The surprising aspect of this limited invalidation is that the Colorado Supreme Court previously had extended constitutional protection (*i.e.*, the actual malice requirement) to *all* speech on matters of public interest or general concern, regardless of whether directed at public officials, public figures, or purely private individuals. *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1106 (Colo. 1982). Further, the United States Supreme Court has imposed the same requirement on purely "private" plaintiffs seeking punitive damages in civil defamation actions. *Gertz. v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974).

Ryan leaves open the possibility that, if Professor Peake is neither a public official nor public figure, the criminal libel statute could be applied here, even though the speech in question clearly addresses matters of public concern. *See Horstkoetter v. Dept. of Public Safety*, 159 F.3d 1265, 1271 (10th Cir. 1998) ("A matter is of public concern if it is 'of interest to the community, whether for social, political, or other reasons.'") (citation omitted). This possibility would harm free expression, and is inconsistent with *Diversified Management* and *Gertz*. Indeed , it is incongruous to limit a civil jury's ability to assess "private fines . . . to punish reprehensible conduct . . . ," 418 U.S. at 350, while allowing a felony conviction under a lesser standard. Thus, the statute is actually facially unconstitutional on even broader grounds than those recognized in *Ryan*. In other words, it is facially unconstitutional regardless of Professor Peake's status as a public official, public figure, or private individual.

c) Section 18-13-105 Facially Violates the First Amendment by Permitting a Conviction for the Publication of True Statements

The criminal libel statute suffers yet another pair of closely related facial constitutional defects. *First*, it permits a criminal conviction without proof that the allegedly libelous statement was false. Truth is relegated to a mere affirmative defense. *Second*, truth is not even permitted as an affirmative defense in several categories of criminal libel, including a potential charge against the Minks: "libels tending to expose the natural defects of the living." C.R.S. § 18-13-105(2). Standing alone, each of these faults would require invalidation of the statute.

The United States Supreme Court has squarely held that defamation laws, to survive constitutional scrutiny, must require proof of the falsity of the defendant's

speech. It is not enough to permit truth as an affirmative defense. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the Court invalidated Pennsylvania's rule that permitted liability for libel in the absence of proof of falsity. The defendant's right to prove the truth of his statements as an affirmative defense did not save the statute:

> We believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before receiving damages for defamation from a media defendant. To do otherwise would "only result in a deterrence of speech with the Constitution makes free."

Id. at 777 (citation omitted). The *Hepps* decision flowed from the principal that "the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified." *Id.* In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Court confirmed that the Constitution requires "'that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages'" in a civil defamation action. *Id.* at 16 (quoting *Hepps*); *see also New York Times,* 376 U.S. at 278 ("The state rule of law is not saved by its allowance of the defense of truth.").

The above-quoted decisions considered *civil* defamation laws. Their holdings apply with even greater force in the criminal libel context, *see Garrison*, 379 U.S. at 74, where the liability faced by a defendant is even greater than the potential civil liability underlying the *Hepps* decision. *Cf.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). Criminal liability involves the stigmatization and punishment of the accused by the state with its manifold resources. The criminal defendant's stake is "an interest of transcendent value," and the federal Constitution "protects the accused

against conviction except upon proof beyond a reasonable doubt *of every fact necessary to constitute the crime with which he is charged*." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added).[6]

Therefore, under *Hepps* and *Winship*, if the state wishes to impose criminal liability on one who has made an allegedly false statement, it must prove the statement's falsity. Because Section 18-13-105 does not place the burden of proving this element on the state, it is unconstitutional.

Adding insult to injury, Section 18-13-105(2) does not even permit truth as an affirmative defense for certain statements, specifically, "libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living." In other words, the statute permits conviction for true statements. This provision directly contravenes the cases discussed above, which unambiguously hold that truth must be a complete defense in any civil or criminal defamation claim. *See*, *e.g.*, *Mangual*, 317 F.3d at 67 (holding unconstitutional Puerto Rico criminal libel statute that recognizes truth as only a qualified defense); *In re I.M.L.*, 61 P.3d at 1044 (same, for Utah criminal libel statute that "provides no immunity for truthful statements").[7]

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[6] The *Ryan* decision did not directly address this issue. In *Mangual*, the First Circuit noted the issue as an open one, with strong arguments that the relegation of truth to an affirmative defense rendered the statute unconstitutional, but did not need to reach it because the court found other constitutional infirmities in the Puerto Rico criminal libel statute. *See* 317 F.3d at 67 n.9.

[7] "The constitutionality of these exceptions to the truth defense were not raised on appeal" in *Ryan*. 806 P.2d at 940-41 n.11.

d) The Application of Section 18-13-105 to Unmistakable Statements of Parody, Rhetorical Hyperbole and Opinion Violates the First Amendment

The United States Supreme Court has made clear that statements that "could not reasonably have been interpreted as stating actual facts," *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988), enjoy virtually absolute First Amendment protection. *See id.*, 485 U.S. at 48 (portrayal of Jerry Falwell as having engaged in "a drunken incestuous rendezvous with his mother in an outhouse"); *Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974) (use of the word "traitor" in definition of a union "scab"); *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6, 13 (1970) (reference to developer's negotiating position as "blackmail").

In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Court confirmed the importance of these decisions: "[T]he *Bresler-Letter Carriers-Falwell* line of cases . . . provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Id.* at 20 (citations omitted). "[L]oose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining [whatever proposition he or she was expressing]," *id.* at 21, cannot be the basis for a civil or criminal defamation claim; *see also Falwell*, 485 U.S. at 51-55 (reviewing historical importance of parody and satire in public and political debate).

Moreover, "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich*, 497 U.S. at 20. In other words, if the statement of opinion does not "reasonably impl[y] false and defamatory facts," *id.* – if it is obviously the product

of the author's imagination and not factual – it enjoys unqualified First Amendment protection. *See Rinsley v. Brandt*, 700 F.2d 1304, 1309 (10th Cir. 1983); *NBC Subsidiary (KCNC-TV), Inc. v. Living Will Center*, 879 P.2d 6, 10 (Colo. 1994). Relevant considerations in determining whether a statement is fact or opinion include "the phrasing of the statement, the context in which it appears, the medium through which it is disseminated, the circumstances surrounding its publication, and a determination of whether the statement implies the existence of undisclosed facts that support it." *Id.* at 11 (citations omitted).

Perhaps most instructive is *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983). There, the Tenth Circuit dismissed defamation and other tort claims arising from an article that described a fictional Miss Wyoming as engaging in multiple sexual acts. The court held:

> The story is a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants. It has no redeeming features whatsoever. There is no accounting for the vast divergence in views and ideas. However, the First Amendment was intended to cover them all. *The First Amendment is not limited to ideas, statements, or positions which are accepted; which are not outrageous; which are decent and popular; which are constructive or have some redeeming element; or which do not deviate from community standards and norms; or which are within prevailing religious or moral standards.*

Id. at 443 (emphasis added). *Pring* further held that the First Amendment protects rhetorical hyperbole and obvious parody regardless of whether the subject is or is not a public figure. *Id.* at 442. *See also Henderson v. Times Mirror Co.*, 669 F. Supp. 356, 359 (D. Colo. 1987) (statements that private individual was a "sleaze-bag agent" who

"slimed up from the bayou" was "no more than name-calling or rhetorical hyperbole"), *aff'd without op.*, 876 F.2d 108 (10th Cir. 1989).[8]

Here, it is evident that all of the allegedly libelous statements constituted rhetorical hyperbole, parody, satire, or opinion, and that none could be reasonably perceived as stating actual facts about Professor Peake. Both the context of the challenged statements and their content render them incredible in that regard. The context is an obvious alternative newspaper – entitled "The Howling Pig", distributed irregularly, and with no publisher indicated. The publication's website expressly announces an "aim[ ] for a combination of satire and commentary" and that "The Howling Pig is satirical in nature." Any reasonable reader would realize that this is not an official or legitimate UNC publication (arguably entitled to an assumption of factual accuracy), but that it is the work of university protesters, encouraged on the website to anonymously "[b]itch," "[m]oan," and "[h]owl," and not "let them get away with anything."

If there were any doubt from the *context* of the purportedly libelous statements about Professor Peake, their *content* indisputably establishes that they were not assertions of fact and could not reasonably be perceived as such. No reader looking at the doctored photographs, both on the website and with each editorial column, could reasonably conclude that Professor Peake would have placed those photographs there himself; to the extent that any reader even could recognize Professor Peake beneath the

[8] Whether a statement is constitutionally privileged as rhetorical hyperbole, satire, parody, or opinion is a question of law. *Milkovich*, 497 U.S. at 17; *Pring*, 695 F.2d at 442; *NBC Subsidiary*, 879 P.2d at 11.

sunglasses and the KISS makeup and pose, he or she would know that the actual author is simply spoofing the professor. Similarly, the use of the name "Puke" rather than "Peake," the irreverent biographical information, and the express (but facetious) distinction between the upstanding professor and the down-and-dirty editor could be construed only as continued parody of Professor Peake. Reading the statements about and by Mr. Puke as actually being about and by Professor Peake flunks the "straight-face" test. Moreover, a number of the statements – *i.e.*, that "Junius Puke is . . . a loudmouth know-it-all" or that he holds "a cushy, do-nothing, ornamental position" – convey opinions rather than hard facts.

e) Section 18-13-105 Is Unconstitutionally Vague

When Professor Peake went to the police to request the investigation of criminal charges, he told Detective Warren "that the articles [in The Howling Pig] have brought him embarrassment and exposed him to public hatred, contempt and ridicule. . . [and] he feels they have impeached his honesty, integrity, virtue, and reputation within the community." Ex. F to Verified Complaint (Affidavit for Search Warrant under Rule 16, at 3). The quoted language is drawn directly from Section 18-13-105, which provides that it is criminal libel to publish "any statement . . . tending to . . . impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule . . ." Assuming that the current investigation into Professor Peake's complaint matures into criminal charges, those charges almost certainly would be based on the quoted portion of Section

18-13-105. However, that provision is unconstitutionally vague. Other language in the statute is also vague.[9]

The United States Supreme Court has made clear that it will not permit the application of a criminal statute so vague "that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (citation omitted). "Criminal statutes must be scrutinized [for vagueness] with particular care." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987) (citation omitted). If a criminal statute fails to establish standards for the police and public that are sufficient to guard against arbitrary deprivation of liberty interests, it is impermissibly vague. *See City of Chicago v. Morales*, 527 U.S. 41, 52 (1999).

Moreover, "[w]here a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (footnote omitted); *accord Ashton v. Kentucky*, 384 U.S. 195, 200-01 (1966) ("Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer.").[10]

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[9] Under the doctrine of "substantial overbreadth" in First Amendment cases, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

[10] The Colorado Supreme Court's decision in *Ryan* did not discuss whether Section 18-13-105 is void for vagueness.

Thus, in *Reno v. American Civil Liberties Union*, which held that the federal Communications Decency Act was unconstitutionally vague, the United States Supreme Court took an especially hard look at the statute's prohibition of "indecent" communication on the Internet, for two compelling reasons. *First*, as "a content-based regulation of speech," the Act "raises special First Amendment concerns because of its obvious chilling effect on free speech." 521 U.S. at 871-72. *Second*, the Act is a criminal statute. "In addition to the opprobrium and stigma of a criminal conviction, . . . the severity of criminal sanction may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Id.* at 872; *see also Morales*, 527 U.S. at 64 (ordinance requiring police to disperse loitering of "criminal street gang member" with others is unconstitutionally vague); *Papachristou*, 405 U.S. at 171 (vagrancy ordinance that prohibited "prowling by auto" and "loitering" is unconstitutionally vague); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (ordinance prohibiting conduct "annoying to persons passing by" is unconstitutionally vague); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (phrase "known to be a member of any gang" as used in state statute held unconstitutionally vague). Section 18-13-105 cannot survive the especially stringent scrutiny that applies to it as both a criminal statute and one that directly affects First Amendment rights.

Under the "void-for-vagueness" doctrine, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations

omitted). Section 18-13-105 satisfies neither criterion for constitutionality. *First*, the statute fails to provide fair notice. Due to the elasticity of the terms "public hatred," "public . . . contempt," "public . . . ridicule," and "natural defects," "no standard of conduct is specified at all." *Smith*, 415 U.S. at 578; *see Morales*, 527 U.S. at 58 ("[The] purpose of the fair notice requirement is to enable to ordinary citizen to conform his or her conduct to the law.").[11] This uncertainty of meaning requires citizens "at the peril of their . . . liberty . . . to speculate as to the meaning of [a] penal statute . . ." *Lanzetta*, 306 U.S. at 453 (citations omitted).

Second, Section 18-13-105 is susceptible to arbitrary enforcement. The United States Supreme Court has recognized time and again that "'[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could rightfully be detained and who should be set at large.'" *Hill*, 482 U.S. at 466 (citation omitted); *Morales*, 527 U.S. at 60. Yet, that is precisely what the criminal libel statute permits. To undersigned counsel's knowledge, the statute is rarely invoked; other than *Ryan*, it has not been mentioned in any reported Colorado decision since its enactment. But if the defendant district attorney decides to rely on the statute here, it will be to teach the Minks a lesson that they will not forget soon, in other words, to punish them for the arguably offensive content of THP.

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[11] The phrases "expose him to public hatred, contempt, or ridicule" and "expose the natural defects of the living" have no established meaning. No reported case has ever construed the latter clause and, accordingly, there is "no settled usage or tradition of interpretation in law" for it. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1049 (1991).

3. The Minks Are Likely to Prevail on Their Fourth Amendment Claim

The search and seizure in this case cries out for emergency injunctive relief. The government has seized the files of a dissident publication *because of what it has published*. It has carted off the computer that functions not only as the publication's electronic file cabinet but also as the means of publication. And it has confiscated the only existing copies of drafts and articles-in-progress. The result is a prior restraint on the Minks' freedom of speech, which requires prompt judicial review. *See Matter of Search of Kitty's East*, 905 F.2d 1367, 1371-72 (10th Cir. 1990).

Plaintiffs have been unable to find a single reported decision in which the government has claimed any similar right to search and seize the files in a publisher's home or office in pursuit of evidence of criminal defamation. Indeed, as the Supreme Court explained in *Stanford v. Texas*, 379 U.S. 476 (1965), the Fourth Amendment traces its origin to the outrage prompted in England by the practice of conducting precisely such searches of the homes and papers of writers suspected of the crime of "seditious libel." *Id.* at 481-85. After reviewing the roots of the Fourth Amendment in the "history of conflict between the Crown and the press," the Court announced a special rule: the protections of the Fourth Amendment must be enforced with "the most scrupulous exactitude" when the government seeks authority to seize materials protected by the First Amendment "and the basis for their seizure is the ideas which they contain." *Id.* at 485; *see Pleasant v. Lovell*, 876 F.2d 787, 794 (10th Cir. 1989).

Application of that heightened Fourth Amendment standard is especially appropriate in this case, where the modern successor to the Crown seeks authority to

cart off virtually every written record in the premises of a disapproved publication on the dubious ground that the act of publishing is itself a crime. As the following sections demonstrate, the search and seizure in this case violated the Fourth Amendment for two independent reasons. *First*, the warrant failed to meet the constitutional requirement of particularity. *Second*, the warrant was not supported by probable case.

a) The Warrant Violates the Particularity Requirement of the Fourth Amendment

To prevent the "general warrants" that helped to spur the American Revolution, the Fourth Amendment requires that a search warrant must "describe the things to be seized with sufficient particularity to prevent a general, exploratory rummaging in a person's belongings." *United States v. Carey*, 172 F.3d 1268, 1272 (10th Cir. 1999). This particularity requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Stanford*, 379 U.S. at 485-86. "The particularity requirement ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause." *Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir. 1985).

In analyzing whether a warrant satisfies the particularity mandate, the first inquiry is whether the text of the description is overbroad on its face. Because in some cases, a broad description is not necessarily invalid, courts also will inquire whether the government included all the detail that was reasonably available. Finally, courts will inquire whether the scope of the warrant exceeded the scope of the probable cause. In

United States v. Leary, 846 F.2d 592 (10th Cir. 1988), the court held that the search warrant at issue violated the particularity requirement in each of these three distinct ways. *First*, the warrant "contained no limitation on the scope of the search." *Id.* at 606. *Second*, the warrant was "not as particular as the circumstances would allow or require." *Id.* *Third*, the warrant "extends far beyond the scope of the supporting affidavit." *Id.* at 605. The warrant in this case suffers from each of the flaws identified in *Leary*. This is especially true because *Leary* did not involve the First Amendment and, thus, the Tenth Circuit did not apply the heightened standard of "scrupulous exactitude" that is required here.

(1) The Warrant Is Overbroad on Its Face

In *Stanford*, the Supreme Court invalidated a search of the home of the operator of a small mail-order business. The warrant authorized seizure of "any books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, or any written instruments concerning the Communist Party of Texas and the operations of the Communist Party in Texas." 379 U.S. at 486. The Court held that the "indiscriminate sweep" of this description was "constitutionally intolerable," because it was the equivalent of a "general warrant" that left too much discretion to the officers conducting the search.

The warrant in this case is even broader than the invalid warrant in *Stanford*, which at least limited its scope to Communist-related material. In this case, there is *no* stated limitation on what is relevant. In addition to authorizing seizure of all computer-related equipment, computer software, and all hard drives and floppy disks, paragraph 6 of the warrant directs police to seize any papers with names, addresses or telephone

numbers, and paragarph 7 directs police to seize "any and all correspondence, diaries, memoirs, journals, personal reminiscences[,] electronic mail . . . letters, notes, memorandum [*sic*], or other communications in written or printed form." Evaluating a similarly overbroad description in a search warrant, another federal district court concluded: "As written, the warrant does indeed violate the scrupulous exactitude standard. Or, if it is considered exact because it authorizes seizure of everything, then there is no probable cause for such a wide ranging search." *United States v. Clough*, 246 F. Supp. 2d 84, 88 (D. Me. 2003).

After authorizing this vast seizure of virtually everything in written form and everything computer-related, the final numbered paragraph of the warrant authorizes a search of the written materials found on the computer and storage devices "as those items may relate to the allegations." But the authorization to search electronically-stored materials only for items that "relate to the allegations" does not adequately limit the scope of the warrant. *First*, even when a warrant authorizes police to search and seize all records relevant to violations of a specified criminal statute, that is not sufficient by itself to limit the warrant's scope. *See Leary*, 846 F.2d at 601-04; *Voss*, 774 F.2d at 402 ("even if the reference to Section 371 is construed as a limitation, it does not constitute a constitutionally adequate particularization of the items to be seized.").[12] *Second*, and more to the point, the warrant provides no information about

[12] The affidavit in support of the search warrant cannot serve to limit the scope of the search in this case, because the affidavit was neither attached to the warrant nor incorporated into it by reference. *See Leary*, 846 F.2d at 603 & n.20 (both attachment and incorporation are required for an affidavit to cure a warrant's lack of particularity); *United States v. Williamson*, 1 F.3d 1134, 1136 n.1 (10th Cir. 1993) (same). The

the nature of these unspecified and unnamed "allegations." Nor does the warrant mention the crime under investigation or refer in any manner to criminal activity. As the Tenth Circuit has explained, "a warrant that simply authorizes the seizure of all files, whether or not relevant to a specified crime, is insufficiently particular." *Voss*, 774 F.2d at 406.

The fact that Detective Warren did not seize all the materials described in the warrant confirms that he exercised discretion that the particularity clause forbids. *See Stanford*, 379 U.S. at 485-86 (explaining that the warrant must be specific so that "nothing is left to the discretion of the officer executing the warrant"). Even when an officer executing an overbroad warrant confiscates only the materials that could have been seized under a proper warrant (which is not the case here), the search nevertheless is judged by the warrant's *text*. *See United States v. Roche*, 614 F.2d 6, 8-9 (1st Cir. 1980); *Application Of Lafayette Academy, Inc.*, 610 F.2d 1, 5 (1st Cir. 1979). This result is required so that a warrant fulfills its function to "assure[ ] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States v. Chadwick*, 433 U.S. 1, 9 (1977).

(cont'd.)..
officers who executed the search warrant on December 12, 2003 provided only the three-page warrant. The supporting affidavit is a separate document that was not available until December 30, when Detective Warren filed the inventory and return in state court.

(2) The Government Failed to Use Available Information to Narrow the Warrant

This is not a case in which a broad description must be tolerated on the ground that the government has supplied all the detail that a reasonable investigation would allow. *See Leary*, 846 F.2d at 604. In this case, the warrant does not mention such readily-available information, for example, as the nature of the criminal activity under investigation. *See United States v. Spilotro*, 800 F.2d 959, 964 (9th Cir. 1986) ("Reference to a specific illegal activity can, in appropriate cases, provide substantive guidance for the officer's exercise of discretion in executing the warrant.") The warrant for the Mink residence refers to "the allegations" but fails to provide any information about them. As a result, this warrant, like the defective warrant in *Leary*, "authorize[s] wholesale seizures of entire categories of items not generally evidence of criminal activity and provide[s] no guidelines to distinguish items used lawfully from those the government had probable cause to seize." *Leary*, 846 F.2d at 605 (quoting *Spilotro*, 800 F.2d at 964).

(3) The Scope of the Warrant Far Exceeds the Scope of the Supporting Affidavit

The search warrant also fails to meet the particularity requirement because it authorizes a search and seizure that extends far beyond the scope of whatever arguable probable cause is presented in the supporting affidavit.[13] *See Leary*, 846 F.2d at 605. Specifically:

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[13] In fact, the affidavit provided *no* probable cause for the search. *See infra* at 37-39.

- Nothing in the affidavit justifies a search of any and all letters, diaries, and "personal reminiscences" found in the Mink residence, yet the warrant authorizes searching these materials without regard to whether they are arguably connected to THP.
- Nothing in the affidavit justifies seizing passwords for computers other than those found at the Mink residence, yet paragraph 6 of the warrant authorizes seizing passwords for *any* computer, no matter where it is located and without regard to any arguable connection to THP.
- Even for material that is connected to THP, the warrant exceeds the arguable scope of the criminal investigation suggested by the affidavit. The gist of the crime of criminal libel is *publication* of statements that fall into a particular category. The statements at issue all appear on THP's website or in the first three issues, which are available at the website. Copies of those publicly-available materials were already in defendants' possession and were attached to the affidavit. The apparent purpose of the search was to uncover evidence linking those already-published statements to a particular computer and to particular persons. Yet the warrant authorizes the search and seizure of electronic documents that do not reveal that connection and have nothing to do with the statements at issue.

Thus even assuming that the affidavit provided probable cause to search for at least some evidence, such as a connection between the Mink residence and THP website, the

warrant was "impermissibly overbroad" because it "extends far beyond the scope of the supporting affidavit." *Leary*, 846 F.2d at 605-06.

b) The Warrant Was Not Supported by Probable Cause

Recognizing the "historical connection between the search and seizure power and the stifling of liberty of expression," the Supreme Court has held that a state's regulation of obscenity must "conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). Accordingly, a prerequisite to the seizure of materials as obscene is a procedure that requires a magistrate to "focus searchingly on the question of obscenity." *Marcus v. Search Warrants of Property at 104 East Tenth Street*, 367 U.S. 717, 732 (1961).

This is not an obscenity case, but a criminal investigation for felony libel presents the same or even greater risk of suppressing constitutionally-protected expression. Accordingly, applying the Fourth Amendment with "scrupulous exactitude" requires that a similar assurance that a search warrant was issued only after a "searching focus" on whether the affidavit provided probable cause of criminal libel. *Cf.*, *Kitty's East*, 905 F.2d at 1372-73.

The elements of the crime are the touchstone in evaluating whether there was probable cause to support the issuance of the search warrant. As discussed earlier, in *Ryan*, the Colorado Supreme Court held that Section 18-13-105 could not be used to prosecute a private individual for "statements about public officials or public figures on matters of public concern." 806 P.2d at 940. The court restricted the valid application

of the statute to cases where one private person has made libelous statements about another private individual on purely private matters. *Id.* at 941. Thus, defendants in this case could have had probable cause to search the Minks' home only if (a) the victim of the claimed libel is a purely "private person," rather than either a public official or figure, and (b) the allegedly libelous statements address "purely private matters," rather than matters of public concern. *Id.* at 939, 941.

Significantly, the affidavit for search warrant fails to address or analyze either of these critical issues under Section 18-13-105, as restricted by *Ryan*. It attaches printouts from THP and provides some facts that are relevant to the inquiry. Analysis of those facts, however, demonstrates that they do not provide probable cause for a criminal libel case. The affidavit states that the investigation concerns allegations of criminal libel made by Professor Peake, who is the Monfort Distinguished Professor of Finance at the University of Northern Colorado. As such, Mr. Peake is not the "purely private person" described in the *Ryan* decision. On the contrary, he is a public employee and a public figure, especially with regard to issues connected to the university community, which is the primary focus of THP's editorial attention. In addition, none of the allegedly libelous statements recounted in the affidavit concern purely private matters. The stock market bubble of the 1990s and the rise (and fall) of technology stocks, for example, is clearly a matter of public concern. Thus, the affidavit for search warrant does not provide probable cause to believe that Professor Peake is a "purely private person" complaining about statements that concern purely private matters. *See supra* at 14-18.

The text of the criminal libel statute and the *Ryan* decision also make clear that another key consideration is the truth or falsity of the purportedly libelous statements. *See supra* at 20-22. Yet the affidavit provides only one sentence that speaks to this issue. It reports that Professor Peake told Detective Warren "that the statements made on the website about him are false." The affidavit does not say which particular statements were identified as false, nor does it provide any information, other than the professor's blanket and nonspecific statement, that could have assisted the magistrate in evaluating whether the statements are true or false. Indeed, there is no information that the affidavit could have provided to assist such an inquiry with regard to several of the purportedly libelous statements, because they are opinions that cannot be proven true or false, or satire, parody or hyperbole that cannot reasonably be read as factual. *See supra* at 23-26.

4. The Minks Are Likely to Prevail on Their Privacy Protection Act Claim

The Privacy Protection Act of 1980 supplements the protections of the First and Fourth Amendment by limiting the power of government officials to search for and to seize materials from persons who disseminate information or opinion to the public. *See* 42 U.S.C. § 2000aa(a); *Steve Jackson Games, Inc. v. United States Secret Service*, 816 F. Supp. 432, 434 n.1 (W.D. Tex. 1993) (Act protects electronic bulletin board operated by private business producing books, magazines, and box games). The Act protects "documentary materials" and "work product materials," 42 U.S.C. § 2000aa-7, and 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.

There can be no doubt that the law enforcement authorities in this case knew that they were searching a person "reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or similar form of public communication." 42 U.S.C. § 2000aa(a). Indeed, it is the fact that THP is posted on the Internet that prompted the police to seek a search warrant in the first place. This is clearly a search to which the Privacy Protection Act applies.[14]

"Work product" refers to materials prepared in anticipation of and for the purpose of communicating information to the public and that contain "mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created such material." 42 U.S.C. § 2000aa-7(b)(3). "Documentary materials" include any additional information in whatever form. In this case, the law enforcement officers searched for and seized not only copies of completed publications but also portions of a yet-to-be-published issue with two articles already laid out; ideas for future stories and articles, and additional research materials gathered to document forthcoming articles. Thus, the material seized included both "work product materials" and "documentary materials" as those terms are defined in the Privacy Protection Act.

Defendants can be expected to argue that "there is probable cause to believe that the person possessing such materials has committed or is committing the criminal

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[14] The Act applies only if the person claiming protection intends to disseminate information "in or affecting interstate or foreign commerce." 42 U.S.C. §§ 2000aa(a), (b). Virtually all communications over the Internet meet this standard. *See United States. v. Kammersell*, 196 F.3d 1137 (10th Cir. 1999).

offense to which the materials relate." 42 U.S.C. §§ 2000aa(a)(1), (b)(1). However, this "probable cause exception" does not apply for two independent reasons. *First*, the search in this case was not supported by probable cause. *See supra* at 37-39. *Second*, the search falls within an exception to the "probable cause" exception: The Act forbids the government to search for or seize materials "when the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein." 42 U.S.C. §§ 2000aa(a)(1), (b)(1). In this case, the offense of criminal libel clearly consists of the "communication" of the seized materials or the information they contain.

B. The Minks Will Suffer Irreparable Injury Absent an Injunction

Both Tom and Crystal Mink have been damaged and will continue to suffer substantial and irreparable injury as a result of defendants' actions, which are violating, and threaten to continue violating, Tom Mink's constitutional rights to freedom of speech and to be free of unreasonable searches and seizures. Tom Mink has been quite literally silenced by the seizure of the computer, which was the twenty-first century equivalent of his printing press. Not only has he lost the means of publishing THP, updating its website, and distributing the publication, he has lost his only copies of research and ideas for future articles and the layout of forthcoming issues. Beyond that, the unlawful search and seizure and the threat of criminal prosecution have had a chilling effect on his freedom of speech. He cannot exercise that right without fear of further investigation, future searches and seizures, prosecution, and the risk of unlawful conviction.

The loss of constitutional rights is itself irreparable injury that merits equitable relief: "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Howard v. United States*, 864 F. Supp. 1019, 1028-29 (D. Colo. 1994) (quoting 11 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, § 2948, at 440 (1973)). This principle holds particular force when the First Amendment is at stake: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). Accordingly, when government action threatens First Amendment rights, as in this case, there is a presumption of sufficient irreparable injury to warrant a preliminary injunction. *See Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981).

Injury to Fourth Amendment rights such as those sustained by Tom and Crystal Mink also constitutes irreparable injury. *See*, *e.g.*, *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987); *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792, 796 (N.D. Ill. 1994). This is especially true when, as in this case, an unreasonable search and seizure results in a prior restraint of First Amendment rights. *Kitty's East*, 905 F.2d at 1371. In this case, the materials seized include the only existing copies of drafts, articles-in-progress, and partially completed layout of future issues of THP. The government's seizure thus constitutes a prior restraint that requires immediate judicial relief.

In addition, "[a] plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Kikumura v. Hurley*, 242 F.3d 950, 963

(10th Cir. 2001) (citation omitted). Here, if Tom Mink is subjected to prosecution for alleged violations of C.R.S. § 18-13-105, he will have no adequate remedy to recover for the resulting additional damages and injury to his constitutional rights. The district attorney's charging decision is likely to be protected from damages liability by the doctrine of absolute immunity. The Eleventh Amendment and the doctrine of qualified immunity would be additional impediments to the recovery of damages. Accordingly, an action for damages could be unavailable to redress the current and future injuries the Minks will sustain without this Court's intervention.

Moreover, even when legal doctrine does not foreclose monetary damages, courts have recognized that damages for violations of First Amendment rights are so difficult to ascertain that relief in equity is appropriate. "[I]njunctions are especially appropriate in the context of first amendment violations because of the inadequacy of money damages." *Nat'l People's Action v. Village of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990); *see also Kikumura*, 242 F.3d at 950 (same).

C. The Threatened Injury to the Minks Outweighs Whatever Injury the Proposed Injunction May Cause Defendants

The balance of hardships at issue here tips decidedly in favor of the Minks and against defendants. As shown above, the Minks are being irreparably injured by defendants' unlawful activity, and this injury will continue unless and until defendants' activities are halted by order of this Court. Further, a TRO will cause no legally cognizable harm to defendants. In other words, "the threatened injury to Plaintiffs' constitutionally protected speech outweighs whatever damage the preliminary injunction may cause Defendants' inability to enforce what appears to be an

unconstitutional statute." *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) (citation omitted).

D. Entry Of An Injunction Would Not Be Contrary To The Public Interest and Will Preserve the Status Quo

Injunctions blocking laws that would otherwise interfere with First Amendment rights are consistent with the public interest. *E.g.*, *ACLU v. Johnson*, 194 F.3d at 1163; *Elam Constr. v. Reg. Transp. Dist.,* 129 F.3d 1343, 1347 (10th Cir.1997); *Utah Licensed Beverage Ass'n*, 256 F.3d at 1076. "[A]s far as the public interest is concerned, it is axiomatic that the preservation of First Amendment rights serves everyone's best interest." *Local Org. Comm., Denver Chap., Million Man March v. Cook,* 922 F. Supp. 1494, 1501 (D. Colo. 1996). Here, because readers of and contributors to THP and its website share the Minks' interest in freedom of expression and publication, entry of an injunction would not be contrary to the public interest.

Finally, granting preliminary injunctive relief here will serve the very purpose of such relief – preserving the *status quo ante* pending resolution on the merits. The protections of the First Amendment are too important to risk their violation until this Court finally resolves the issues raised in the Verified Complaint.

E. The Equities in this Case Favor No Bond

No bond is necessary in this case because the entry of the TRO and preliminary injunction will cause no monetary damages to the defendants.

IV. CONCLUSION

For all of the reasons set forth above, Tom Mink and Crystal Mink respectfully request that the Court grant their Motion for Temporary Restraining Order and Preliminary Injunction.

Dated this __ day of January, 2004.

Respectfully submitted,

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