NO. 04-1496

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS MINK and THE HOWLING PIG,

Plaintiffs-Appellants,

vs.

JOHN W. SUTHERS, KENNETH R. BUCK, and SUSAN KNOX,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, HONORABLE LEWIS T. BABCOCK, PRESIDING

APPELLANTS' OPENING BRIEF

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THIS BRIEF HAS ATTACHMENTS THAT ARE INCLUDED ONLY IN WRITTEN FORM

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THERE ARE NO PRIOR OR RELATED APPEALS

Plaintiffs and Appellants Thomas Mink and The Howling Pig ("THP") respectfully submit this opening brief in support of reversal of the judgment below, entry of judgment in favor of Plaintiffs as to the unconstitutionality of the Colorado criminal libel statute, and remand of Mink's claims against Defendant Susan Knox.

STATEMENT OF JURISDICTION

The district court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1343. On October 27, 2004, the district court entered judgment against Plaintiffs and in favor of all Defendants on all of Plaintiffs' claims, and dismissed Plaintiffs' First Amended and Supplemental Complaint (the "Amended Complaint"). Aplt.App. 370-72. The district court also denied Plaintiffs' motion for partial summary judgment on their first claim for relief, which sought a declaratory judgment that the Colorado criminal libel statute, C.R.S. § 18-13-105 (the "Criminal Libel Statute"), is unconstitutional. Aplt.App. 368, 370-72. The October 27, 2004 judgment is a final order disposing of all claims with respect to all parties. Fed.R.Civ.P. 58.

This Court's jurisdiction arises under 28 U.S.C. § 1291. In accordance with Rule 4(a) of the Federal Rules of Appellate Procedure ("F.R.A.P."), Plaintiffs filed a timely notice of appeal on November 24, 2004. Aplt.App. 373-75.

ISSUES PRESENTED FOR REVIEW

1. Plaintiffs' claim against John W. Suthers as Attorney General of Colorado (the "AG") and Kenneth R. Buck as District Attorney for the Nineteenth Judicial District (the "DA") asserts that the Criminal Libel Statute violates the First and Fourteenth Amendments (the "First Amendment Claim"). Without reaching the merits, the district court dismissed the claim based on lack of standing, relying on the fact that no criminal charges were pending against Plaintiffs for their publication of *The Howling Pig* ("*THP*"), and on the court's misperception that the DA had assured that no charges would be filed in the future. Was it error to dismiss the First Amendment claim for lack of standing when Plaintiffs alleged that (a) the DA's "no-file" decision was limited to the first three issues of *THP*, (b) Plaintiffs had published additional issues containing articles that facially violated the Criminal Libel Statute, and (c) Plaintiffs stated their intent to publish articles in future issues that also could be construed as violating the statute?

2. The Criminal Libel Statute fails to include an actual malice standard; is an impermissible content-based regulation of speech; omits falsity as an element of the crime of libel; permits prosecution and conviction for constitutionally-protected statements of opinion, satire, and hyperbole; and is unconstitutionally vague. Are Plaintiffs entitled to summary judgment declaring that the statute is facially unconstitutional under the First and Fourteenth Amendments?

3. As part of a pre-indictment investigation into alleged criminal libel, the lead detective obtained a warrant for a search of the Mink home and the seizure of the computer that Mink used to publish *THP*, its electronic contents, and all writings in the house. Plaintiffs alleged that before the detective submitted the warrant application to a magistrate, Defendant Knox, an assistant DA, reviewed and approved the affidavit and draft warrant. Did the district court err in dismissing Mink's claim alleging an unlawful search and seizure in violation of the First and Fourth Amendments, on the basis that Knox was entitled to absolute immunity?

4. The federal Privacy Protection Act, 42 U.S.C. §§ 2000aa, *et seq.* (the "PPA") prohibits searches and seizures of certain materials related to a person's communication of information to the public. Mink alleged that, in reviewing and approving the warrant application, Knox authorized and caused a violation of the PPA. Did the district court err in concluding that Mink failed to state a claim for relief against Knox under the PPA?

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiffs filed this action to vindicate their constitutional and statutory rights to freedom of speech, freedom of the press, and freedom from unreasonable searches and seizures. The case arises out of Plaintiffs' publication of *THP*, an

internet-based alternative newsletter providing commentary on matters of public concern to the University of Northern Colorado ("UNC") community. The first three issues of *THP* poked fun at a prominent UNC professor, Junius W. Peake, by identifying an obvious fictional character named "Junius Puke" as the purported editor of the publication. Peake took offense and, at his request, the DA's Office asked the Greeley Police Department (the "Police Department") to begin a criminal investigation, relying on Colorado's outdated criminal libel statute:

> **18-13-105. Criminal libel.**
>
> (1) A person who shall knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead, or 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, commits criminal libel.
>
> (2) It shall be an affirmative defense that the publication was true, except libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living.
>
> (3) Criminal libel is a class 6 felony.[1]

By reviewing and approving an insufficient affidavit, Knox caused the Police Department to obtain an overbroad search warrant and to conduct an unconstitutional search of the Mink home. During that search, the Police

Department confiscated the computer used for publishing *THP*, and later advised Plaintiffs' counsel that the Police Department would recommend criminal libel charges. These events chilled Plaintiffs from exercising their rights to freedom of expression and the press – publication of *THP* temporarily ceased.

Plaintiffs obtained limited relief when the district court entered a temporary restraining order ("TRO") compelling return of the seized computer and precluding prosecution of Mink based on his publication of the first three issues of *THP*. However, the threat of prosecution under the Criminal Libel Statute did not abate. Through this litigation, Plaintiffs pursue a judicial declaration that the Criminal Libel Statute is facially unconstitutional under the First and Fourteenth Amendments, and monetary relief for the unlawful search of the Mink home and the illegal seizure of the computer and electronic documents.

B. Course of Proceedings and Disposition Below.

Mink and his mother, Crystal Mink, initially sued the DA (then A.M. Dominguez, Jr.), Knox (who was originally identified as John Doe #1), the City of Greeley (the "City"), and Detective Ken Warren, a Greeley police officer. Aplt.App. 9-56. The Minks asserted claims for violation of their First, Fourth, and Fourteenth Amendment rights, and under the PPA. *Id.*.

(cont'd.)

[1] Plaintiffs provide copies of the Criminal Libel Statute and relevant

On January 9, 2004, the district court entered a TRO prohibiting the DA from initiating prosecution of Mink under the Criminal Libel Statute, and requiring the City to return the Minks' computer.[2] Aplt.App. 64-66. After the DA assured the district court that he would not file criminal charges based on the first three issues of *THP*, the parties agreed to the vacatur of the TRO. Aplt.App. 67-68. The Minks then reached a settlement resulting in dismissal of their claims against the City and Detective Warren. Aplt.App. 69-75, 132-35. Mr. Mink and THP then filed an Amended Complaint, which removed Mrs. Mink as a plaintiff, removed the City and Detective Warren as defendants, added THP as a plaintiff, added the AG (then Ken Salazar) as a defendant, and specifically named Knox in place of John Doe #1. Aplt.App. 76-131. The Amended Complaint asserted a

(cont'd.)
provisions of the PPA in the Addendum.

[2] The Amended Complaint mistakenly identifies January 200*3* (rather than 200*4*) as the month during which the TRO was entered and certain subsequent events occurred. *See* Aplt.App. 86 (¶37), 87 (¶41), 88 (¶44).

single claim against the AG and the DA: that the Criminal Libel Statute, which they are responsible for enforcing and defending, is unconstitutional under the First and Fourteenth Amendments. It asserted three claims against Knox: (1) violation of the PPA; (2) violation of the First and Fourth Amendments, through 42 U.S.C. § 1983; and (3) violation of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2701, *et seq.* (the "ECPA").[3]

Knox moved to dismiss all claims asserted against her. Aplt.App. 140-64. The DA answered the Amended Complaint. Aplt.App. 136-39. The AG moved to dismiss the First Amendment Claim, asserting that he was not a proper party to the case, but he nonetheless filed an amicus brief defending the constitutionality of the Criminal Libel Statute. Aplt.App. 165-99. Plaintiffs moved for summary judgment on their claim against the DA and the AG on the basis that the Criminal Libel Statute is unconstitutional. Aplt.App. 241-340.

In a Memorandum Order and Opinion dated October 26, 2004, the district court granted Knox's motion to dismiss and denied Plaintiffs' motion for partial summary judgment. Aplt.App. 353-69. The district court also dismissed

[3] Plaintiffs' ECPA claim arose out of Knox's role in the unlawful search of electronic records from THP's website and related e-mails. Plaintiffs do not pursue their ECPA claim on appeal.

Plaintiffs' constitutional claim against the DA and the AG based on a lack-of-standing argument that neither defendant had raised.[4] *Id.* This appeal followed.

STATEMENT OF FACTS

The following statement of facts is based on (1) the allegations of the Amended Complaint, which are controlling for purposes of review of the district court's order dismissing Plaintiffs' claims,[5] and (2) additional facts presented in support of Plaintiffs' motion for summary judgment, which Defendants did not attempt to rebut and, therefore, must be accepted as undisputed for purposes of reviewing whether the district court should have granted summary judgment on the First Amendment Claim.

A. The Parties.

Mink is 24 years old and recently completed his studies at UNC. He lives in Ault, Colorado. Aplt.App. 284 (¶1), 289. THP is an unincorporated association of persons engaged in organizing, editing, and circulating *THP*. Aplt.App. 78 (¶6).

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[4] The AG had argued only that Plaintiffs had failed to establish injury-in-fact because the AG "lacks the ability to prosecute Plaintiffs under the criminal libel statute," Aplt.App. 197 – not because Plaintiffs faced no threat of prosecution at all.

[5] Knox submitted affidavits in support of her alternative motion for summary judgment, *see* Aplt.App. 158-64, but the district court did not cite or otherwise appear to rely on the affidavits, and it clearly granted her motion to dismiss, rather than for summary judgment. *See* Aplt.App. 368, 370-72.

The DA serves the Nineteenth Judicial District, including the City, and is charged with prosecuting violations of Colorado statutes. Aplt.App. 78 (¶7), 89 (¶45). Knox was instrumental in the illegal search of the Minks' home and the unlawful seizure of their computer and electronic documents because she reviewed and approved the affidavits submitted to the state court for (1) the production of records by Yahoo (Geocities), Inc. for the purpose of obtaining electronic records relating to *THP* and its website, and (2) a search warrant of the Mink home. Aplt.App. 78-79 (¶8). The AG is charged with defending the constitutionality of Colorado statutes, and with prosecuting and defending all cases in the state appellate courts in which the State of Colorado is a party, including cases in which defendants appeal convictions for violating the Criminal Libel Statute. Aplt.App. 79 (¶9), 89 (¶45).

B. The First Three Editions of *THP*.

In the Fall of 2003, Plaintiffs published three editions of *THP*, which featured satirical and sarcastic commentary about matters of public concern to the UNC community, including the UNC newspaper, the lack of diversity in the administration and faculty, budget cutbacks, spending priorities, and campus "free speech zones." Aplt.App. 99-104. Plaintiffs made *THP* available for reading, downloading, and printing on an internet website. Aplt.App. 80 (¶13); *see* http://www.thehowlingpig@yahoo.com.

Each of the first three issues included an "editorial column" by *THP's* purported editor-in-chief "Mr. Junius Puke," a parody of UNC's Monfort Distinguished Professor of Finance, Professor Peake. Aplt.App. 80 (¶¶15-16), 99-104. The first three issues included obviously doctored photographs of the real Peake, wearing sunglasses and a Hitler-like moustache. Aplt.App. 80 (¶16), 99-104. The home page of *THP*'s website pictured "Professor Puke" in outlandish makeup such as that worn by the members of the rock band "KISS." Aplt.App. 80 (¶16), 105-07. The editorial columns attributed to "Professor Puke" spoofed and parodied Peake by addressing subjects on which the real professor would have been unlikely to write, or through the assertion of views diametrically opposed to those previously expressed by Peake. Aplt.App. 80-81 (¶17), 99-104.

Peake is well known in the Weld County and UNC communities as someone who often has voiced his views publicly on a wide range of issues. According to an editorial published in the Greeley Tribune, Peake had become a public figure in the community as a result of "his constant ramblings that circulate to students and faculty members via e-mail on campus and his opinion articles that appear on this very page." Aplt.App. 81 (¶18).

However, Peake apparently lacks a sense of humor. Based on the first three editions of *THP*, he complained to the second-in-command prosecutor in the DA's Office. Aplt.App. 81 (¶19), 289. Although a reasonable prosecutor would have

known, or could have discovered, that Peake was a public figure for First Amendment purposes, the DA's Office assigned an investigator to the matter, and the investigator compiled a packet of information that he turned over to the Police Department, with a request that Peake be contacted. Aplt.App. 81 (¶20). Pursuant to that request, Detective Warrant contacted Peake, who submitted a complaint asserting that *THP's* portrayal of him violated the Criminal Libel Statute. Aplt.App. 81 (¶20), 311.

C. The Initial Criminal Investigation, Search and Seizure, and the Threat of Prosecution.

Following receipt of Peake's complaint, Detective Warren began his criminal investigation. Aplt.App. 291. As part of that investigation, he drafted an affidavit seeking a state court order that Yahoo produce electronic records related to *THP's* website, including e-mails. Aplt.App. 84-85 (¶31), 94 (¶¶ 74-75, 77), 294. Knox reviewed and approved the affidavit. Aplt.App. 78-79 (¶8), 94 (¶ 74). Detective Warren then drafted an affidavit seeking a warrant to search the Mink home and confiscate the computer, the electronic files stored within it, and virtually every other writing in the home. Aplt.App. 82 (¶23), 84 (¶30), 113-23. Knox reviewed and approved that affidavit, too. Aplt.App. 78 (¶8), 93 (¶71).

On December 12, 2003, the search warrant issued and three police officers appeared at the Mink house to execute the warrant; the police searched the home

and seized the computer that Mink used for his work on *THP* and the computer's electronic contents. Aplt.App. 82-83 (¶¶21-26), 109-11, 284 (¶4), 294-95. Those contents included work product materials and documentary materials that are expressly protected by the PPA. Aplt.App. 91-92 (¶60). During the search, the police officers told Mink that they were investigating a potential charge of "felony libel" against him. Aplt.App. 284 (¶3). Shortly thereafter, Detective Warren informed Mink's attorney that he would recommend that the DA file a charge of criminal libel. Aplt.App. 84 (¶28). In response to the criminal investigation, search and seizure, and threatened prosecution, Plaintiffs stopped publishing *THP*. Aplt.App. 83 (¶27), 85 (¶33).

D. Partial Relief from the Threat of Prosecution.

On January 9, 2004, the district court entered a TRO that ordered the DA not to prosecute Mink under the criminal libel statute and further ordered the City to return the Minks' computer and all of its contents. Aplt.App. 64-66. On January 20, 2004, the DA announced in a memorandum that he would not file a criminal libel charge against Mink based on material published about Peake in the first three issues of *THP*. Aplt.App. 87 (¶41), 88-89 (¶44), 331-32. Based on this "no file" decision, the district court vacated the TRO. Aplt.App. 67-68.

E. The Continuing Threat of Prosecution Against Plaintiffs.

The DA's "no file" decision was limited to the first three issues of *THP*, and did not renounce future reliance on the criminal libel statute. Aplt.App. 88-89 (¶44), 331-32. When Plaintiffs moved for summary judgment in July 2004, they had published and posted to THP's website additional issues of *THP*. Aplt.App. 301 (¶2), 302 (¶5), 334-40. Those issues contain articles that facially violate various aspects of the Criminal Libel Statute beyond those specifically at issue concerning Peake, including articles that would "blacken the memory of the dead," or "impeach the honesty, integrity, virtue or reputation" of a living person, or "expose the natural defects" of a living person. Aplt.App. 334-40. Plaintiffs intend to publish future issues of *THP* containing articles that could be construed as violating the Criminal Libel Statute. Aplt.App. 89 (¶47).

There is no bill pending in the Colorado General Assembly that proposes to amend or repeal the Criminal Libel Statute. Aplt.App. 89 (¶46). The AG, charged with defending the constitutionality of Colorado statutes, has announced that the Criminal Libel Statute is constitutional and therefore could be enforced against Plaintiffs. Aplt.App. 191. A number of law enforcement authorities in Colorado have invoked or threatened to invoke the Criminal Libel Statute within the past ten years. Aplt.App. 86 (¶¶35, 36).

SUMMARY OF ARGUMENT

The district court got it right when it initially entered a TRO prohibiting prosecution of Mr. Mink under the unconstitutional Criminal Libel Statute. But the court sorely missed the mark when it dismissed all of Plaintiffs' claims on a variety of invalid bases. The district court's first error was its conclusion that Plaintiffs lack standing to pursue their First Amendment challenge to Section 18-13-105. The Amended Complaint, particularly as expanded upon by Mr. Mink's affidavit and exhibits, alleged both an intention to violate the Criminal Libel Statute and a credible threat of prosecution. The court simply misread and misstated the record when it concluded otherwise.

Although the district court did not reach the merits of Plaintiffs' First Amendment Claim, this Court should do so and it should hold the Criminal Libel Statute facially unconstitutional. The statute violates the First and Fourteenth Amendments because it fails to include an actual malice standard; is an impermissible content-based regulation of speech; omits falsity as an element of the crime of libel; permits prosecution and conviction for constitutionally-protected statements of opinion, satire, and hyperbole; and is unconstitutionally vague.

The district court further erred in holding that Deputy DA Knox enjoys absolute immunity from prosecution for her role in the illegal search and seizure that violated Mr. Mink's First and Fourth Amendment rights. In reviewing and

approving the search warrant application, Knox was not acting as an advocate, but instead was providing legal advice to Detective Warren. Therefore, she was at most entitled to qualified, not absolute, immunity.

Finally, the district court was wrong to dismiss Mr. Mink's PPA claim against Knox. Under the standards applicable to motions to dismiss, Mink adequately stated a claim. He alleged that, in reviewing and approving the search warrant application, Knox authorized and thereby caused a search and seizure violative of the PPA.

This Court should redress each of these reversible errors by declaring the Criminal Libel Statute unconstitutional and remanding for a trial of Mr. Mink's claims against Knox.

ARGUMENT

I. Standard of Review.

This case challenges the district court's dismissal of all of Plaintiffs' claims, based on standing, absolute immunity, or on the merits. Each of these issues is subject to *de novo* review. *See Colorado Environmental Coalition v. Wenker*, 353 F.3d 1221, 1227 (10th Cir. 2004).

The sufficiency of a complaint is a question of law. Granting a motion to dismiss is improper "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v.*

Gibson, 355 U.S. 41, 45-46 (1957). Moreover, dismissal "is a 'harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading, but also to protect the interests of justice.'" *Morse v. Regents of the University of Colorado*, 154 F.3d 1124, 1127 (10th Cir. 1998) (citation omitted).

Summary judgment should be granted if the movant demonstrates that there is no genuine issue of material fact and that judgment is appropriate as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[W]hen a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality." *ACORN v. Golden*, 744 F.2d 739, 746 (10th Cir. 1984) (citations omitted).

II. The District Court Erred in Dismissing Plaintiffs' First Amendment Claim Based on Lack of Standing.

A. Plaintiffs Have Standing.

A plaintiff invoking the jurisdiction of a federal court must satisfy the case-or-controversy requirement imposed by Article III of the Constitution. *Ward v. State of Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003). Under Article III, a plaintiff must have a "'personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions.'" *Id.* (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983)). To demonstrate standing, a plaintiff must show that

(1) he or she has suffered injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998).

Such traditional prerequisites for standing are relaxed in the context of a facial challenge to a statute on First Amendment grounds. *See Sec'y of State v. Munson*, 467 U.S. 947, 956 (1984) ("[W]here there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged."); *Ward*, 321 F.3d at 1266-67 (same). First Amendment plaintiffs may challenge an overbroad statute not merely because their own rights to freedom of expression are violated, but because of the chilling effect on others. "[A] judicial prediction or assumption [exists] that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

A First Amendment plaintiff demonstrates his or her own injury-in-fact, *i.e.*, the first element of the traditional three-part standing test, when the plaintiff "alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat

of prosecution thereunder." *Ward*, 321 F.3d at 1263 (citations omitted). To satisfy this standard, a plaintiff must merely demonstrate (1) an intention to violate the terms of the statute, and (2) a credible threat of prosecution. For the credible threat component, a plaintiff need not suffer actual prosecution or be actively threatened with prosecution; rather, a plaintiff must show only that his or her fear of criminal prosecution under an unconstitutional statute is not "imaginary or wholly speculative." *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987) (citations omitted).

Reading the allegations of the Amended Complaint accurately, Plaintiffs satisfied the lenient two-part requirement for standing in a First Amendment case. *First*, they have published and intend to continue publishing articles that violate or will violate provisions of the Criminal Libel Statute, including by "blacken[ing] the memory of the dead" or "impeach[ing] the honesty, integrity, virtue or reputation or expos[ing] the natural defects of one who is alive." For example, an issue published after the first three issues included the following statement: "[A] graduate of the Kenneth W. Monfort School of Business can be expected to follow in Kenny's footsteps and exploit their [*sic*] overworked, underpaid, and undereducated workers for as much quick profit and political clout as possible." Aplt.App. 335. This statement undeniably "blackens the memory" of the late Kenneth W. Monfort.

Second, Plaintiffs' fear of prosecution is not "imaginary or wholly speculative." *Wilson*, 819 F.2d at 946. Not only were they expressly threatened with past prosecution, but the DA has failed to renounce future prosecutions, and the AG continues to defend the constitutionality of the Criminal Libel Statute. In *Ward*, the court held that there was an injury in fact, in part, because the plaintiff had been given "no assurances that he would not be charged" under the statute if he engaged in similar protests in the future. 321 F.3d at 1268; *see also Chamber of Commerce v. REC*, 69 F.3d 600, 603-04 (D.C. Cir. 1995) (a credible threat of prosecution existed because nothing "would prevent the Commission from enforcing its rule at any time with, perhaps, another change of mind of one of the Commissioners"). Here, too, Plaintiffs have received "no assurances that [they] would not be charged" in the future for statements that violate Section 18-13-105.

Given the content of the later editions of *THP*, the past threat of prosecution, the seizure of the Minks' computer (alleviated only by resort to federal court), and the failure of the DA and AG to provide any assurances to Plaintiffs, the threat of prosecution was and is real and credible. Thus, Plaintiffs have standing to assert their First Amendment Claim.

B. The District Court's Ruling on Standing Was Erroneous.

The following is the district court's complete analysis of Plaintiffs' standing to pursue their First Amendment Claim:

> *The Plaintiffs allege* in the Amended Complaint that no criminal charges are pending against them and *that the District Attorney has assured that no charges will be filed*. Nevertheless, they fear prosecution in the future because they intend to continue violating the Libel Statute. The Plaintiffs lack standing to preempt a potential prosecution. The Tenth Circuit has held that "assurances from prosecutors that they do not intend to bring charges are sufficient to defeat standing, even when the individual plaintiff had actually been charged or directly threatened with prosecution for the same conduct in the past." *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004), *citing Faustin v. City & County of Denver*, 268 F.3d 942, 948 (10th Cir. 2001) and *PeTA v. Rasmussen*, 298 F.3d 1198, 1203 (10th Cir. 2002). The First Count is dismissed.

Aplt.App. 367 (emphasis added).

The district court fundamentally misunderstood and misstated the allegations in the Amended Complaint. The court believed that Plaintiffs had alleged that "the District Attorney has assured that no charges will be filed." In fact, they alleged only that, on January 20, 2004, the DA "announced that the District Attorney's Office would not file a criminal libel charge *on the basis of material published in the first three issues of The Howling Pig*." Aplt.App. 87 (¶41) (emphasis added). The Amended Complaint made clear that, because "[t]he 'no file' decision was limited to material appearing in the first three issues of The Howling Pig," the DA "did not renounce future reliance on the Criminal Libel Statute." Aplt.App. 88 (¶44). It also made clear that Plaintiffs intend to publish

future issues of *THP* that will facially violate the Criminal Libel Statute. Aplt.App. 89 (¶47), 301 (¶2).

These allegations distinguish the present case from those relied on by the district court. In *D.L.S. v. Utah*, 374 F.3d 971 (10th Cir. 2004), the plaintiff challenged Utah's sodomy laws, claiming that his fear of prosecution inhibited his sexual conduct and limited his ability to pursue intimate relationships. *Id.* at 973. This Court held the plaintiff lacked standing, because, *inter alia*, (1) "D.L.S. has never been charged with sodomy, prosecuted under the statute, or directly threatened with prosecution," *id.* at 974, (2) the city prosecutor had assured plaintiff unequivocally that he would "not file charges against D.L.S. for the kind of sexual activity D.L.S. intends to practice," *id.*, and (3) the Supreme Court had since invalidated a similar Texas sodomy statute as applied to consenting adults. *Id.* at 975.

Both *Faustin v. City & County of Denver*, 268 F.3d 942 (10th Cir. 2001), and *PeTA v. Rasmussen*, 298 F.3d 1198 (10th Cir. 2002), *cited in D.L.S.* and by the district court, are equally inapposite for the reasons explained by the Court in *Ward*: In those cases, the plaintiffs failed to "show a 'real and immediate threat' of prosecution in the future because the conduct in which [the plaintiffs] intended to engage was not proscribed by the challenged statute[s], as interpreted by the city prosecutor[s]." 321 F.3d at 1268. The prosecutors' "concessions" that the

challenged statutes "do not apply" to the plaintiffs' activities, "were critical to [the Court's] conclusion in *Faustin* and *Rasmussen* that the plaintiffs did not have standing." *Id.*

This case bears no resemblance to *D.L.S.*, *Faustin*, or *PeTA*. *First*, state officials *did* threaten to charge Mink under the Criminal Libel Statute. *Second*, the DA's limited "no file" decision is not determinative. The DA did not decide that no charges could or would be brought against Mink because the Criminal Libel Statute is facially unconstitutional or that it otherwise would not apply to Plaintiffs' future conduct. He merely reviewed the altered photographs of Peake that appeared in the first three issues of *THP*, along with one unidentified "comment which is being attributed to the fictional character Jay Puke and, according to Professor Peake, indirectly attributable to him." Aplt.App. 332. On that limited basis, the DA concluded that "[w]ith the evidence that was presented to this office it is my position that we would not be able to prove beyond a reasonable doubt that the altered pictures along with the satirical comments meet the burden required by C.R.S. 18-13-105 . . ." *Id.* In short, the DA's analysis was that the content of the specific three issues he reviewed would not have been sufficient to prove criminal libel – not that the DA would refrain from filing criminal libel charges based on the content of future issues of *THP*. Given the circumstances, if the DA had wanted to assure Mink that he was safe from future prosecutions, he

could have so stated, but he did not do so. *Third*, this is not a dormant statute like those considered in the Tenth Circuit cases that the district court cited; nor has the Supreme Court ruled unconstitutional a criminal libel statute suffering from the defects of Section 18-13-105 – though Plaintiffs believe that the Court *would* reach that conclusion if given the opportunity today. *See infra* at 38-40. Rather, unlike the Utah sodomy statute in *D.L.S.*, the Criminal Libel Statute continues to be invoked to punish and chill protected speech.

III. Section 18-13-105 Is Facially Unconstitutional.

A. The Court Should Reach the Merits of Plaintiffs' First Amendment Claim.

After the Court concludes that Plaintiffs have standing to pursue their First Amendment Claim, it should reach the merits of that claim. The First Circuit recently took that approach in a strikingly similar case – a challenge to Puerto Rico's criminal libel statute in which the district court had dismissed the plaintiff's claims on jurisdictional grounds, including standing, without deciding the plaintiff's motion for summary judgment as to the unconstitutionality of the statute. *Mangual v. Rotger-Sabat*, 317 F.3d 45, 64 (1st Cir. 2003). The court held:

> Normally, when a district court dismisses a matter on jurisdictional grounds and this court reverses, the case is remanded for consideration of the merits. However, "[w]here the merits comprise a purely legal issue, reviewable de novo on appeal and susceptible of determination without additional factfinding, a remand ordinarily will serve no useful purpose."

Id. (citations omitted). Here as in *Mangual*, "[t]he issues in contention are pure ones of federal law," *id.*, which this Court must review *de novo*, specifically, whether the Criminal Libel Statute facially violates the First and Fourteenth Amendment. Those issues do not turn on questions of fact.[6]

Also as in *Mangual*, "there have been arguments on the merits from both sides," *id.*, and the issues are well-framed for this Court to resolve. Plaintiffs squarely challenged the Criminal Libel Statute in their motion for summary judgment. In response, the AG stated that "[i]n the event the Court determines that the Colorado Attorney General is a proper defendant in this lawsuit, the legal arguments that will be made are identical to those outlined in the *Amicus* brief filed separately by the Attorney General . . . ," and he requested that "the legal arguments incorporated in the State's *Amicus* brief be considered as responsive to Plaintiffs' constitutional arguments." Aplt.App. 343 (¶¶5, 6). The DA, viewing himself as a mere nominal defendant, chose to "defer[ ] the Plaintiffs' challenge to the constitutionality of the statute at issue to the Colorado Attorney General," and stated that he "perceive[d] no impediment to [the district] Court simply accepting the brief filed by the Colorado Attorney General on this issue as the state's position

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[6] The AG stated that he "anticipate[d] responding to the factual assertions made by Plaintiffs in their Motion for Partial Summary Judgment," if the AG were deemed a proper defendant. Aplt.App. 343 (¶6). Yet, when he attempted to

in opposition to Plaintiffs' Motion for Partial Summary Judgment." Aplt.App. 346-47. In short, the First Amendment issues have been briefed and are ready for decision, and a remand on that claim would serve "no useful purpose." *Mangual*, 317 F.3d at 64; *cf. National Union Fire Ins. Co. v. Emhart Corp.*, 11 F.3d 1524, 1534 (10th Cir. 1993) ("Where the standard of Fed.R.Civ.P. 56(c) has been met," this Court is "free to enter an order granting summary judgment even where the district court denied the motion.").

B. Section 18-13-105 Violates the First Amendment.

In its seminal decision, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court analyzed the nation's history of rejecting punishment for speech. *Id.* at 273-74, 276. The Court emphasized that "libel can claim no

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(cont'd.)
defend the statute as constitutional, he relied exclusively on legal arguments, not on any supposedly disputed facts. *See* Aplt.App. 168-92.

talismanic immunity from constitutional limitations." *Id.* at 268. Rather, "[i]t must be measured by standards that satisfy the First Amendment," and the Court must "consider this case against the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ." *Id.* at 268, 270 (citations omitted). The Criminal Libel Statute violates the First Amendment for numerous independent reasons.

1. The Criminal Libel Statute Fails to Include An Actual Malice Standard.

The constitutional requirement of proof of actual malice in civil and criminal defamation/libel claims has evolved in a series of Supreme Court decisions from the mid-1960s to the mid-1980s.

- In *New York Times*, the Court held that the First Amendment precludes a civil action for damages unless a defamatory false statement about a public official was made with "'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 280.

- In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court held that "the *New York Times* rule also limits state power to impose criminal sanctions for criticism of the official conduct of public officials." *Id.* at 67. Thus, the First Amendment forbids a conviction for criminal libel based on speech about public officials, unless the statute requires the state to prove the defendant's actual malice.

- In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court extended the constitutional privilege first recognized in *New York Times* to defamatory criticism of "public figures," or nonpublic persons who "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* at 164 (Warren, C.J., concurring).

- In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court concluded that "in defamation suits by private individuals," the state may "impose liability . . . on a less demanding showing than that required by *New York Times*," *id.* at 348, but it nevertheless forbade a state from "impos[ing] liability without fault" even in civil cases involving private victims of defamatory statements. *Id.* at 347. Because punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence," the Court held that the First Amendment requires proof of actual malice before punitive damages may be awarded in civil cases brought by purely private individuals. *Id.* at 349-50.

- Finally, in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985), a majority of justices concluded, albeit in separate opinions, that the *Gertz* rule, requiring a showing of actual malice to support recovery of punitive damages by private individuals, applies only in cases involving speech on matters of public concern. *Id.* at 758-59 (plurality opinion); *see also id.* at 764 (Burger, C.J.,

concurring); *id.* at 774 (White, J., concurring). There was no majority decision on this point, however, and the plurality decision did not alter the separate holding in *Gertz* that States may "not impose liability without fault," 418 U.S. at 347, in any civil defamation action brought by a private individual – regardless of the subject matter of the speech. *See Dun & Bradstreet*, 472 U.S. at 781 ("Nor do the parties question the requirement of *Gertz* that respondent must show fault to obtain a judgment and actual damages.") (Brennan, J., dissenting).

Against this backdrop, it is not surprising that court after court has held criminal libel statutes unconstitutional because they do not include an actual malice requirement for statements defaming public officials or figures, or for statements concerning matters of public concern. *See, e.g., Mangual*, 317 F.3d at 65-67; *Fitts v. Kolb*, 779 F. Supp. 1502, 1514-15 (D.S.C. 1991); *Ivey v. State*, 821 So.2d 937, 941-46 (Ala. 2001); *State v. Powell*, 114 N.M. 395, 839 P.2d 139, 143-45 (1992); *In re I.M.L. v. State*, 61 P.3d 1038, 1044 (Utah 2002) (citing cases). Like the criminal libel statutes of those states, Section 18-13-105 is facially unconstitutional because it does not require proof of actual malice in a prosecution arising out of speech about (a) public officials, (b) public figures, or (c) matters of general public concern. The only state of mind requirement is that the publication of the challenged statement must be "knowing[ ]." C.R.S. § 18-13-105(1). But a "knowing[ ]" *publication* falls far short of the constitutionally-mandated

requirement that the defendant spoke "with knowledge that [his or her statement] was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280.

Based on *New York Times* and its progeny, the Colorado Supreme Court partially invalidated Section 18-13-105 in *People v. Ryan*, 806 P.2d 935 (Colo. 1991), holding that, because the statute does not require proof of actual malice, it cannot be constitutionally applied to "libelous statements about public officials or public figures involving matters of public concern." *Id.* at 940. But the court resolved the issue imperfectly on multiple levels, leaving the statute as a threat to free speech in Colorado.

First, *Ryan* inaccurately states the scope of the actual malice rule under *New York Times* and its progeny. The language quoted above suggests that the speech must be both "about public officials or public figures" *and* "involving matters of public concern" before the actual malice standard applies.[7] However, as the AG concedes, under *New York Times* and *Garrison*, proof of actual malice is required whenever the speech is about a public official or figure – without any independent showing that the matter also relates to a matter of public concern. Aplt.App. 171

[7] *Ryan* is ambiguous on this point. It also could be read as applying the actual malice requirement to any speech "about public officials," regardless of whether the speech involves a matter of public concern. Even under that reading, the court erred for the reasons further stated in the text.

(Section 18-13-105 cannot constitutionally reach "a false libelous statement about public figures relating to matters of private concern" because "public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods, and little distinction is made between issues of public and private concern.").

Second, although the *Ryan* court recognized that the "lack of an 'actual malice' standard threatens to deter a substantial amount of expression protected by the first amendment," it nevertheless declined to fully invalidate the statute, holding instead that it might be constitutionally applied to purely private defamation, *i.e.*, "where one private person has disparaged the reputation of another private individual." 806 P.2d at 941. But for criminal libel, as the Supreme Court necessarily held in its analysis of punitive damages in *Gertz*, the actual malice standard also applies to statements about purely private persons so long as the challenged speech was on a matter of public concern. The threat of criminal prosecution is typically even more punitive and deterrent than punitive damages. Thus, to the extent that the First Amendment requires proof of actual malice to award punitive damages in civil defamation cases brought by private persons, the Constitution necessarily requires no less in criminal prosecutions based on allegedly libelous statements about private persons, but involving matters of public concern. *See Phelps v. Hamilton*, 59 F.3d 1058, 1073 (10th Cir. 1995)

(*New York Times* and *Garrison* require proof of actual malice "in criminal defamation cases involving matters of public concern") (footnote omitted);[8] *Powell*, 839 P.2d at 144 ("[C]riminal penalties certainly pose as much of a threat to First Amendment interests as do punitive damages."); *see also* Aplt.App. 176 (according to AG, actual malice standard applies to "defamatory statements published about a private figure when a matter of public concern is involved").

Third, the *Ryan* court failed to acknowledge that in *all* defamation cases there must be proof of fault over and above mere knowing publication**.**

Fourth, the court failed to reach any of the independent reasons discussed below as to why Section 18-13-105 fails in its entirety, both under the First and Fourteenth Amendments. *See*, *e.g.*, 806 P.2d at 940 n.11 (declining to decide whether the statute's relegation of truth to an affirmative defense, and the unavailability of truth as a defense in certain circumstances, independently dooms the statute under the First Amendment). Plaintiffs' declaratory judgment claim

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[8] In *Phelps*, this Court did not hold the Kansas statute at issue in that case unconstitutional, concluding instead that the Kansas Supreme Court would construe the statute as including an actual malice requirement. *Id.* at 1070-73. Here, by contrast, the Colorado Supreme Court already has considered Section 18-13-105 and has declined to read into the statute the actual malice element that is essential under *New York Times* and later cases. In other words, the Colorado Supreme Court failed to do precisely what the Tenth Circuit predicted the Kansas Supreme Court would do.

squarely presents those issues for resolution and compels invalidation of the entire statute.

Fifth, *Ryan's* incomplete invalidation of the Criminal Libel Statute has left constitutionally-protected speech subject to the chilling effect of real and threatened prosecutions. After the *Ryan* decision, the General Assembly neither amended Section 18-13-105 to add an actual malice standard nor addressed the statute's other defects, outlined in this brief. Rather, the Criminal Libel Statute remains on the books unaltered, as flawed today as it was when the Colorado Supreme Court decided *Ryan*. The unsurprising result is that – as in this case – prosecutors have continued to invoke Section 18-13-105 to prosecute and threaten to prosecute defendants. For example, in criminal cases brought against a juvenile in 1997 and 1998 in Larimer County, a student faced criminal libel charges even though he engaged in satirical speech and opinion about public figures and officials, and even though the criminal information included no allegations of actual malice. *See* Aplt.App. 85-86 (¶34). Prosecutors in Boulder, Clear Creek and La Plata Counties also have invoked the criminal libel statute to investigate and, in some cases, to file criminal charges within the past five years. *See, e.g.*, Aplt.App. 86 (¶¶35-36).

2. Section 18-13-105 Omits Falsity as an Element of the Crime of Libel, Thereby Permitting Conviction for the Publication of True Statements.

The criminal libel statute suffers other 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 explicitly excluded as an affirmative defense in several categories of criminal libel: Statements tending to blacken the memory of the dead and statements tending to expose the natural defects of the living. Thus, since a defendant is not required to put on a defense, the statute unconstitutionally permits conviction for true statements. Further, a defendant may not assert a defense of truth for certain categories of speech. Each of these faults separately requires invalidation of the statute.

The 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 a defense. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the Court struck down the Pennsylvania law that permitted liability for libel in the absence of proof of falsity, despite the defendant's right to prove the truth of his statements as an affirmative defense:

> 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 which the Constitution makes free."

Id. at 777 (citation omitted). The *Hepps* decision flowed from the principle 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 decisions quoted above considered *civil* defamation laws. Their rationales apply with even greater force in the criminal libel context, *see Garrison*, 379 U.S. at 74, where the criminal sanctions faced by a defendant are greater than potential civil monetary liability. *Cf. Reno v. American Civil Liberties Union*, 521 U.S. 844, 860 (1997) (holding that the increased deterrent effect of criminal sanctions – including fines and/or imprisonment for up to two years – poses "greater First Amendment concerns than those implicated by . . . civil regulations."). 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 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); *see also Ashcroft v. American Civil Liberties Union*, __ U.S. __, 124 S.Ct. 2783, 2794 (2004) ("Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech.").

Therefore, if the state wishes to impose criminal liability on one who has made an allegedly libelous 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, the Criminal Libel Statute also excludes truth as an affirmative defense for "libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living." This provision directly contravenes the cases discussed above. *See Hepps*, 475 U.S. 767; *Milokovich*, 497 U.S. at 16; *see also 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").

3. Section 18-13-105 Permits Prosecution and Conviction for Constitutionally-Protected Statements of Opinion, Satire, and Hyperbole.

The Criminal Libel Statute violates the First Amendment for yet another reason: It permits prosecution – again, as threatened in this case – for speech that must be protected because it is opinion, parody or hyperbole.

The Supreme Court has made clear that statements that "could not reasonably have been interpreted as stating actual facts" enjoy First Amendment protection. *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). In *Milkovich*, the Court confirmed the importance of these decisions, which "provide[ ] 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." 497 U.S. 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 cannot be the basis for a civil or criminal defamation claim. *Id.* at 21; *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 does not "reasonably impl[y] false and defamatory facts," *id.* – if it is the product of the author's imagination or conjecture and not factual – it enjoys unqualified First Amendment protection. *See Rinsley v. Brandt*, 700 F.2d 1304, 1309 (10th Cir. 1983). Instructive on this issue is *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982), in which this Court 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.

These undeniable constitutional protections led the district court to enter a TRO, because the statements in the first three issues of *THP* constituted classic satire and opinion. But Section 18-13-105 is not merely unconstitutional as applied in this case. Rather, it is also unconstitutional because, on its face the statute – even as partially invalidated in *Ryan* – permits prosecution for statements that use hyperbole or satire to "to blacken the memory" of the dead or "impeach the honesty, integrity, virtue or reputation, or expose the natural defects" of the living. For example, on its face Section 18-13-105 would permit a criminal prosecution for the fanciful and incredible statements about Mr. Falwell and his mother, *see Falwell*, 485 U.S. at 48, and for the outlandish statements about Ms. Pring, *see Pring*, 695 F.2d at 443, notwithstanding the indubitably protected status of that hyperbolic speech.

Finally, this defect in the statute exacerbates the separate flaw caused by its relegation of truth to, at most, a mere affirmative defense. *See supra* at 35. With respect to the portion of Section 18-13-105 for which truth *is* an affirmative defense, a defendant loses the benefit of even that constitutionally-insufficient protection when the underlying speech is opinion, satire or hyperbole – which cannot be proved true or false. *See Gertz*, 418 U.S. at 339-40 ("Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges or juries but on the competition of other ideas.").

4. The Criminal Libel Statute Cannot Survive the Strict Scrutiny That Should Apply to It as a Content-Based Regulation of Speech.

Section 18-13-105 suffers from another flaw that should render it unconstitutional regardless of whether the speech concerns a public official, a public figure, or a purely private individual, and regardless of whether it relates to matters of public or private concern. Because the Criminal Libel Statute regulates speech – including truthful speech – based on its content, it should be subject to a strict scrutiny standard of review. The statute cannot survive that rigorous test because (a) no compelling state interest justifies its restrictions on speech, and (b) the threat of criminal prosecution is not the least restrictive means to advance whatever interest the state could articulate for the statute.

Statutes that impose sanctions on the basis of the content of protected speech implicate fundamental First Amendment rights and, therefore, are subject to strict scrutiny: "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (citations omitted); *see also Reno*, 521 U.S. at 874-79. "Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat, the Constitution demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality." *Ashcroft* 124 S.Ct. at 2788 (citations omitted).

The Supreme Court has not reviewed a criminal libel statute in almost forty years, *see Ashton v. Kentucky*, 384 U.S. 195 (1966), presumably due to the general repudiation and, hence, abandonment of criminal defamation law in the twentieth century. *See infra* at 40-41. If the Court were to consider a criminal libel statute today, it very likely would apply the strict scrutiny standard. *Cf., e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 381, 382 (1992) (observing that Supreme Court "decisions since the 1960s have narrowed the scope of the traditional categorical exceptions [from First Amendment protection] for defamation," and applying strict

scrutiny to strike down law that punished hate speech which Court assumed constituted "fighting words").

Section 18-13-105 is a "content-based restriction," because "enforcement authorities must necessarily examine the content of the message that is conveyed to determine" whether the defendant has violated the statute. *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984); *see also Playboy*, 529 U.S. at 811-12. That is so because the statute's scope is limited to statements that "tend[ ] to blacken the memory" of the dead, or "impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive." Thus, Section 18-13-105 should be presumed invalid unless the government can prove a compelling state interest that justifies its content-based prohibition of expression, and that the statute uses the least restrictive means available to further that interest. Here, the AG and DA cannot demonstrate either of those critical circumstances.

Certainly, the historical rationale for the crime of libel – "to avert the possibility that the utterance would provoke an enraged victim to a breach of peace," *Garrison*, 379 U.S. at 68 – no longer carries weight, as the Supreme Court has recognized:

> Changing mores and the virtual disappearance of criminal libel prosecution lend support to the observation that ". . . under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of

> peace requires a criminal prosecution for private defamation."

Id. at 69 (citation and footnote omitted). The Colorado Supreme Court reached a similar conclusion in *Ryan*, acknowledging that "[w]hile criminal action was used to preserve the peace, civil action was the more popular remedy, as it is today, because it provided compensation for damage to the reputation of the person defamed." 806 P.2d at 938 n.8 (citation omitted). Nor is there any other compelling justification for criminal libel statutes given the availability of a civil remedy for defamation.

Even if the state could articulate a compelling state interest in prohibiting libelous statements, there are far less restrictive alternatives than criminal prosecution and the risk of imprisonment and fines. In particular, if the governmental interest is to protect individuals from reputational damage, embarrassment or hurt feelings due to defamatory statements, the availability of a civil tort remedy is a far less restrictive, yet effective, alternative. "Above all," limiting aggrieved persons to a civil remedy "does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished." *Ashcroft*, 124 S.Ct. at 2792.

Based on the obsolete historical justification for criminal libel laws and the absence of any current compelling justification, as well as the availability of a less

restrictive alternative for addressing harm to reputation, defendants cannot meet their burden of showing that the alternative civil remedy is less effective than the antiquated criminal offense. Therefore, the Court should strike down Section 18-13-105 under a strict scrutiny standard of review.

C. Section 18-13-105 Is Unconstitutionally Vague.

Beyond these First Amendment violations, Section 18-13-105 also fails to afford due process because it is unconstitutionally vague. *See Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (ordinance prohibiting conduct "annoying to persons passing by" is unconstitutionally vague); *Gooding v. Wilson*, 405 U.S. 518 (1972) (statute prohibiting "opprobrious words and abusive language tending to cause a breach of the peace" is unconstitutionally vague); *Tollett v. United States*, 485 F.2d 1087 (8th Cir. 1973) (federal statute that criminalized "libelous, scurrilous, defamatory and threatening" writings on the outside of a mailed envelope is unconstitutionally vague).

The 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). The Constitution requires that

criminal statutes give clear and coherent notice of what conduct is forbidden. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (a court must consider whether the law "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly").

Moreover, in the context of the First Amendment, the "void for vagueness" doctrine is applied more stringently to avoid chilling constitutional expression. *Smith v. Goguen*, 415 U.S. 566, 573 (1974) ("[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.") (footnote omitted); *accord Ashton*, 384 U.S. at 200-01 (in challenge to Kentucky's criminal libel law, explaining: "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."); *Fitts*, 779 F. Supp. at 1516 ("When a statute touches the area of free expression, the requirements of preciseness are most strictly applied . . . . To avoid chilling the exercise of vital First Amendment rights, restriction of expression [in criminal libel statute] must be expressed in terms which clearly inform citizens of prohibited conduct and in terms susceptible of objective measurement.").

Thus, in *Reno*, which held that the federal Communications Decency Act was unconstitutionally vague, the 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. As the Court explained, this increased deterrent effect in the criminal context, coupled with vague regulations, poses greater First Amendment concerns than those implicated by a civil regulation. *Id.*

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, there is a two-part standard to determine whether a law is unconstitutionally vague. *First*, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted). *Second*, the statute must set forth explicit standards "in a manner that does not encourage arbitrary and discriminatory

enforcement." *Id.*; *accord*, *Hill*, 482 U.S. at 466 ("'[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.'") (citation omitted); *Grayned*, 408 U.S. at 108-09 ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

The Criminal Libel Statute 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," "blacken the memory of the dead," and "natural defects," C.R.S. § 18-13-105, "no standard of conduct is specified at all." *Smith*, 415 U.S. at 578. Here, there is insufficient notice to the person of ordinary intelligence as to what speech the statute prohibits. In addition, 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). The language in the statute is so amorphous and malleable that

it fails to provide any notice as to what is proscribed criminal activity and thus requires citizens "at the peril of their . . . liberty . . . to speculate as to the meaning of [a] penal statute . . ." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (citations omitted).

Second, Section 18-13-105 is susceptible to arbitrary enforcement. The prohibitions in Section 18-13-105 appear so broad and standardless that the statute is arguably violated every day.[9] Meanwhile, "policemen, prosecutors, and juries . . . pursue their personal predilection" about whom to hold criminally liable, *Smith*, 415 U.S. at 575, such as when a prominent college professor complains about the website of a student. Unquestionably, "[l]egislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Id.*

In sum, the Criminal Libel Statute poses a grave chilling threat to the citizens of Colorado. It restricts expression in a way that fails to inform the ordinary citizen of prohibited conduct and does so in terms that are susceptible to

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[9] Newspaper articles that could be construed as "blackening the memory of the dead" include: Jim Sheeler, "Jefferson's wig—the flip side," *Rocky Mountain News*, July 3, 2004, at 23A (discussing July 4th re-creation of Jefferson's life and how it will, among other things, "knock off halos that often hover over the Founding Fathers" and remember the "fallibility" of Jefferson); Karen Rouse, "Columbus' story getting native voices in curriculum," *Denver Post*, July 5, 2004, A1 (describing teachers who are designing a school curriculum that includes lessons about the rape, pillage and slave trading of indigenous people caused by Columbus and his peers).

arbitrary enforcement. Such a result is contrary to the demands of the Fourteenth Amendment's Due Process Clause.

IV. Defendant Knox Is Not Entitled to Absolute Immunity.

The district court held that Knox was absolutely immune from Plaintiffs' third claim, under 42 U.S.C. § 1983 and the First and Fourth Amendments, for the unreasonable search and seizure. The court concluded that, in reviewing and approving the search warrant application, Knox was acting in a "quasi-judicial" role. Aplt.App. 362. To the contrary, Knox was providing legal advice to a police officer during an investigation, rather than advocating in a judicial proceeding. Therefore, she is not entitled to absolute immunity.

An official seeking absolute immunity "bears the burden of showing that such immunity is justified for the function in question." *Burns v. Reed*, 500 U.S. 478, 486 (1991). In most cases, "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Id.* at 486-87. The Supreme Court has held that a prosecutor is absolutely immune only for those activities "intimately associated with the judicial

phase of the criminal process," such as "initiating a prosecution and presenting the State's case." *Imbler v. Pachtman,* 424 U.S. 409, 430-31 (1976). In *Burns*, the Court squarely held that prosecutors are not entitled to absolute immunity for their role in giving legal advice to the police in the investigative phase of a criminal case: "We do not believe . . . that advising the police in the investigative phase of a criminal case is so 'intimately associated with the judicial phase of the criminal process' . . . that it qualifies for absolute immunity." 500 U.S. at 493 (quoting *Imbler*, 424 U.S. at 430). The Court also observed that it would be "incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice." *Id.* at 495.

Since *Burns*, the Supreme Court has repeatedly reaffirmed that "provision of legal advice to the police during their pretrial investigation of the facts [is] protected only by qualified, rather than absolute, immunity." *Kalina v. Fletcher,* 522 U.S. 118, 126 (1997); *see also Buckley v. Fitzsimmons,* 509 U.S. 259, 271 (1993) ("prosecutors are not entitled to absolute immunity for their actions in giving legal advice to the police").

The district court concluded that Knox's actions bore only a "superficial resemblance" to the actions at issue in *Burns*. Aplt.App. 359. This conclusion was erroneous, and improper at this stage of the case. On a motion to dismiss, all

reasonable inferences must be resolved in favor of the non-moving party. *Morse*, 154 F.3d at 1126-27. Here, the obvious inference to be drawn from the allegations is that, like the police officers in *Burns*, Detective Warren consulted a prosecutor, Defendant Knox, for advice on whether his affidavit met the legal standard to support a search warrant. Just as the prosecutor in *Burns* advised the police that they had probable cause to make an arrest, Knox – in approving the application – effectively advised Warren that his affidavit provided probable cause and sufficient legal grounds to seize materials from the Mink home. As in *Burns*¸ no judicial proceeding to prosecute Plaintiffs had been initiated; the case was in an investigative phase. Thus, like the prosecutor in *Burns*, Knox is not entitled to absolute immunity.

Both *Eden v. Voss*, 105 Fed. Appx. 234, 2004 WL 1535829 (10th Cir. 2004),[10] and *KRL v. Moore*, 384 F.3d 1105, 1113 (9th Cir. 2004), illustrate the district court's error. In *Eden*, this Court denied absolute immunity to a prosecutor who was sued for her role in preparing an application for a search warrant. The Court explained that obtaining the search warrant and the evidence it yielded "was so preliminary as to be an investigatory and not an advocacy step." 2004 WL

[10] Plaintiffs cite the unpublished *Eden* decision both because it has persuasive value on the immunity question under facts that are very similar to those in this case, and because it would assist the Court in its disposition of that issue. In

1535829, at *7. The Court further stated that "[t]here is a difference between evaluating evidence in order to prepare for trial," which is an advocacy function entitled to absolute immunity, and "searching for evidence that might give probable cause to bring an action," which is not entitled to such immunity. *Id.* In this case, too, Knox clearly reviewed and approved the search warrant application at a stage "before she could possibly claim to be acting as an advocate." *Id.*

In *KRL,* the Ninth Circuit held that prosecutors were acting as advocates and entitled to absolute immunity for their role in preparing post-indictment search warrants to gather additional evidence to prove their pending case. 384 F.3d at 1111-12. On the other hand, the court held that prosecutors are engaged in an investigative function that is not entitled to absolute immunity when they review and approve a search warrant "to assist with a collateral investigation into new crimes" that were not charged in the pending indictment. 384 F.3d at 1113-15 ("because probable cause had not been established to prosecute anyone for conduct relating to the collateral investigation, the prosecutors did not serve as advocates in reviewing and approving the investigatory search warrant"). Similarly, when Knox reviewed and approved the warrant in this case, there was not probable cause to

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(cont'd.)
accordance with Local Rule 36.3(C), Appellees provide a copy of the Court's *Eden* decision in the Addendum.

prosecute anyone. Knox did not act in an advocacy role, and she is entitled to no more than, perhaps, qualified immunity.[11]

Nor does it matter that the Colorado General Assembly has attempted to shield prosecutors through legislation that characterizes their investigative function in advising the police as "quasi-judicial." C.R.S. § 20-1-106.1 provides as follows:

> (1) The district attorneys of the several judicial districts in the state of Colorado shall:
>
> (a) Render, in *their quasi-judicial capacity, legal advice* to peace officers, upon the request of such officers or of the court, pertaining to the preparation and review of affidavits and warrants for arrests, searches, seizures, and nontestimonial identification items.

(Emphasis added.)

As the district court properly noted, a state statute cannot immunize a governmental official from a Section 1983 claim. Aplt.App. 362 (citing *Howlett v. Rose*, 496 U.S. 356, 376 (1990)). In *Howlett*, the Court reiterated the well-established principle that "'Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.'" *Id.* at 378 (quoting *Wilson v. Garcia*, 471 U.S. 261, 269 (1985)). After correctly

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[11] The district court did not address the qualified immunity issue; this Court should remand that question to the lower court. *Eden*, 2004 WL 1535829, at *8 (citing *Snell v. Tunnell*, 920 F.2d 673, 696 (10th Cir. 1990)).

acknowledging that a state cannot through statutory fiat control whether a prosecutor is absolutely immune from federal liability, the district court inconsistently found the Colorado statute "persuasive" as to "what constitutes a quasi-judicial act." Aplt.App. 362.

In fact, the only relevance of the Colorado statute is that it confirms that Knox was giving "legal advice" to Detective Warren when she reviewed the draft affidavit and warrant. The statute makes clear that Colorado prosecutors have a duty to provide "legal advice to peace officers, upon the request of such officers or the court, pertaining to the preparation and review of affidavits and warrants for arrests, searches, seizures, and non-testimonial identification items." If Knox was acting in compliance with the statute, as she contends, then just as in *Burns*, she was a prosecutor providing "legal advice to [a] peace officer" as part of a criminal investigation – and she therefore does not enjoy absolute immunity.[12]

V. The District Court Erred in Dismissing Mink's PPA Claim.

The district court dismissed Mr. Mink's PPA claim against Defendant Knox because, according to the court, her role did not "constitute[ ] involvement in the

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[12] It is also significant that, despite its "quasi-judicial" label, the state statute does not provide absolute immunity to prosecutors, but allows for an action if the prosecutor performs his or her duties in bad faith. C.R.S. § 20-1-106.1(2). *See also Kalina*, 522 U.S. at 132 (Scalia, J., concurring) (when Section 1983 was enacted, public officials could assert common-law "quasi-judicial immunity,"

execution of the warrant sufficient to create liability," Aplt.App. 358 (emphasis in original), and Mr. Mink failed to allege "any action that could be construed as engagement in the warrant's execution." Aplt.App. 357. This ruling represents an overly literal and narrow view of the scope of liability under the PPA; it also overlooks the critical allegation that Knox *authorized* and *caused* the violation of Mr. Mink's statutory rights.

A. The PPA Clearly Was Violated.

Congress enacted the PPA in response to the Supreme Court's decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). In *Zurcher*, a student newspaper sued police and prosecutors for obtaining and executing a warrant to search the newspaper office for photographs they believed would document criminal activity at a demonstration. In ruling that the search was unreasonable, the district court relied on both the First and Fourth Amendments to hold that the Constitution required law enforcement authorities to resort to search and seizure only if it was not practical to obtain the sought-for documentary evidence by means of a subpoena. The Supreme Court reversed. In doing so, it acknowledged that Congress was free to establish by statute the protections that the Court declined to find in the Constitution. *Id*. at 567. Congress quickly accepted that invitation and

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(cont'd.)
which could be overcome by a showing of malice, "and hence was more akin to

enacted the PPA. *See* S. Rep. No. 874, 96th Cong. 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 3950, 3950-51.

The PPA supplements the Fourth Amendment protections of journalists and others who disseminate information to the public. *See* 42 U.S.C. § 2000aa(a) (extending protection to "a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication"); *Steve Jackson Games, Inc. v. United States Secret Service*, 816 F. Supp. 432, 434 n.1 (W.D. Tex. 1993) (electronic bulletin board operated by private business producing books, magazines, and box games was protected by the PPA). It specifically protects "documentary materials" and "work product materials," 42 U.S.C. § 2000aa-7(a)-(b), and it generally requires investigators to seek such materials by subpoena as a first resort. Thus, government officials violate the PPA if they "search for or seize" documentary or work product materials. *Id.* § 2000aa(a)-(b). The Act provides an exception when there is probable cause to believe that the target of the search is responsible for the crime under investigation. *Id.* §§ 2000aa(a)(1), (b)(1). But that "suspect exception" does not apply when the suspected crime consists of the communication of the materials sought in the search or seizure. *Id.*

(cont'd.)
what we now call qualified, rather than absolute, immunity").

Upon reviewing Detective Warren's affidavit and draft of the search warrant, Defendant Knox was on notice that Warren planned a search that would violate the PPA. The affidavit showed that Mr. Mink was engaged in disseminating information to the public. Because the warrant sought his computer, electronic files, and every writing connected to *THP*, it included documentary and work product materials protected by the PPA. Although Mr. Mink was a suspect, the crime under investigation – criminal libel – consisted of the communications published in *THP* that Warren intended to seize. Accordingly, the "suspect exception" to the PPA did not apply, and the remaining protections of the Act were applicable.

B. The District Court Misapplied *Citicasters*.

Despite the obvious violation of the PPA, Defendant Knox argued below that she was not individually liable because she was not present when Detective Warren seized Mink's electronic files, and therefore did not "search for or seize" those materials. She relied on *Citicasters v. McCaskill*, 89 F.3d 1350 (8th Cir. 1996), a PPA case involving seizure of a videotape from a TV station, in which a prosecutor challenged the district court's factual finding that she "assisted in executing the search warrant." *Id.* at 1356.

The district court properly rejected Knox's argument that her physical absence from the scene would be sufficient to absolve her of liability. Aplt.App.

357. Nevertheless, the district court gave too narrow a reading to the PPA, the *Citicasters* decision, and the Amended Complaint, when it phrased the question as whether Defendant Knox was sufficiently involved in the *execution* of the warrant. Aplt.App. 357-58.

In *Citicasters*, the focus on the prosecutor's involvement in the "execution" of the warrant resulted from the specific facts of that case. The prosecutor argued that there was insufficient evidence in the record to support the finding that she participated in executing the warrant. The Eighth Circuit opined that the point about the evidentiary insufficiency was "well taken," but it also noted that the proceeding addressing this question in the district court had not been a full hearing. The court held that the plaintiff should have the opportunity, on remand, "to establish that [the prosecutor] directed, supervised, or otherwise engaged in the execution of the warrant to such an extent that a finding can be made that she 'searched for or seized' the tape." *Id.* Importantly, the facts recounted in the district court and court of appeals decisions suggest that the prosecutor was not alleged to have been involved until *after* police already had obtained the search warrant. *See id.* at 1351-53, 1356; *Citicasters v. McCaskill*, 883 F. Supp. 1282, 1285 (W.D. Mo. 1995). Thus, the focus in *Citicasters* on the prosecutor's role in *executing* the warrant stems from the district court's factual finding, which the prosecutor challenged on appeal, that she had accompanied the police when they

went to the plaintiff's place of business and that she had "assisted" them there when they executed the warrant. 89 F.3d at 1356. Unlike this case, the plaintiff in *Citicasters* apparently did not allege that the prosecutor had reviewed and approved a police officer's affidavit prior to the search, nor was there any allegation, as there is in this case, that the prosecutor had authorized or caused the violation of the PPA.

C. The Amended Complaint Adequately Stated a Claim Against Knox.

Here, the district court overlooked critical factual allegations and, as a result, erroneously minimized Defendant Knox's role. The Amended Complaint alleges, for example, not only that Knox reviewed and approved the affidavit, but also that she *authorized* and thereby *caused* the search and seizure that violated the PPA, Aplt.App. 91-92 (¶¶60-61), an allegation the district court did not discuss.

Under the liberal standard applicable to motions to dismiss, *see supra* at 15-16, dismissing the PPA claim was error. Mink could certainly prove a set of facts consistent with the Amended Complaint that would entitle him to relief. He could prove, for example, that Knox performed as a gatekeeper responsible for ensuring that affidavits for search warrants are factually and legally sufficient to justify the contemplated search and seizure. He could prove that both Knox and Detective Warren understood that her approval of the affidavit was a prerequisite to the

search. He could prove that, after reviewing the affidavit, Knox knew that Detective Warren intended a search and seizure that would violate the PPA; that she had the power and legal responsibility to stop that violation from occurring; and, that she failed to stop it. The foregoing would support an inference that, at a minimum, Knox was deliberately indifferent to the risk of violating Mink's rights under the PPA, and that she was sufficiently involved in the resulting search and seizure to be held legally responsible. *Cf. Green v. Branson*, 108 F. 3d 1296, 1302 (10th Cir. 1997) (defendant liable on theory of supervisory liability when plaintiff shows an affirmative link between the deprivation and the supervisor's personal participation, his exercise of control or direction, or his deliberately indifferent failure to supervise); *Randall v. Prince George's County*, 302 F.3d 188, 203 (4th Cir. 2002) (under "bystander liability," an officer is liable as an accomplice if he "(1) is confronted with a fellow officer's illegal act, (2) possesses the power to prevent it, and (3) chooses not to act"); *Mink v. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996) (officers may be liable for failing to intervene to prevent another officer from violating a plaintiff's rights).

Mink also might prove that Knox agreed with Detective Warren on the plan to conduct the search and seizure and that her approval of the affidavit was an act in furtherance of the plan, thus making her liable for Warren's actions based on a conspiracy theory. *See Dixon v. City of Lawton*, 898 F.2d 1443, 1449 n.6 (10th

Cir. 1990) ("Provided that there is an underlying . . . deprivation, the conspiracy claim allows for imputed liability; a plaintiff may be able to impose liability on one defendant for the actions of another performed in the course of the conspiracy."). Given the liberal federal pleading standards, Mink need not have labeled his claim "conspiracy" if the allegations otherwise support it. Fed.R.Civ.P. 8(a), 12(b); *see, e.g.*, *Barrett v. Tallon*, 30 F.3d 1296, 1299 (10th Cir. 1994).

D. The District Court's Overly Narrow Interpretation Must Be Reversed.

Finally, in stating that "a search warrant application is irrelevant to the operation of the PPA," Aplt.App. 358, the district court overlooked the factual circumstances of this particular search and seizure. The affidavit and draft warrant revealed that the search would take place in Mink's home and that there were no exigent circumstances. The search and seizure, therefore, could take place *only* if a warrant issued. *See Payton v. New York*, 445 U.S. 573, 587-88 (1980) ("[A]bsent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within."). Mink is entitled to prove that Knox was the gatekeeper, and that the warrant could have issued only if she approved the affidavit and thereby authorized and caused the PPA violation. Aplt.App. 91-92 (¶¶60-61).

Further, while the portion of the PPA that directly controls Mink's claim does not mention applications for search warrants, the district court's broad statement overlooks 42 U.S.C. § 2000aa-11(a)(4), in which Congress required federal law enforcement officers to obtain an attorney's approval before conducting any search or seizure governed by the PPA. The PPA thus contemplates that prosecutors would be involved in the process in exactly the manner that Mink alleges that Knox was involved. Mink's claim does not turn on whether an attorney's approval is a prerequisite that is required by statute or, as is apparently the case in Weld County, by a commendable informal policy that governs all warrant applications. Plaintiff is entitled to prove that Knox served in the same gatekeeper role contemplated by Section 2000aa-11a(4) in federal cases.

In summary, Mink is entitled to prove that the warrant could have issued only if Knox first reviewed and approved the affidavit, thereby authorizing and causing the search and seizure that violated the PPA. *See KRL*, 384 F.3d at 1117 (defendant prosecutor's "approval of the invalid warrant led directly to the search that violated plaintiffs' Fourth Amendment rights); *Malley v. Briggs*, 475 U.S. 335, 345 n.7 (1986) (magistrate's issuance of arrest warrant does not break chain of causation, and officer who submitted deficient affidavit may be liable for causing the subsequent illegal arrest). Therefore, the Court should reverse the dismissal of the PPA claim.

CONCLUSION

For all the reasons stated above, Plaintiffs respectfully request the Court to reverse the judgment below, enter judgment in favor of Plaintiffs as to the unconstitutionality of the Colorado Criminal Libel Statute, and remand for trial Mink's claims against Knox.

STATEMENT CONCERNING ORAL ARGUMENT

Plaintiffs request the Court to hear oral argument. This appeal raises four issues, each of which has important ramifications for the parties and the public as a whole. The issues are complex and the PPA issue is one of first impression in this Circuit, under a statute that has received relatively scant consideration by other courts. Oral argument would allow the parties to expand upon their positions and to respond to the Court's questions.

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(B)

In accordance with F.R.A.P. 32(a)(7)(C), undersigned counsel certifies that this brief complies with the type-volume limitation set forth in F.R.A.P. 32(a)(7)(B), and that this brief, exclusive of the items listed in F.R.A.P. 32(a)(7)(B)(iii), contains 13,237 words.

Dated April 4, 2005.

Respectfully submitted,

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