NO. 08-1250

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS MINK,

Plaintiff-Appellant,

vs.

SUSAN KNOX,

Defendant-Appellee.

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

APPELLANT'S OPENING BRIEF

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THIS BRIEF HAS ATTACHMENTS THAT ARE INCLUDED ONLY IN SCANNED PDF FORMAT

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PRIOR RELATED APPEAL

Mink v. Suthers, 482 F.3d 1244 (10th Cir. 2007)

Plaintiff and Appellant Thomas Mink respectfully submits this opening brief in support of reversal of the judgment below and remand for trial of his claims against Defendant and Appellee Susan Knox (DA Knox).

STATEMENT OF JURISDICTION

The district court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1343. On June 24, 2008, the district court entered judgment against Mr. Mink and in favor of DA Knox, and dismissed Plaintiffs' First Amended and Supplemental Complaint (the Amended Complaint). Aplt.App. 558-59. The June 24, 2008 judgment is a final order disposing of all claims with respect to all parties under Rule 58 of the Federal Rules of Civil Procedure (F.R.C.P.).

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 July 11, 2008. Aplt.App. 560-62.

ISSUE PRESENTED FOR REVIEW

Mr. Mink published *The Howling Pig* (*THP*), an internet-based alternative newsletter providing satirical commentary on matters of public concern to the University of Northern Colorado (UNC) community. In response to a complaint by a UNC professor whom Mr. Mink had spoofed in *THP*, DA Knox participated in a pre-indictment investigation into whether *THP* violated Colorado's antiquated criminal libel statute, C.R.S. § 18-13-105 (the Criminal Libel Statute): DA Knox

reviewed and approved an affidavit prepared by the lead detective, which resulted in issuance of a warrant for a search of the Mink home. The affidavit sought authority for a warrant authorizing the seizure of the computer that Mr. Mink used to publish *THP*, its electronic contents and files, and all writings in the house. Did the district court err in dismissing, on the basis of qualified immunity, Mr. Mink's claim alleging an unlawful search and seizure in violation of the Fourth Amendment, where the search lacked probable cause because clearly-established First Amendment law protected Mr. Mink's speech, and because the overbroad affidavit and warrant violated clearly-established Fourth Amendment law?

STATEMENT OF THE CASE

A. Nature of the Case.

Mr. Mink filed this action to vindicate his constitutional and statutory rights to freedom of speech, freedom of the press, and freedom from unreasonable searches and seizures. The case arises out of Mr. Mink's publication of *THP*. The first three issues poked fun at a prominent UNC professor, Junius W. Peake, by identifying an obvious fictional character named "Junius Puke" as the purported editor of *THP*. Professor Peake took offense and, at his request, the Office of the District Attorney for the Nineteenth Judicial District of Colorado (the District Attorney) 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, DA 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 Mr. Mink's counsel that the Police Department would recommend prosecution under the Criminal Libel Statute. These events chilled Mr. Mink from exercising his rights to freedom of expression and the press—publication of *THP* temporarily ceased.

Mr. Mink obtained limited relief when the district court entered a temporary restraining order (TRO) compelling return of the seized computer and precluding

[1] Mr. Mink provides a copy of the Criminal Libel Statute in the Addendum.

prosecution of Mr. Mink based on his publication of the first three issues of *THP*. Through this litigation, Mr. Mink then pursued 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.

The initial complaint. On January 8, 2004, Mr. Mink and his mother, Crystal Mink, initially sued the District Attorney (then A.M. Dominguez, Jr.), DA 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. 34-82. The Minks asserted claims, among others, for violation of their First, Fourth, and Fourteenth Amendment rights.

The TRO. The next day, on January 9, 2004, the district court entered a TRO prohibiting the District Attorney from initiating prosecution of Mr. Mink under the Criminal Libel Statute, and requiring the City to return the Minks' computer.[2] Aplt.App. 90-92. After the District Attorney 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. 93-94. The Minks then

reached a settlement resulting in dismissal of their claims against the City and Detective Warren. Aplt.App. 95-101, 158-61. Mr. Mink and The Howling Pig (an unincorporated association that published *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 Attorney General for the State of Colorado (then Ken Salazar) as a defendant, and specifically named DA Knox in place of John Doe #1. Aplt.App. 102-57. The Amended Complaint asserted a single claim against the Attorney General and the District Attorney: That the Criminal Libel Statute, which they are responsible for enforcing and defending, is unconstitutional under the First and Fourteenth Amendments. Among other claims against DA Knox, the Amended Complaint alleged violation of the First and Fourth Amendments, through 42 U.S.C. § 1983.

The district court's first dismissal of Mr. Mink's claims. DA Knox moved to dismiss all claims asserted against her on the basis of absolute immunity. Aplt.App. 166-90. The District Attorney answered the Amended Complaint. Aplt.App. 162-65. The Attorney General moved to dismiss the First Amendment Claim, asserting that he was not a proper party to the case, but he nonetheless filed

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(cont'd.)

[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. 112-13 (¶37), 113 (¶41), 114 (¶44).

an amicus brief defending (in a very limited manner) the constitutionality of the Criminal Libel Statute. Aplt.App. 191-218. Mr. Mink moved for summary judgment on his claim against the District Attorney and the Attorney General on the basis that the Criminal Libel Statute is unconstitutional. Aplt.App. 284-383.

In a Memorandum Order and Opinion dated October 26, 2004, the district court granted DA Knox's motion to dismiss and denied Mr. Mink's motion for partial summary judgment. Aplt.App. 391-407. The district court also dismissed Mr. Mink's constitutional claim against the District Attorney and the Attorney General based on a lack-of-standing argument that neither defendant had raised, but the court reached *sua sponte*. *Id.*

The first appeal – *Mink I*. Mr. Mink appealed from the first judgment of dismissal to this Court, contending that the district court had erred in dismissing, among other claims, his respective First and Fourth Amendment claims. In a published decision, *Mink v. Suthers*, 482 F.3d 1244 (10th Cir. 2007), a panel of this Court affirmed the dismissal of Plaintiffs' First Amendment claim against the District Attorney and the Attorney General based on lack of standing, *id.* at 7, 21, but held that DA Knox did not enjoy absolute immunity because she was not acting as an advocate when she reviewed and approved the allegedly constitutionally deficient search warrant, *id.* The Court declined to decide whether DA Knox might be entitled to qualified immunity and remanded for the district court to address that

issue. *Id.* The Supreme Court denied DA Knox's petition for a writ of certiorari. Aplt.App. 33.

The remand in *Mink II*. On remand, Mr. Mink pursued his Fourth Amendment claim against DA Knox. The district court granted DA Knox's motion to dismiss based on qualified immunity. *Mink v. Knox*, 566 F. Supp. 2d 1217 (D. Colo. 2008) (slip opinion at Aplt.App. 539-57). The court ruled that a reasonable official in DA Knox's position would not have realized that the *THP*'s references to Peake were protected by the First Amendment under the circumstances of this case, and therefore, could have concluded that probable cause existed to support the warrant application. The court also ruled that, although the search warrant was constitutionally deficient due to its lack of particularity, DA Knox could not be held liable for the unlawful warrant. According to the court, DA Knox approved only the affidavit submitted in support of the warrant, and the First Amended Complaint failed to expressly allege that she reviewed the draft warrant, as well. Aplt.App. 539-57. In so ruling, the district court once more developed an argument on behalf of a defendant that the defendant herself had not made. This appeal followed.

STATEMENT OF FACTS

The following statement of facts is based on the allegations of the Amended Complaint, unless otherwise noted.

A. The Parties.

When the Amended Complaint was filed, Mr. Mink was 24 years old, had recently completed his studies at UNC, and lived in Ault, Colorado. Aplt.App. 327 (¶ 1), 333.

Ms. Knox was an assistant DA, who 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 in support of the search warrants 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 of the Mink home. Aplt.App. 104-05 (¶ 8), 185 (¶ 2).

B. The First Three Editions of *THP*.

In the Fall of 2003, Mr. Mink published three editions of *THP*, which featured satirical and sarcastic commentary about matters of public concern to the UNC community, including critiques of the UNC newspaper, lack of diversity in the administration and faculty, budget cutbacks, spending priorities, and campus "free speech zones." Aplt.App. 125-30. Mr. Mink made *THP* available for reading, downloading, and printing on an internet website. Aplt.App. 106 (¶ 13).

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. 106 (¶¶ 15-16), 125-30. The first three issues included obviously doctored photographs of the real Professor Peake, wearing sunglasses and a Hitler-like moustache. Aplt.App. 106 (¶ 16), 125-30. 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. 106 (¶ 16), 131-33. The editorial columns attributed to "Professor Puke" parodied Professor 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 the real professor. Aplt.App. 106-07 (¶ 17), 125-30.

Professor Peake was 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*, Professor 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. 107 (¶ 18).

However, Professor Peake apparently lacked any sense of humor. Based on the first three editions of *THP*, he complained to the second-in-command prosecutor in the District Attorney's Office. Aplt.App. 107 (¶ 19), 332. Although a reasonable prosecutor would have known that Professor Peake was a public

figure for First Amendment purposes, the District Attorney'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 Professor Peake be contacted. Aplt.App. 107 (¶ 20). Pursuant to that request, Detective Warren contacted Professor Peake, who submitted a complaint asserting that *THP's* portrayal of him violated the Criminal Libel Statute. Aplt.App. 107 (¶ 20), 354.

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

Following receipt of Professor Peake's complaint, Detective Warren began his criminal investigation. Aplt.App. 334. 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. 110-11 ((¶ 31), 120 (¶¶ 74-75, 77), 337. DA Knox reviewed and approved the affidavit. Aplt.App. 104-05 (¶ 8), 120 (¶ 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. 108 (¶ 23), 110 (¶ 30), 138-49. DA Knox authorized this illegal search because she reviewed and approved that affidavit in support of the search warrant. Aplt.App. 104-05 (¶ 8), 119 (¶ 71), 185 (¶ 2).

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 Mr. Mink used for his work on *THP* and the computer's electronic contents. Aplt.App. 108-09 (¶¶ 21-26), 134-37, 327 (¶ 4), 337-38. During the search, the police officers told Mr. Mink that they were investigating a potential charge of "felony libel" against him. Aplt.App. 327 (¶ 3). Shortly thereafter, Detective Warren informed Mr. Mink's attorney that he would recommend that the District Attorney file a charge of criminal libel. Aplt.App. 110 (¶ 28). In response to the criminal investigation, search and seizure, and threatened prosecution, Mr. Mink stopped publishing *THP*. Aplt.App. 109 (¶ 27), 111 (¶ 33).

On January 9, 2004, the day after the lawsuit was filed, the district court entered a TRO that prohibited the District Attorney from prosecuting Mr. Mink under the Criminal Libel Statute and further ordered the City to return the Minks' computer and all of its contents. Aplt.App. 90-92. On January 20, 2004, the District Attorney announced in a memorandum that he would not file a criminal libel charge against Mr. Mink based on material published about Professor Peake in the first three issues of *THP*. Aplt.App. 113 (¶ 41), 114-15 (¶ 44), 373-75. Based on this "no file" decision, the district court vacated the TRO. Aplt.App. 93-94. *Mink I* and the decision on remand followed thereafter.

SUMMARY OF ARGUMENT

The district court's dismissal of Mr. Mink's claims based on DA Knox's qualified immunity was erroneous on multiple levels and, as a whole, misapprehends the standards for dismissal under F.R.C.P. 12(b)(6) in the wake of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007).

First, the content of *THP* concerning Professor Peake was satire and parody. As such, it could not have been the subject of a criminal libel charge under long-standing Supreme Court, Tenth Circuit, and Colorado Supreme Court precedent. The district court recognized as much when it first reviewed *THP* and entered the TRO precluding prosecution of Mr. Mink based on his publication of the first three issues.

Second, the district court misconstrued the issues of whether Professor Peake was a public official or public figure, and whether the statements concerning him in *THP* were matters of public concern. Once more, under established First Amendment law that broadly protects these categories of speech, no reasonable district attorney could have concluded that there was probable cause for a criminal libel charge.

Third, the court's ruling on the lack of particularity in the warrant improperly exalted form over substance. The affidavit that DA Knox reviewed and approved was identical to the warrant with respect to the items to be seized. The

Amended Complaint adequately alleged that DA Knox caused an illegal search in violation of the particularity requirement of the Fourth Amendment.

ARGUMENT

I. Standard of Review.

This Court applies *de novo* review to dismissals in qualified immunity cases, "us[ing] the same standard . . . as [it applies to review of] dismissals generally." *Shero v. City of Grove*, 510 F.3d 1196, 1200 (10th Cir. 2007). Specifically, the Court must review *de novo* both (a) whether the plaintiff's allegations state the deprivation of a constitutional right, and (b) whether the asserted federal right was clearly established. *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)); *Cortez v. McCauley*, 478 F.3d 1108, 1122 n.19 (10th Cir. 2007) (*en banc*) (citing *Elder*).

After the Supreme Court's 2007 decision in *Twombly*, a complaint "must plead sufficient facts, taken as true, to provide 'plausible grounds' that discovery will reveal evidence to support the plaintiff's allegations." *Shero*, 510 F.3d at 1200 (quoting *Twombly*, 127 S.Ct. at 1965). However, *Twombly* "expressly rejected" "'heightened fact pleading.'" *Robbins v. Oklahoma,* 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 127 S. Ct. at 1964, for proposition that "a complaint 'does not need detailed factual allegations'"). Rather, under *Twombly*, the complaint must contain only "enough factual matter (taken as true) to suggest" or

"to infer" the elements of the claim for relief. 127 S. Ct. at 1965. *See also id.* (complaint must contain "enough fact to raise a reasonable expectation that discovery will reveal evidence" of the elements of the claim). Moreover, *Twombly* did not change the requirements that, "[i]n reviewing a dismissal, a court must accept as true all well-pleaded facts, as distinguished from conclusory allegations, and those facts must be viewed in the light most favorable to the non-moving party." *Shero*, 510 F.3d at 1200 (citing *Moya v. Schollenbarger*, 465 F.3d 444, 455 (10th Cir. 2006)).

The district court appears to have misunderstood *Twombly* as limiting the court to "the alleged facts—and only the alleged facts" when reviewing the sufficiency of a complaint. 566 F. Supp. 2d at 1222 (citing *Twombly* and *Robbins*). As discussed below, the court's inappropriately narrow review of Mink's allegations led it to erroneously find qualified immunity.

II. The Controlling Standards for Qualified Immunity.

"The doctrine of qualified immunity shields public officials . . . from damages actions unless their conduct was unreasonable in light of clearly established law." *Elder*, 510 U.S. at 512. The court's first task in a qualified immunity analysis is to determine whether the plaintiff's allegations state the deprivation of a constitutional right. *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (citing *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)).

The next inquiry is whether the constitutional right was "clearly established" at the time of the alleged violation.

> "Clearly established" for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful*, but it is to say that in light of the pre-existing law the unlawfulness must be apparent."

Wilson, 526 U.S. at 614-15 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added). The Supreme Court has "shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004). Government officials must make "reasonable applications of the prevailing law to their own circumstances." *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir.), *cert. denied*, 534 U.S. 1019 (2001). They "can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

Under these authorities, DA Knox is entitled to qualified immunity only if either (a) Mr. Mink failed to allege a Fourth Amendment violation, or (b) at the time of the asserted violation, DA Knox "neither knew nor should have known"

that the affidavit and warrant would authorize a search that would violate Mr. Mink's constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 819-20 (1982).

III. DA Knox Is Not Entitled to Qualified Immunity.

On remand, Mr. Mink pursued two constitutional challenges to DA Knox's role in approving the affidavit that caused the warrant to issue: *First*, that in light of the First Amendment limits on the Criminal Libel Statute, as applicable to this case, there was no probable cause to believe a prosecutable crime had been committed; and *second*, that the affidavit and warrant were facially invalid for lack of sufficient particularity. The district court held that DA Knox enjoyed qualified immunity from both these challenges.

Probable cause. The district court first held that the Amended Complaint sufficiently alleged a Fourth Amendment violation based on DA Knox's approval of the affidavit without probable cause, thereby satisfying the first qualified immunity inquiry. 566 F. Supp. 2d at 1223. The court then held, however, that "a reasonable official in Knox's position could believe that the statements in *The Howling Pig* were not protected statements under the First Amendment—and, accordingly, that Plaintiff's actions in publishing such statements could subject him to criminal prosecution under the Colorado libel statute[.]" *Id.* at 1227-28. Stated differently, the district court held that clearly established law would not have demonstrated to a reasonable prosecutor the unconstitutionality of

investigating charges against Mr. Mink under the Criminal Libel Statute. On that basis, the court held that DA Knox was qualifiedly immune from suit for the alleged approval of the affidavit without probable cause.

Particularity. The district court acknowledged that the search warrant violated the particularity requirement of the Fourth Amendment. *Id.* at 1228-29. Nevertheless, according to the court, the Amended Complaint alleged a lack of particularity in only the affidavit and not the warrant itself and, therefore, Mr. Mink failed to allege a Fourth Amendment violation. *Id.* at 1229. Therefore, under the first prong of the qualified immunity inquiry, the court dismissed the lack-of-particularity claim. *Id.*

The district court was wrong with respect to both probable cause and particularity. On probable cause, at the time DA Knox approved the affidavit, Supreme Court and Tenth Circuit cases clearly and overwhelmingly established that the Criminal Libel Statute could not be constitutionally applied to Mr. Mink for at least two reasons: (a) The challenged content of *THP* consisted of protected satire and parody; and (b) the challenged content consisted of statements about a public official, public figure, or matter of public concern, to which the Criminal Libel Statute could not be applied.

As for particularity, Mr. Mink's allegations about the affidavit were sufficient since the identical language was used in the search warrant, especially

given Mr. Mink's implicit allegation that DA Knox reviewed the warrant as well as the affidavit, and DA Knox's separate admission that she reviewed both documents.[3] Because the Amended Complaint alleged a constitutional violation, the district court should have addressed the second qualified immunity question, *i.e.*, whether clearly established law should have put DA Knox on notice of the violation. Here, the district court answered that question when it acknowledged, "[u]nder the 'scrupulous' standard required by the Supreme Court" for seizures of books and other First-Amendment-protected materials, "no doubt the warrant in this case was overly broad." *Id.* at 1228 (quoting *Stanford v. Texas*, 379 U.S. 476, 511-12 (1965)).

[3] DA Knox admitted that she reviewed the warrant in an affidavit submitted on March 8, 2004. App. 185.

A. Under Clearly Established First Amendment Law, The Affidavit and Warrant Lacked Probable Cause.

Under clearly-established law, a reasonable prosecutor in DA Knox's shoes would have known that application of the Criminal Libel Statute to Mr. Mink in this case would violate the First Amendment for several independent reasons.

1. The Content of *The Howling Pig* Consisted of Unmistakable Satire and Parody, Which Could Not Constitute Criminal Libel Under 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 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 Supreme Court subsequently made clear that statements which "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 v. Lorain Journal Co.*, 497 U.S. 1 (1990), 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." *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 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). If a statement does not "reasonably impl[y] false and defamatory facts," *Milkovich*, 497 U.S. at 20—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 the well-known decision in *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983), in which this Court held that the First Amendment protects rhetorical hyperbole and obvious parody, and that a defamation action must be based on statements that "in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated." *Id.* at 442. *Pring* is also significant for its confirmation that the First Amendment protects satire and parody regardless of whether the subject is or is not a public figure. *Id.* at 442. In light of *Pring*, which remains good law to this day, there is no basis for the district court's

statement that it is unclear in the Tenth Circuit whether the "opinion, parody, and hyperbole" exception applies to statements about private figures on matters of private concern. 566 F. Supp. 2d at 1226 (citing *Schwartz v. Am. College of Emergency Physicians*, 215 F.3d 1140, 1144 (10th Cir. 2000)). The *Schwartz* decision contains no such ruling.

Given the established First Amendment protection for satire and parody, no reasonable district attorney could have concluded that *THP* contained defamatory statements concerning Professor Peake that would support a charge of criminal libel. The website excerpts attached to the affidavit—particularly as they relate to Professor Peake—contained only satire and parody, rather than false assertions of fact. The first page of the website unambiguously explained the publication's goal of providing "social and political" "satire and commentary[.]" App. 145. As an obvious example, *THP* changed Professor Peake's name to "Mr. Junius Puke." His photograph was obviously altered to include sunglasses and a "Hitler-like" mustache. App. 145-49. Another photo was altered to depict the professor in elaborate make-up like that used by the rock band "KISS." App. 132. The website's editorials, supposedly by "Professor Puke," covered subjects that the real Monfort Distinguished Professor of Finance would not have addressed and used language that the real professor would not have used, including the following:

- "This will be a regular bitch sheet that will speak truth to power, obscenities to clergy, and advice to all the stoners sitting around watching Scooby Doo." App. 147.

- "This will be a forum for the pissed off and disenfranchised in Northern Colorado, basically everybody." *Id.*

- "I made it to where I am through hard work, luck, and connections, all without a college degree." *Id.*

- "Dissatisfaction with a cushy do-nothing ornamental position led me to form this subversive little paper." *Id.*

- "I don't normally care much about the question of daycare since my kids are grown and other people's children give me the willies[.]" App. 148.

If these caricatures and statements alone were not obvious enough to signal to readers the satirical nature of *The Howling Pig*, the site also contained an express "disclaimer":

> 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 has 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.

App. 146.

The district court confirmed in no uncertain terms the obviously satirical nature of the statements in the *THP* when it granted the TRO in January 2004—protecting Mr. Mink from prosecution and requiring the return of his computer, which had been seized pursuant to the unlawful search warrant. At that time, Judge Babcock said that the *THP* articles in question "constitute satire in its classic sense." App. 588. Judge Babcock went on to quote the American Heritage Dictionary definition of "satire," as well as to refer to his undergraduate studies of Desiderius Erasmus. *Id.* He then stated: "[W]hat's written in this case is satire. I think young Mr. Mink should be commended to Erasmus' praise of folly and could perhaps improve his rhetoric, because as written it is crass and vulgar, but that makes it no less protected by the First Amendment." App. 589-90. The court also recognized that the threat of prosecution for such satire "is like the sword of Damocles which hangs over [Mr. Mink's] head by a slender thread." App. 590. The court went on to hold that "[t]his is the purest of speech which has been tolerated by all but tyrants and despots from ancient times." *Id.*

Inexplicably, four years later Judge Babcock discounted these findings as his "passing view." 566 F. Supp. 2d at 1227. In 2008, he held only that the content of

THP "might be entitled to constitutional protection under the 'opinion, parody, and hyperbole' exception" to speech that can be prosecuted for libel or defamation, *id.* (emphasis in original), even though in 2004 he had decisively held that the *THP's* content *is* entitled to constitutional protection. In 2008, he ruled that "[DA] Knox could not fairly have been expected to prophecy how I would rule at the January 4, 2004, hearing as my views were necessarily based upon an examination of all the facts gathered up to that time." *Id.* But Judge Babcock made his initial, well-reasoned findings based on what one must assume was his considered review of the *THP* website excerpts that were attached to the affidavit approved by DA Knox. Also, the content on which he relied—"the facts gathered up at that time"—was identical to that available to DA Knox (as attachments to the affidavit).

In the end, the district court failed to follow the Supreme Court's and this Court's law on qualified immunity. Despite the abundant, long-established body of law making clear that the First Amendment protects satire and parody, and despite the obviously non-factual nature of the statements about "Professor Puke," Judge Babcock found qualified immunity because Mr. Mink failed to identify a case involving the same facts—a case "that clearly establishes the statements in *The Howling Pig* were hyperbole, parody, or satire conclusively protected by the First Amendment." *Id.* However, as reviewed above, a plaintiff need not cite cases with the same facts, but instead must demonstrate that the law is clearly

established and that this law provides fair notice of the unconstitutionality of the acts at issue. *Hope*, 536 U.S. at 739. Here, Mr. Mink did exactly that, by showing that the statements about Professor Peake constituted classic parody and satire, and that the First Amendment as applied by the Supreme Court and this Court protects such speech.[4]

Moreover, what could be more germane to the "clearly established" inquiry under the qualified immunity doctrine than the findings of a federal court—just days after the actions at issue—on the obviousness of the law, as applied to the facts? Like Judge Babcock, any reasonable district attorney would have immediately realized under long Supreme Court and Tenth Circuit precedent that the content of *THP*, as it related to Professor Peake, was satire and parody enjoying protection under the First Amendment from criminal libel charges.

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[4] Further, there *are* cases with similar facts in which courts, based on United States Supreme Court precedent, concluded that the statements at issue were non-actionable satire. For example, in *Garvelink v. Detroit News*, 206 Mich. App. 204, 522 N.W.2d 883 (1994), the defendant newspaper published a fictional interview with a school superintendent, referring to him as "Supt. Roger Gravelhead" and attributing comments to him that exaggerated and mischaracterized the superintendent's positions. The court easily concluded that the column was "obvious satire" and, therefore, was non-actionable. *Id.* at 887 (citing *Milkovich* and *Falwell*).

2. The Content of *The Howling Pig* Was About Public Officials, Public Figures, or Matters of Public Concern, Which Could Not Constitute Criminal Libel Under the First Amendment.

There is an independent basis for reversing the district court's qualified immunity holding on probable cause. The court held that a reasonable prosecutor in DA Knox's position would not have known, based on clearly established law, "that Professor Peake was a public figure and that the allegedly defamatory statements in *The Howling Pig* addressed a matter of public concern and were not made with actual malice." 566 F. Supp. 2d at 1224. This aspect of the district court decision founders on multiple levels.

First, and fundamentally, the court wrongly combined two separate issues, holding that only "a defamatory false statement [1] *about a public official or public figure* [2] *on a matter of public concern*," might be exempt from criminal libel charges. *Id.* at 1223 (emphasis added). In fact, under established Supreme Court law, the test is disjunctive such that speech about certain types of individuals, as well as on certain topics, is protected. *See*, *e.g.*, *Garrison v. Louisiana*, 379 U.S. 64 (1964) (addressing criminal libel concerning public officials, without regard to whether topic was matter of public concern); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974) (addressing restrictions on punitive damages when the plaintiff

is a private citizen, but the statements are of public concern).[5] *Gertz* is particularly instructive; if the First Amendment restricts punitive damages, it obviously also restricts criminal prosecution.

Second, the district court failed entirely to address Mr. Mink's assertion that Professor Peake was a public official as a result of his status as the Monfort Distinguished Professor of Finance at the University of Northern Colorado, a public university. *See*, *e.g.*, *Grossman v. Smart*, 807 F. Supp. 1404, 1408 (C.D. Ill. 1992). As established in *Garrison*, speech concerning a public official cannot be the basis for criminal libel charges in Colorado in the absence of actual malice. And, since the Colorado Supreme Court has refused to write an actual malice standard into the statute, *Ryan*, 806 P.2d at 940, the result is that no statements concerning public officials can be the basis for a criminal libel charge. *See*, *e.g.*, *Beedle v. Wilson*, 422 F.3d 1059, 1066 (10th Cir. 2005) (reversing dismissal of First Amendment claim predicated on governmental entity's pursuit of civil libel action: "Supreme Court authority suggests that governmental entities are not

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[5] In *People v. Ryan*, 806 P.2d 935, 940 (Colo. 1991), the Colorado Supreme Court arguably suggested that to be protected, speech must be both "about public officials or public figures" *and* "involving matters of public concern." *Id.* at 940. However, that Colorado decision cannot override controlling United States Supreme Court precedent on the scope of First Amendment protections. Moreover, in other contexts, the Colorado Supreme Court has extended protection under the state constitution to "matters of public concern," regardless of the

permitted to bring libel actions against private citizens, at least without alleging actual malice, and that allowing them to do so would be contrary to the protections afforded to the citizenry by the First Amendment.").

Third, if the district correctly assumed Professor Peake may not be a public official, nonetheless the district court erred in its public figure analysis. The court ruled that Mr. Mink did not allege that Professor Peake was an all-purpose public figure, *i.e.*, someone having "pervasive fame or notoriety." 566 F. Supp. 2d at 1224. While Professor Peake might not have been alleged to be a *national* public figure, Mr. Mink did allege he was an all-purpose public figure *in Greeley*:

> Professor Peake is well-known in the Weld County and University of Northern Colorado communities as someone who has often voiced his views publicly on a wide range of issues. According to an editorial published in the Greeley Tribune on January 18, 2004, Professor Peake had become a public figure in the community as a result of "his constant ramblings that circulate to students and faculty members via email on campus and his opinion articles that appear on this very page.

App. 107, ¶ 18. The district court held that these allegations were insufficient to "*show* Professor Peake to be a 'public figure for all purposes and in all contexts.'" 566 F. Supp. 2d at 1225 (citation omitted and emphasis added). But at this stage of the proceedings, Mr. Mink was not required to "show," or prove, anything. The

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(cont'd.)
plaintiff's status. *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103,

question, instead, is did he "plead sufficient facts, taken as true, to provide 'plausible grounds' that discovery will reveal evidence to support [his] allegations"? *Shero*, 510 F.3d at 1200 (quoting *Twombly*, 127 S.Ct. at 1965). In any event, the district court's holding is too narrow since public figure analysis is based on the relevant community at issue: "The president of a college student body, for example, might be a 'pervasive' public figure for purposes of commentary by the student newspaper but not for commentary by *Time* magazine or the 'CBS Evening News.'" R. Sack, *Sack on Defamation* § 5.3.9 at 5-49. Having alleged that, in the UNC community, and for purposes of a website devoted to issues of interest in that community, Professor Peake was a public figure, Mr. Mink was entitled to develop further facts to support his allegation.

Alternatively, Mr. Mink adequately alleged that Professor Peake had become a limited purpose public figure by voicing his views on various issues, including on the editorial page of *The Greeley Tribune*. The district court avoided this allegation by focusing on that part of *THP* which asserted that "Junius Puke" had gambled in tech stocks in the 1990s and rode the tech bubble "like a $20 whore, and made a fortune." 566 F. Supp. 2d at 1225. As to these statements, the court concluded that there was no allegation that Professor Peake had involved himself

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(cont'd.)
1105-06 (Colo. 1982).

in the controversy concerning tech stocks, and therefore he was not a "limited purpose" or "vortex" public figure. *Id.* In doing so, the court overlooked a fundamental issue—these particular statements are not defamatory. Making a fortune by gambling in tech stocks is not, on its face, libelous. Therefore, whether Professor Peake had involved himself in this controversy was beside the point.

Fourth, the district court erred in its cavalier treatment of the public concern issue. In a sentence, the court held that Mr. Mink did not allege that a reasonable prosecutor would know that *THP's* statements about Professor Peake concerned matters of public concern. 566 F. Supp. 2d at 1226 (citation omitted). The district court's approach, once more, was too narrow. The Amended Complaint attached and incorporated the first three issues of *THP*, App. 106 (¶ 16), which stated that "Professor Puke" "gambled and made a bundle in tech stocks," obtained his tenured position "through an endowment from one of my business partners," and became a UNC professor "without a college degree." App. 125-30. These statements (though satirical) about the background, appointment, educational qualifications, and judgment of a professor of finance at a public university are on matters of public concern. *Cf.*, *Considine v. Bd. of County Comm'rs*, 910 F.2d 695, 699 (10th Cir. 1990) ("Speech on a matter of public concern is generally defined as speech 'fairly considered as relating to any matter of political, social, or other

concern to the community.'") (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

Fifth, the district court culminated its confused analysis of the public official/figure and matter of public concern issues by holding that "Plaintiff has not alleged a reasonable official in Knox's position would have known Plaintiff lacked 'actual malice' when he made the allegedly defamatory statements." 566 F. Supp. 2d at 1226. This holding is both erroneous and irrelevant. As previously noted, the Colorado Supreme Court in *Ryan* refused to write an actual malice requirement into the Criminal Libel Statute—holding instead that the statute could not be applied to allegedly defamatory statements concerning public figures or officials. 806 P.2d at 940. Because actual malice is irrelevant to criminal libel law in Colorado, Mr. Mink was not required to address that issue in his Amended Complaint.

In summary, a reasonable district attorney would have known that a criminal defamation charge could not be brought against Mr. Mink because (a) Professor Peake was a public official, *or* (b) Professor Peake was a public figure, *or* (c) the allegedly defamatory statements were on matters of public concern. Since the content of *THP* would not support a charge of criminal libel, DA Knox was not entitled to qualified immunity for approving an affidavit in support of a search warrant to investigate a non-existent, non-chargeable crime.

B. Under Clearly Established Fourth Amendment Law, the Affidavit and Warrant Lacked Particularity.

1. Mr. Mink Adequately Alleged a Constitutional Violation.

The district court's opinion on the Fourth Amendment particularity issue exalts form over substance. The court concluded that Mr. Mink may not sue DA Knox under the threshold qualified immunity analysis because (1) Mr. Mink "does not . . . allege that Knox issued the warrant, nor that she reviewed the warrant, nor that she participated in the search and seizure executed pursuant to the warrant," and (2) "no case law support[s] [Mr. Mink's] theory here—namely, that submission of an affidavit [as opposed to a warrant] lacking particularity . . . violates the Fourth Amendment." 566 F. Supp. 2d at 1229.

The district court is incorrect on both conclusions. *First*, it is a fair inference from the Amended Complaint that DA Knox reviewed the warrant. The Amended Complaint alleges that "[a] reasonable prosecutor would have known that the warrant failed to meet the particularity requirement of the Fourth Amendment." App. 119 (¶ 69). Implicit in this allegation is that DA Knox indeed reviewed the warrant—how could DA Knox be faulted for not having met the "reasonable prosecutor" standard in this respect if she did not review the warrant in the first instance? Moreover, while the Amended Complaint emphasizes DA Knox's review of the affidavit, it attaches and incorporates both the affidavit and the warrant, which use identical language to describe the property to be seized.

Compare App. 135-36 (¶¶ 1-11) (warrant), *with* App. 139-40 (¶¶ 1-11) (affidavit). Thus, DA Knox's review of the affidavit and the items to be seized was effectively a review and authorization of the warrant, which contained an identical description.

These allegations satisfy the liberal pleading standard of F.R.C.P. 8(a)(2). They "provide 'plausible grounds' that discovery will reveal evidence" to support Mr. Mink's allegations that DA Knox's review and authorization caused a search in violation of the particularity requirement of the Fourth Amendment. *Shero*, 510 F.3d at 1200 (quoting *Twombly*, 127 S.Ct. at 1965). In fact, the Court need not speculate about what discovery will reveal, since DA Knox herself confirmed that she reviewed the warrant. In an affidavit submitted with her motion to dismiss, DA Knox stated in no uncertain terms: "I reviewed the affidavits *and warrants* in question and found their form to be appropriate for submission to a judge of our judicial district." App. 185 (¶ 2) (emphasis added). *See also* App. 184 (¶ 1) (". . . I and the other attorney members of the District Attorney's Office are periodically contacted by peace officers from the various law enforcement entities in the Nineteenth Judicial District for the purpose of reviewing affidavits *and warrants* for arrest and search to review their legal sufficiency and support for probable cause.") (emphasis added); App. 184-85 (¶ 1) ("[T]he county and district judges in the Nineteenth Judicial District who are requested by peace officers to sign these warrants either assume or specifically ask for verification that the affidavit *and*

warrant in question have been reviewed by a member of our District Attorney's Office.") (emphasis added).

Second, the district court misconstrued *Groh v. Ramirez*, 540 U.S. 551 (2004), and *United States v. Hurwitz*, 459 F.3d 463 (4th Cir. 2006), as holding that particularity is required in only the warrant, but not in the supporting documents for the warrant. 566 F. Supp. 2d at 1229. Both cases hold that, under most circumstances, the warrant must specify the items to be seized, and a defective warrant cannot be saved by particularity in the supporting affidavit if the warrant itself does not cross-reference and incorporate the affidavit. *Groh*, 540 U.S. at 557-58; *Hurwitz*, 459 F.3d at 470-71. But the fact that a sufficiently particular affidavit cannot save an overbroad warrant does not mean that an overbroad affidavit is irrelevant to a Fourth Amendment challenge. If the state court had narrowed the scope of the search outlined in the affidavit and issued a particularized warrant, then Mr. Mink would agree that DA Knox's approval of the overbroad affidavit would not be actionable. But this is not what occurred. Here, the warrant mirrored the affidavit—both lacked particularity. Even ignoring the fact that DA Knox admits she reviewed the warrant itself, she also approved an affidavit that lacked particularity, which led to the issuance of an unconstitutional warrant and thereby caused an unconstitutional search and seizure. Thus, even if

the Amended Complaint alleged DA Knox reviewed only the affidavit, this allegation was sufficient to support a Fourth Amendment claim.

In short, Mr. Mink satisfied the threshold test for overcoming DA Knox's assertion of qualified immunity because his allegations adequately state the deprivation of a constitutional right—here, DA Knox caused a violation of that right by reviewing and approving a defective affidavit as well as an identically-worded, and equally defective, warrant. *Wilson*, 526 U.S. at 609.

2. The District Court Correctly Concluded That the Warrant Lacked Particularity.

Although the district court misapprehended Mr. Mink's allegations concerning both the affidavit's and warrant's lack of particularity, it fully appreciated the Fourth Amendment law requiring particularity. The court recognized that "'[t]he Fourth Amendment requires that a search warrant describe things with sufficient particularity to prevent a general exploratory rummaging in a person's belongings[,]" 566 F. Supp. 2d at 1228 (quoting *United States v. Carey*, 177 F.3d 1268, 1277 (10th Cir. 1999) (citing *Marron v. United States*, 275 U.S. 192, 196 (1927))), and that this requirement "'is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure

is the ideas which they contain.'" 566 F. Supp. 2d at 1228 (quoting *Stanford*, 379 U.S. at 511-12).[6]

The district court observed that the warrant "authorized the seizure—among other things—of 'any and all correspondence, diaries, memoirs, journals, personal reminiscences, electronic mail (e-mail), letters, notes, memorandum [*sic*], or other communications in written or printed form' without regard to whether these materials were related to the suspected crime." 566 F. Supp. 2d at 1228. Applying the clearly-established law that the court had recognized and quoted earlier on the particularity issue, Judge Babcock ultimately concluded: "Under the 'scrupulous' standard required by the Supreme Court, I have no doubt the warrant in this case was overly broad. . . . The language in this warrant is even more broad than that in *Stanford*—language the Supreme Court described as 'constitutionally intolerable.'" *Id.* at 128-29 (quoting *Stanford*, 379 U.S. at 486) (additional citation omitted).

This part of the district court's analysis was undeniably correct. Supreme Court and Tenth Circuit decisions have long required particularity in the description of "things to be seized" for a search to satisfy the Fourth Amendment. *Stanford*, 379 U.S. at 485. *See*, *e.g.*, *Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir. 1985) ("The particularity requirement ensures that a search is confined in

[6] The district court's pinpoint cite is incorrect. The quoted language in *Stanford* appears at 379 U.S. at 485.

scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause."). The law was clearly established on this issue. Therefore, DA Knox's actions are not entitled to qualified immunity.

CONCLUSION

For all the reasons stated above, Mink respectfully requests the Court to reverse the judgment below and remand for trial of Mink's claims against DA Knox.

STATEMENT CONCERNING ORAL ARGUMENT

Mink requests the Court to hear oral argument. Although this appeal raises a single issue of qualified immunity, that issue turns on important issues of law under the First and Fourth Amendments. 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 8,333 words.

Dated December 23, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 23, 2008, a true and correct hard copy of the foregoing PLAINTIFFS' OPENING BRIEF was sent to the following persons in the manner indicated below:

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