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 REPLY BRIEF

Marcy G. Glenn
A. Bruce Jones
HOLLAND & HART LLP
P.O. Box 8749
Denver, Colorado 80201
Telephone: 303-295-8000
mgglenn@hollandhart.com
bjones@hollandhart.com

Mark Silverstein
American Civil Liberties Union Foundation of Colorado
400 Corona Street
Denver, Colorado 80218
Telephone: 303-777-5482
msilver2@worldnet.att.net

ATTORNEYS FOR APPELLANT

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

INTRODUCTION

Defendant's Answer Brief is striking for expressing as much disagreement with the district court's opinion as did Mr. Mink in his Opening Brief. Defendant disagrees with Judge Babcock's conclusion that the warrant lacked particularity, Ans. Br. at 23-25, and contends that the court should not have considered First Amendment principles. *Id*. at 28. The heart of DA Knox's argument, however, is that she is entitled to qualified immunity because she made a reasonable mistake. To the contrary, it is not a reasonable mistake when a police officer goes to a district attorney for legal advice about a warrant to search a home because someone has posted a satiric parody of a prominent college professor—*and the district attorney authorizes the search*.

I. First Amendment Principles Are at the Heart of This Case.

DA Knox argues that reliance on First Amendment principles is "misplaced" and asserts that "[n]either the Plaintiff nor the District Court explain with any particularity or by reference to any actual precedent why they have engaged in any analysis of First Amendment principles in this case . . . ." Ans. Br. at 28. Either

DA Knox still does not understand Mr. Mink's claim or she is obfuscating the issues.

A potential charge of criminal libel necessarily implicates the First Amendment because the alleged crime is based on speech. As of late-2003, when DA Knox was presented with the search warrant affidavit in this matter, this basic principal—that criminal libel laws are prone to violate the First Amendment—had been recognized for over 40 years. *See generally Garrison v. Louisiana*, 379 U.S. 64 (1964). More recently, but still well before DA Knox approved the defective warrant, the Colorado Supreme Court had ruled C.R.S. § 18-13-105 (the Criminal Libel Statute) unconstitutional on First Amendment grounds, as applied to speech concerning public officials. *See People v. Ryan*, 806 P.2d 935, 940 (Colo.), *cert. denied*, 502 U.S. 860 (1991). Obviously, in considering whether to approve an affidavit seeking a search warrant, a district attorney must consider whether the criminal statute in question has been ruled unconstitutional and therefore cannot be the basis for criminal charges. As a result, First Amendment principles were and are at issue.

DA Knox attempts to ignore this precedent by repeatedly citing *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986), and asserting that "'[a]n application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used

to review warrant applications generally.'" Ans. Br. at 30 (quoting *P.J. Video*, 475 U.S. at 875); *see also* Ans Br. at 17, 30-31, 32. DA Knox also quotes extensively from *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), as further support for her argument that the First Amendment is not of concern. *See* Ans. Br. at 31-32. However, neither *P.J. Video* nor *Zurcher* is particularly relevant here. In *Zurcher*, the First Amendment was raised because the *location* to be searched was a student newspaper office. 436 U.S. at 551. In *P.J. Video*, the *material* to be seized were obscene videos. 475 U.S. at 869.

In contrast, Mr. Mink's complaint was not based solely, or primarily, on the materials that were the subject of the search approved by DA Knox, nor the place to be searched. Rather, Mr. Mink focused on the nature of the crime that purportedly gave rise to the need for the search.[1] Mr. Mink's claim is that it violates the Fourth Amendment to search for evidence to support prosecution of a crime that cannot be prosecuted under the First Amendment. Because the First Amendment directly controls whether Mr. Mink could have been prosecuted under the Criminal Libel Statute, by definition it is directly relevant to whether the warrant satisfied the Fourth Amendment. DA Knox ignored his protected speech

[1] DA Knox purports to recite Mr. Mink's claim against her "in its entirety," Ans. Br. at 10-11, but she fails to include any of the allegations concerning her actions that were expressly incorporated in the claim. *See, e.g.*, App. 103-11 (Complaint, ¶¶ 8, 18, 20, 23, 30, 59).

and thereby violated his First Amendment rights in authorizing a search to seek evidence of a non-prosecutable crime. *See* Op. Br. at 21-25.

Further, *P.J. Video* supports Mr. Mink's position. The Supreme Court confirmed that it "ha[s] long recognized that the seizure of films or books on the basis of their content *implicates First Amendment concerns* not raised by other kinds of seizures." 475 U.S. at 873 (emphasis added). While the ultimate standard for issuance of a search warrant remains the same, the First Amendment is indeed relevant to determining the existence of probable cause.

Similarly, *Zurcher*, which requires courts to "apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search," 436 U.S. at 565, cuts directly against DA Knox's argument that the First Amendment imposes no heightened obligations upon her in this case. Since Mr. Mink's First Amendment rights were in question, DA Knox was required to examine the search warrant affidavit with "particular exactitude" and to ensure there was a prosecutable crime at issue. *See*, *e.g.*, *Voss v. Bergsgaard*, 774 F.2d 402, 405 (10th Cir. 1985). Again, any reasonable district attorney would have known that Mr. Mink's statements were not criminal libel, but rather a satirical review of Professor Peake. DA Knox should have thoroughly reviewed the applicability of the Criminal Libel Statute and assessed whether the statements were protected satire and parody under the First Amendment. Had DA Knox

applied the clearly-established standard of "particular exactitude," she would not have authorized submission of the affidavit to obtain a warrant.

II. Probable Cause to Issue a Search Warrant Necessarily Includes Probable Cause to Uncover Evidence of a Crime.

DA Knox incorrectly dissects the probable cause standard into two thresholds. She states that probable cause for a search warrant is separate from probable cause that the search would lead to evidence of a crime, and subsequently, an arrest. Ans. Br. at 21. Based on this false dichotomy, DA Knox claims that "the only issue is whether . . . it was reasonable for her to conclude there was *sufficient probable cause to justify requesting a search warrant*[.]" *Id.* at 23 (emphasis added). She insists the issue is *not* whether "Junius Peake was a public figure" or whether "the Plaintiff's internet website activities were protected by the First Amendment[ ]" as satire and parody. *Id.* at 22-23.

DA Knox cites no authority for these statements. Earlier, however, she relies upon *Illinois v. Gates*, 462 U.S. 213 (1983), and quotes the very holding in that decision which disproves her position. Ans. Br. at 21. In *Gates*, the Supreme Court made clear that to have probable cause to issue a search warrant, there also must be probable cause that the search would lead to evidence of a crime. That is true because probable cause to issue a search warrant requires "a fair probability that contraband or evidence of a crime will be found in a particular place." 462

U.S. at 238, *quoted in* Ans Br. at 21.) *See also United States v. Corral-Corral*, 899 F.2d 927, 937 (10th Cir. 1990) ("Probable cause undoubtedly requires a nexus between suspected criminal activity and the place to be searched.").

Given the established First Amendment protection for satire and parody, a reasonable district attorney would have known that the content of *The Howling Pig* was nothing more than a satirical commentary on the University of Northern Colorado community and faculty. Therefore, because the affidavit described no prosecutable crime, the search could not have yielded evidence of a crime, and there could not have been probable cause for the search.

III. DA Knox Is Not Entitled to Qualified Immunity.

DA Knox faults Mr. Mink for failing "to describe how a prior case exists that would have led [her] to know that her action in reviewing the search warrant affidavit was violative of the Plaintiff's constitutional rights." Ans. Br. at 34. She says that Mr. Mink relies on only "general First Amendment precedent," and that "[n]one of the specific factual circumstances in any of these decisions is remotely *factually* analogous to what [DA] Knox did in this case." *Id.* at 34, 35 (emphasis in original). Therefore, according to DA Knox, prior precedent did not "provide the contours of the right sufficiently clear [*sic*] so that a reasonable official would understand that what she is doing violated that right." *Id.* at 35 (citations omitted).

DA Knox's argument lacks merit because it rests on multiple mistaken premises. *First*, prior case law can establish a constitutional right—and provide a defendant with the required "fair warning" that her conduct will violate that right—even absent identical factual circumstances. *Second*, *Douglas v. Dobbs*, 419 F.3d 1097 (10th Cir. 2005), *cert. denied*, 546 U.S. 1138 (2006), on which DA Knox largely relies, is not applicable for multiple reasons set forth in Section III(B) below.

A. DA Knox Misstates the "Clearly Established" Requirement.

Qualified immunity is not available to an official if prior case law provided fair warning to her that her actions would violate constitutional rights. *See Denver Justice & Peace Comm., Inc. v. City of Golden*, 405 F.3d 923, 932 (10th Cir. 2005) (quoting *Hope v. Peltzer*, 536 U.S. 730, 739 (2002)). Here, the district court found that Mr. Mink failed to meet his burden of showing fair warning because he failed to identify a case "that clearly establishes the statements in *The Howling Pig* were hyperbole, parody, or satire conclusively protected by the First Amendment." *Mink v. Knox*, 566 F.Supp. 2d 1217, 1227 (D. Colo. 2008).

In support of this ruling, DA Knox relies chiefly on *Brosseau v. Haugen*, 543 U.S. 194 (2004), a *per curiam* decision in an excessive force case, which, she says, "re-emphasized . . . that the clearly established 'inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.'"

Ans. Br. at 14 (quoting *Brosseau*, 543 U.S. at 198 (internal citation omitted)). DA Knox argues that the Supreme Court's approach in *Brosseau* mirrors this Court's approach in other cases. *Id.* at 15 (citing *Walker v. City of Orem*, 451 F.3d 1139, 1151 (10th Cir. 2006); *Simkins v. Bruce*, 406 F.3d 1239, 1241 (10th Cir. 2005)). But regardless of whether the Supreme Court and this Court have applied a fact-specific analysis when analyzing excessive force cases, those cases do not resolve the qualified immunity question in this First Amendment case.

Both before and after *Brosseau*, the Supreme Court and this Court have required varying levels of specificity of notice to defeat qualified immunity depending upon the facts and the applicable constitutional principles. Indeed, *Brosseau* cites the Supreme Court's 2002 decision in *Hope* as holding that where the constitutional violation is "'obvious[,]'" "there need not be a materially similar case for the right to be clearly established." 543 U.S. at 199. Rather, *Brosseau* confirms that "in an obvious case, these standards can 'clearly establish' [a constitutional right], even without a body of relevant case law." *Id.* (citing *Hope*). Consistent with *Hope*, this Court recently explained: "We have therefore adopted a sliding scale to determine when law is clearly established. 'The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to establish the violation.'" *Casey v. City of Federal Heights*, 509 F.3d 1278 (10th Cir. 2007) (citation omitted).

In *Hope*, the Supreme Court rejected the Eleventh Circuit's requirement "that the facts of previous cases be 'materially similar'" to those in the case at hand, holding that "[t]his rigid gloss on the qualified immunity standard . . . is not consistent with [the Supreme Court's] cases." 536 U.S. at 739 (internal citations omitted). The Court reaffirmed its prior recognition that "'general statements of the law are not inherently incapable of giving fair and clear warning,'" *id.* at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)), and "that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.*

DA Knox implies that *Brosseau* has changed the qualified immunity analysis under *Hope,* but it has not. This Court regularly continues to rely upon *Hope* to reject defense arguments that allegedly violated constitutional rights were not clearly established. For example, in *Anderson v. Blake*, 469 F.3d 910 (10th Cir. 2006), the Court held that the plaintiff's privacy interest (which the defendant police officer allegedly violated by releasing to the media a videotape depicting her alleged rape) was a clearly established right that defeated the officer's qualified immunity claim. The Court rejected the officer's claim that the preexisting case law was distinguishable on its facts, and held in pertinent part:

> Because we do not require "precise factual correspondence" between the cases establishing the law and the case at hand, "[i]t is incumbent upon government

> officials to relate established law to analogous factual settings[.]"
>
> We think Ms. Anderson's privacy interest in the video . . . was clearly established based on [prior Tenth Circuit decisions], all decided before the events here. . . . *These cases must be considered in the context of the Supreme Court's holding in* Hope *that a general constitutional rule that has already been established "can apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful."*

Id. at 917 (citations omitted, emphasis added, last alteration in original).

Similarly, in *Marshall v. Columbia Lea Regional Hospital*, 474 F.3d 733 (10th Cir. 2007), the Court held that the plaintiff's Fourth Amendment right to be free from a nonconsensual, warrantless blood test (which the police officers conceded was an unlawful search and seizure) was clearly established, even though prior decisions had not applied the established law to the same facts. Again relying on *Hope*, the Court reemphasized that "'"officials can still be on notice that their conduct violates established law even in novel factual circumstances."'" *Id.* at 740 (quoting *Denver Justice & Peace Comm.*, 405 F.3d at 932 (quoting *Hope*, 536 U.S. at 739-41)).

More recently, in *Weigel v. Broad*, 544 F.3d 1143 (10th Cir. 2008), *petition for cert. filed*, __ U.S.L.W. __ (U.S. March 6, 2009) (No. 08-1128), the Court reversed the entry of summary judgment on the basis of qualified immunity, holding that highway patrol officers violated clearly established law when they

allegedly used excessive force in making an arrest. Again relying on *Hope*, *see id.* at 1154 (quoting *Hope*, 536 U.S. at 739), the Court rejected the troopers' argument that the prior case law involved distinct facts:

> [O]ur analysis in this case of the constitutionality of the restraint does not require us to compare the facts of *Cruz* [the prior Tenth Circuit decision] to the allegations here. *It is based on more general principles.* The Fourth Amendment prohibits unreasonable seizures. We do not think it requires a court decision with identical facts to establish clearly that it is unreasonable to use deadly force when the force is totally unnecessary to restrain a suspect or to protect officers, the public, or the suspect himself. . . .

Id. (emphasis added). *See also Casey*, 509 F.3d at 1284 ("The *Hope* decision 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.") (citations and all internal quotation marks omitted).

These decisions, and others like them, make clear that a plaintiff need not produce prior cases involving identical facts to defeat a qualified immunity claim, as the district court mistakenly believed and as DA Knox argues on appeal. Rather, where a body of law is clearly-established, "[i]t is incumbent upon government officials to relate established law to analogous factual settings[.]" *Eastwood v. Dept. of Corrections*, 846 F.2d 627, 631 (10th Cir. 1988), *quoted in*

Anderson, 469 F.3d at 917. *See also Currier v. Doran*, 242 F.3d 905, 923 (10th Cir.) (officials must make "reasonable applications of the prevailing law to their own circumstances."), *cert. denied*, 534 U.S. 1019 (2001). It is particularly incumbent upon a government official who happens to be a lawyer specifically responsible for reviewing search warrants for constitutionality, among other things, to relate that established law to the facts at hand.

Here, as set forth in detail in Mr. Mink's opening brief, as of late-2003, when DA Knox approved the warrant and affidavit, there was a well- developed body of controlling federal precedent providing fair notice of the constitutional protection afforded to satire and parody. Op. Br. at 19-21 (discussing, among other authorities, *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988); *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983)). Another well-developed body of law provided First Amendment protection to speech about public officials, public figures, and matters of public concern. *Id.* at 26-28 (discussing, among other authorities, *Garrison*). It was "incumbent" upon DA Knox to apply all of that law to the circumstances she confronted. Having failed to do so, the doctrine of qualified immunity affords her no refuge.[2]

[2] DA Knox further misses the point when she argues that Mr. Mink may not rely "on the District Court's determination in issuing the Temporary Restraining

B. *Douglas v. Dobbs* Does Not Apply.

The Court should reject Knox's contention that no clearly established constitutional right existed to support Mr. Mink's Section 1983 claim under this Court's 2005 decision in *Douglas v. Dobbs*. Ans. Br. at 37-39. As an initial matter, it is questionable whether this Court should even consider *Douglas* given its prior opinion in the first appeal in this case, *Mink v. Suthers*, 482 F.3d 1244 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 1122 (2008) (*Mink I*), which required the district court to focus on probable cause and the First Amendment, neither of which was an issue in *Douglas*. *Douglas* discusses whether probable cause was *necessary* in order to obtain pharmacy records, as compared to whether probable cause *existed*, which is the distinct issue in this case. 419 F.3d at 1101-02. Further, if *Douglas* were clearly controlling, as DA Knox asserts, then the panel in *Mink I* (which included Judge Tymkovich, who authored a concurring opinion in *Douglas*) would not have needed to remand to the district court to resolve the qualified immunity question. Significantly, the district court's opinion does not

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(cont'd.)
Order as creating clearly established law." Ans. Br. at 40 n.6. Mr. Mink is not claiming that the district court *created* clearly established law. Instead, Judge Babcock's strong and unequivocal comments at the TRO hearing demonstrated how clearly established the law was and that the statements in *The Howling Pig* were protected speech under that well-established body of law. *See* Opening Br. at 23.

refer to *Douglass*, even though DA Knox relied extensively on the decision in moving to dismiss after remand. App. 425-27.

In any event, *Douglas* is distinguishable in a number of key respects. *First*, it was unclear whether the "zone of privacy" had previously been extended to the prescription drug records in which the *Douglas* plaintiff asserted a right to privacy. 419 F.3d at 1102. While the *Douglas* panel ultimately concluded that pharmacy records were protected, the plaintiff had not met her burden of demonstrating the law was clearly established at the time of the district attorney's actions. *Id.* at 1103. Here, by contrast, Mr. Mink identified far more than a previously unrecognized and abstract right to privacy protected by the Fourth Amendment. The warrant was to search for various materials at Mr. Mink's home, and there is a clear and fundamental right to privacy in an individual's home. *See*, *e.g.*, *United States v. Cos*, 498 F.3d 1115, 1124 (10th Cir. 2007) (privacy in the interior of a home is at the core of what the Fourth Amendment was intended to protect). There is also a clear right to privacy in the use and content of an individual's computer. *See*, *e.g.*, *United States v. Carey*, 172 F.3d 1268, 1276 (10th Cir. 1999) (a warrant is required for closed computer files).

Second, it appears that the police officer in *Douglas* was seeking an order more akin to a non-party subpoena, and that the deputy district attorney merely reviewed a proposed motion and order that was then submitted to a judge to obtain

records from a third party. The protections provided by the Fourth Amendment are not as stringent in cases where an investigatory or administrative subpoena is at issue. *Becker v. Kroll*, 494 F.3d 904, 916 (10th Cir. 2007). "The Fourth Amendment requires only that a subpoena be 'sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.'" *Id*. (quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)). In this case, however, DA Knox reviewed and approved a search warrant for Mr. Mink's home and personal computer, which implicated wholly different privacy interests from those at stake in *Douglas*.

Third, and fundamentally, in *Douglas* there were no violations of clearly-established First Amendment law.

Despite these key differences, DA Knox argues that *Douglas* requires qualified immunity because what she describes as her very limited actions—review and approval of the warrant application and affidavit—are similar to those of the district attorney in that case. But if the holding in *Douglas* were as simple and straightforward as Knox suggests, then most of the qualified immunity analysis in the opinion would be superfluous.

Moreover, such a holding would be contravene other Supreme Court and Tenth Circuit decisions, which establish that a defendant need not be the "moving force" when sued in her personal capacity, but must be simply a cause of the

constitutional violation. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("It is enough to show that the official . . . *caused* the deprivation of a federal right.") (emphasis added). As this Court has made clear:

> "For liability under Section 1983, direct participation is not necessary. Any official who 'causes' a citizen to be deprived of her constitutional rights can also be held liable. The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights."

Snell v. Tunnell, 920 F.2d 673, 700 (10th Cir. 1990) (quoting *Conner v. Reinhard*, 847 F.2d 384, 396-97 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988)), *cert. denied sub nom.*, *Sweptson v. Snell*, 499 U.S. 976 (1991). *See also, e.g.*, *Johnson v. Martin*, 195 F.3d 1208, 1219 (10th Cir. 1999) ("allegations . . . of actual knowledge and acquiescence" are sufficient to establish violation of constitutional rights); *Green v. Branson*, 108 F.3d 1296, 1302 (10th Cir. 1997) (relying on "affirmative link" between the violation and defendant's personal participation, exercise of control or direction, or deliberately indifferent failure to supervise).

Under these decisions, DA Knox had "fair warning" that she could be liable for constitutional torts committed by another, if there was a causal connection between her acts or omissions and the resulting violation. Thus, she is not entitled to qualified immunity under *Douglas*.

IV. DA Knox Authorized a Warrant Lacking Sufficient Particularity.

A. The Warrant Is Broader Than, and Cannot be Construed in the Same Manner as, the Warrant in *Brooks*.

Before the district court, DA Knox did not even try to defend the lack of particularity in the affidavit and warrant. *See* App. 414-28, 513-25. She has suffered a change of heart before this Court, Ans. Br. at 23-25, but to no avail.

The Fourth Amendment mandates that "no Warrants shall issue . . . [without] particularly describing the place to be searched[.]" The purpose of this particularity requirement is to prevent general searches and to "ensure[] that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *United States v. Riccardi*, 405 F.3d 852, 861-62 (10th Cir.), *cert. denied*, 546 U.S. 919 (2005). In *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988), this Court set out the general standard for evaluating when the Fourth Amendment's particularity requirement has been met:

> A description is sufficiently particular when it enables the searcher to reasonably ascertain and identify the things authorized to be seized. Even a warrant that describes the items to be seized in broad or generic terms may be valid when the description is as specific as the circumstances and the nature of the activity under investigation permit. However, the fourth amendment requires that the government describe the items to be seized with as much specificity as the government's knowledge and circumstances allow, and warrants are conclusively invalidated by their substantial failure to

> specify as nearly as possible the distinguishing characteristics of the goods to be seized.

The district court observed that the warrant in this case "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 1288; *see also* App. 135 (Warrant at 1, ¶ 7). As a result, Judge Babcock held that the warrant "was overly broad[.]" 566 F. Supp. 2d at 1228-29.

DA Knox's reliance on *United States v. Brooks*, 427 F.3d 1246 (10th Cir. 2005), *cert. denied*, 546 U.S. 1222 (2006), to dispute Judge Babcock's application of the Fourth Amendment's particularity requirement, *see* Ans. Br. at 24-26, is misplaced. As a threshold issue, *Brooks* did not have occasion to address the interplay between free speech and the particularity requirement. The existence of free speech concerns is highly relevant to a particularity analysis because "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things are books and the basis for their seizure is the ideas they contain.'" *Stanford v. Texas*, 379 U.S. 476, 485 (1965). Indeed, a "warrant's overbreadth is made even more egregious by the fact that the search at issue implicated free speech . . . rights." *See*

Voss, 774 F.2d at 405. Thus, to the extent that the *Brooks* opinion relaxes the particularity requirement under certain circumstances, such a relaxed standard should not be applied where, as here, the warrant concerns free speech rights.

Moreover, the warrant here lacks particularity even under the *Brooks* standard. In *Brooks*, the Court explained that warrants should be read in context such that a poorly drafted warrant may still satisfy the particularity requirement if its language "more naturally instructs" officers to limit the entire scope of their search to a sufficiently narrow subject matter restriction. The *Brooks* warrant authorized officers to search two computers and a number of disks "for evidence of child pornography," including "photographs, pictures, computer generated pictures or images, depicting partially nude or nude images of prepubescent males and or females engaged in sex acts," as well as "correspondence, including printed or handwritten letters, electronic text files, emails and instant messages[.]" 427 F.3d at 1252 (internal citations omitted). The alleged lack of particularity was the warrant's failure to expressly limit the search of text files to those containing child pornography. *Id*. Rejecting this assertion, the Court held that "the warrant should be—and was—read by officers to implicitly place the same restriction (i.e., to locate child pornography) on the scope of the entire search[.]" *Id*.

In other words, the warrant in *Brooks* had a subject matter restriction, namely, "child pornography." This restriction was explicitly stated at the

beginning of the warrant, which later described in more detail what "child pornography" encompassed in the context of "photographs, pictures, computer generated pictures or images[.]" *Id*. Given the initial inclusion of a subject matter restriction and the later detailed description of that restriction, the Court found that the warrant also described with sufficient particularity the kinds of other materials, including the "electronic text files" that could be searched. *Id.* (warrant "more naturally instructs officers to search [the text] files only for evidence *related to child pornography*") (emphasis in original).

The warrant in this case does not comport with the "natural instruction" theory employed in *Brooks*. The first ten paragraphs of the warrant authorize the unfettered search of everything from computer systems, storage media, peripheral devices and manuals to "other readable material[.]" App. 135-36, ¶¶ 1-10. The warrant contains no subject matter restriction until the eleventh paragraph, *id*. at 136, ¶ 11, which states that the affiant is seeking permission to examine the "computer and storage devices" for evidence of "connection by this computer to the website www.geocities.com/thehowlingpig/[.]'" *Id*. No similar restriction applies to a separate paragraph that authorizes a search of all readable material, computer-generated or otherwise. App. 135, ¶ 7. It is the overbreadth of this paragraph that served as the basis for the district court's finding that the warrant lacked particularity. *See* 566 F. Supp. 2d at 1288 ("[T]he warrant in this case

"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[.]'").

Inclusion of a subject matter restriction more than two thirds of the way through the warrant does not cure the lack of particularity in paragraphs one through ten and, specifically, paragraph seven. Unlike the warrant in *Brooks*, the warrant in this case suffers from more than poor drafting. While a warrant may "naturally instruct[]" officers to assume that a general subject matter restriction carries over from the beginning of a warrant to the end, the same is not true when the warrant fails to contain any subject matter restriction until the end and then explicitly limits that restriction to one aspect of the search. Thus, even under *Brooks*, this warrant fails to "ensure[] that the search will be carefully tailored to its justifications, and will not take on the character of a wide-ranging exploratory search[]." *Riccardi*, 405 F.3d at 862.

The warrant therefore fails the particularity requirement of the Fourth Amendment because it authorizes a search that potentially threatens free speech rights and does so without clearly limiting the subject matter of that search.

B. The District Court Erred by Failing to Consider the Undisputed Fact that DA Knox Admitted Reviewing Both the Warrant and Affidavit.

Mr. Mink's opening brief discusses the error in the district court's cramped reading of his complaint as alleging only that DA Knox reviewed the affidavit in support of the search warrant, but not the warrant itself. *See* Opening Br. at 32-35. In response, DA Knox does not do much more than quote the district court's mistaken analysis. *See* Ans. Br. at 26. Like the district court, DA Knox reads the allegations of the complaint as narrowly as possible, rather than, as the law requires, to determine whether they "plausibly support a legal claim for relief." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 n.2 (10th Cir. 2007). If the district court had, as it should have, considered all allegations in the complaint as true, drawing all reasonable inferences in Plaintiff's favor, *Stidham v. Peace Officer Standards and Training*, 265 F.3d 1144, 1149 (10th Cir. 2001), it would have properly inferred that DA Knox reviewed both the defective warrant and the nearly identical affidavit on which the warrant was based. *See* Opening Br. at 32-33.

DA Knox offers no legitimate response to her undisputed admission that she reviewed the warrant—an admission that the district court overlooked or ignored and that DA Knox now asks this Court to ignore, too. *See* Opening Br. at 32-33. Her footnote response on this point cites only one inapposite case, *Miller v. Glanz*,

948 F.2d 1562 (10th Cir. 1991). The general recitation of the standard for motions to dismiss in *Miller* does not account for the "plausible claim" standard that this Court has since expressly approved. *See, e.g., Shero v. City of Grove*, 510 F.3d 1196, 1200 (10th Cir. 2007); *Alvarado*, 493 F.3d at 1215 n.2. *Miller* certainly does not address a party's express sworn admission, as distinguished from "potential evidence that the parties might present at trial[.]" *Miller*, 948 F.2d at 1565. It would exalt form over substance if this Court were to uphold the district court based on a "fact" (that DA Knox did not review the warrant) which she directly refuted in her sworn affidavit.

Finally, DA Knox does not even attempt to defend the district court's reliance on *Groh v. Ramirez*, 540 U.S. 551 (2004), and *United States v. Hurwitz*, 459 F.3d 463 (4th Cir. 2006), which the court mistakenly read as holding that the constitutional mandate of particularity does not also apply to documents supporting a search warrant, including the affidavit in this case. 566 F.Supp. 2d at 1229. Mr. Mink has explained the error in the district court's analysis. Opening Br. at 34-35. DA Knox's silence on this point is telling. It is an implied concession that, even if this Court, like the district court, pretends that DA Knox reviewed only the affidavit, the search was unconstitutional because the affidavit, like the identically-worded warrant, lacked particularity.

CONCLUSION

For the foregoing reasons, the district court's order should be reversed and the case remanded for trial on the merits.

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 5,611 words.

Dated March 20, 2009.

Respectfully submitted,

s/ Marcy G. Glenn
Marcy G. Glenn
A. Bruce Jones
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Post Office Box 8749
Denver, Colorado 80201-8749
Telephone: 303-295-8000
mgglenn@hollandhart.com
bjones@hollandhart.com

Mark Silverstein
American Civil Liberties Union
Foundation of Colorado
400 Corona Street
Denver, Colorado 80218
Telephone: 303-777-5482
msilver2@worldnet.att.net

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that on March 20, 2009, a true and correct hard copy of the foregoing APPELLANT'S REPLY BRIEF was sent to the following persons in the manner indicated below:

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David R. Brougham
Andrew D. Ringel
Hall & Evans, L.L.C.
1125 17th Street, Suite 600
Denver, CO 80202-2037
broughamd@hallevans.com
ringela@hallevans.com

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