NO. 04-1496

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS MINK and THE HOWLING PIG,

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees.

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

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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Plaintiffs Thomas Mink and The Howling Pig, pursuant to F.R.A.P. 35 and 40, petition for rehearing or rehearing en banc of the standing and mootness portions of the panel opinion filed on April 16, 2007 (attached at Addendum A).

STATEMENT OF COUNSEL PURSUANT TO F.R.A.P. 35(b)

1. The panel decision conflicts with the following decisions of this Court and the Supreme Court, and their progeny, and consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions: *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *Secretary of State v. Munson*, 467 U.S. 947 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Ward v. Utah*, 321 F.3d 1265 (10th Cir. 2003); *Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987).

2. This appeal is of exceptional importance because (a) the panel decision conflicts with established Supreme Court and Tenth Circuit law concerning standing and mootness in First Amendment cases, and (b) the result of the panel decision is to effectively insulate state criminal statutes from First Amendment challenge.

ARGUMENT IN SUPPORT OF PANEL REHEARING

A. The Panel Should Correct Its Misapprehension of the Record.

The decision properly states the standard of review:

> We accept all well pleaded facts as true for purposes of resolving an appeal from a motion to dismiss. . . . We review the facts as alleged in the complaint in the light most favorable to the plaintiffs, and we will uphold the dismissal only if it appears beyond doubt that they can prove no set of facts which would entitle them to relief. . . .

Opinion at 9 (citations and footnotes omitted). However, the decision then wholly disregards this standard, instead drawing key inferences against plaintiffs and ultimately misapprehending the record on the critical fact question of whether Mr. Mink faced a credible threat of prosecution.

1. The Panel Wrongly Found That the District Attorney and Attorney General Disavowed Any Intent to Prosecute.

In a key statement, the panel observed that "[b]oth the current Attorney General and District Attorney, and their predecessors, firmly rejected any intent to prosecute Mink under the statute before the district court, in their submissions to us, and in oral argument. We take them at their word." Opinion at 18 n.8. *In fact, the broad-ranging assurances the panel cites simply do not exist.*

The District Attorney (DA) could not have provided any assurance to the panel in its "submissions . . . and in oral argument," because he submitted no briefs and did not participate in oral argument. Counsel who represented the DA below entered an appearance in this Court, but filed a brief only on behalf of Assistant DA Knox, and only with respect to the damages claim against Knox (but not the DA) for the illegal search. *See* Answer Brief from Susan Knox (June 7, 2005). In a February 17, 2006 letter to the Court, the DA's counsel confirmed that "*Mr. Buck* [the DA] . . . *did not file an appellate brief in this appeal* and has instead deferred to the position of the State Attorney General with respect to the challenge to the criminal libel statute." (Emphasis added.) And the DA's counsel limited his oral argument to the illegal search issue that pertained solely to Ms. Knox, expressly stating he would not argue the constitutionality of the criminal libel

statute or the related standing and mootness issues.[1] (Because the DA failed to file a brief, he could not be heard at oral argument without the Court's permission, F.R.A.P. 31(c)), which he did not seek.)

Nor did the Attorney General (AG) "firmly reject[ ] any intent to prosecute Mink under the statute . . . ." Opinion at 18 n.9. Rather, he merely argued that he lacks the legal authority to unilaterally bring criminal charges under the challenged criminal libel statute. John Suthers' Answer Brief at 10 (June 7, 2005); *see also id.* at 18, 20. Plaintiffs fully rebutted this proposition of law, pointing out the many statutory bases for the AG's enforcement authority at both the trial and appellate levels. *See* Appellants' Reply Brief at 5-7. The AG never asserted that, assuming he had the authority, he would not pursue Mr. Mink.

According to the AG's counsel at oral argument, the DA's counsel – at an untranscribed conference in the district court – characterized the DA's "no file" decision as meaning that it would be "a cold day in hell" before the DA would bring charges against Mr. Mink. If this was the assurance on which the panel relied in footnote 18 of the opinion, there are multiple reasons to reconsider that reliance. *First*, given that the statement is hearsay on multiple levels (counsel for the AG reporting on how counsel for the DA characterized what his client the DA said), it is inherently unreliable. *Second*, as discussed below, the DA expressly admitted just the opposite, *i.e.*, that neither he nor the AG had declared they would not enforce the criminal libel statute. *Third*, also as

[1] Plaintiffs do not have access to the Court's recording of oral argument and base

discussed below, the DA's original statement was limited to the first three issues of *The Howling Pig* and did not renounce future reliance on the unconstitutional statute.

2. The Panel Wrongly Disregarded the District Attorney's Admission of an Imminent Threat of Prosecution.

Plaintiffs alleged an imminent threat of prosecution, Aplt. App. 77 (¶ 3), and that "[n]either Defendant Dominguez [the originally-named DA], Defendant Salazar [the originally-named AG] nor any other high-ranking Colorado law enforcement officer has declared that the criminal libel statute should not or will not be enforced." Aplt. App. 89 (¶ 45). In his answer, the DA *admitted* both these allegations. *Id.* at 136 (¶ 1).

The panel acknowledged the DA's "admi[ssion] . . . that Mink faced an imminent threat of prosecution," Opinion at 18, but discounted it as an "oversight" having "no significance." *Id.* That conclusion, however, is irreconcilable with the governing standard of review on a motion to dismiss. Not only did the panel fail to view the allegations of the complaint in a light most favorable to plaintiffs, it went further and disregarded the DA's *admissions* of those very allegations. Ultimately, the panel's conclusion was the diametric opposite of both the allegations and the admissions, namely, that "the threat of prosecution was still speculative at [the time the complaint was filed]." *Id.* at 15. In fact, it is the panel that has engaged in speculation – speculation that the record and controlling standard of review do not permit.

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portions of this petition on their counsel's notes.

3. The Panel Improperly Extended the "No File" Decision Beyond the First Three Issues of *The Howling Pig*.

The panel decision relies heavily on the DA's "no file" decision – a memorandum issued after the district court entered a temporary restraining order (TRO) precluding prosecution based on the first three issues of *The Howling Pig*, in which the DA agreed not to prosecute Mr. Mink for those initial issues. *See* Aplt. App. 331-32. The panel, however, treated the "no file" decision as extending to future issues of *The Howling Pig* because "[t]he analysis provided by the attorney general and district attorney demonstrate their legal reasons for not enforcing the statute in this case would carry over to further statements of the type Mink has subsequently made or intends to make," and therefore, it saw "no reason [the DA's] analysis would not apply to subsequent statements that are legally indistinguishable." Opinion at 23.[2]

[2] *See id.* at 7 ("[T]he district attorney issued a written 'No File' decision, concluding the statements contained in *The Howling Pig* could not be prosecuted under the statute."); 16 (referencing "the disavowal of prosecution in this case"); 17 ("the district attorney publicly announced he would not prosecute . . . ."); 18 (referencing "the government's position that the statute will not be enforced against Mink"); *id.* ("It is obvious no charges against Mink would be pursued, . . ."); *id.* n.18 (quoted *supra* at 2); 19 (approving DA's action as one that "assur[ed] citizens that it will not pursue prosecutions based on statutes that cannot be constitutionally enforced"); *id.* (referencing the DA's "legal conclusion" that "the case could not be prosecuted"); 21 ("legal opinion . . . precluded prosecution"); *id.* (DA's "opinion letter explained the statute could not be constitutionally applied to the conduct attributed to Mink, and, accordingly, charges would not be filed in this matter."); 22 (referencing "the district attorney's repudiation of an intent to prosecute"); *id.* ("district attorney took an unequivocal position . . . advising the court that Mink would not be prosecuted under the statute now or in the future"); *id.* at 23 (quoted *supra* at 5).

But the panel has confused the issue. The question, respectfully, is not whether the reasons for the "no file" decision logically *should* extend to later issues of *The Howling Pig*. The question is whether the DA and AG unequivocally communicated that the decision *does* extend beyond the first three issues – and the record is devoid of any such assurances.

First, Mr. Mink alleged the "no file" decision was based solely on "material published in the first three issues of The Howling Pig," Aplt. App. at 87 (¶ 41), and the DA admitted that allegation, *id.* at 136 (¶ 1). *See also id.* at 88 (¶¶ 44, 44(A)) (alleging that "[t]he 'no file' decision . . . did not resolve the controversy between Plaintiffs and the District Attorney's Office"; "[t]he 'no file' decision was limited to material appearing in the first three issues of *The Howling Pig* and was further limited to the references to Professor Peake"; and "Defendant Dominguez did not renounce future reliance on the Criminal Libel Statute").[3] But once again, the panel ignored the well-pled allegations of the complaint – including yet another that was expressly admitted – in favor of its own improper and unsupported findings.

Second, the "no file" memorandum itself refutes the panel's improper finding of fact. The DA wrote: "In reviewing Issue I Volume I, Issue II Volume I, and Issue III Volume I of the Howling Pig I find no criminal libel as described by Colorado Statue [*sic*] in the body of those three issues." Aplt. App. 331. He based that conclusion on his

[3] Plaintiffs further alleged that they had published additional issues of *The Howling Pig*, and an intent to publish future statements, that could be construed to violate the

analysis of the content of *the first three issues* – not on any general conclusion that the criminal libel statute is facially unconstitutional or could not or would not be invoked based on future issues. *Id.* at 331-32. The DA had numerous opportunities in both the district court and on appeal to specifically state that he would not prosecute Mr. Mink for statements made in later issues. The DA *never* did so, yet the panel erroneously extrapolated such an assurance from the "no file" decision. Once again, the panel misapprehended the record and disregarded the legal standard for a motion to dismiss.

4. The Panel's Errors Were Fundamental to Its Decision.

The panel's analysis of standing and mootness hinged on its determination that Mr. Mink faced no imminent threat of prosecution. Its finding that the DA and AG "firmly rejected any intent to prosecute Mink under the statute . . . ." Opinion at 18 n.8 – repeated multiple times, *see supra* at 5 n.2 – was the essential factual predicate for its holdings on standing and mootness. Because that finding was mistaken, the panel should grant rehearing in order to reconsider its subject matter jurisdiction. *See* F.R.A.P. 40(a)(2).

B. The Panel Opinion Incorrectly Relies on Post-Complaint Events to Determine Standing.

The panel acknowledged that Mr. Mink had standing when he first filed suit. *See* Opinion at 17 ("[W]hen he brought the suit Mink appeared to have a legitimate basis for alleging a credible fear of future prosecution."). However, the panel looked to

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criminal libel statute, including in ways that no court has previously considered. Aplt. App. at 87 (¶ 40), 89 (¶ 47).

subsequent developments, as of the date plaintiffs filed their amended and supplemental complaint, to find that standing no longer existed at that later time. In so doing, the panel both misconstrued the procedural impact of the amended and supplemental complaint and erroneously analyzed post-complaint events as relevant to standing, when their only possible relevance was to a potential mootness defense.

The panel decision states that the amended and supplemental complaint superseded the original complaint and rendered it "without legal effect." *Id.* at 15 (citations to non-Tenth Circuit authority omitted). This assertion, however, ignores the fact that most of the amended and supplemental complaint reasserted plaintiffs' initial claims and therefore "relate[d] back to the date of the original pleading." F.R.C.P. 15(c).[4] The panel erred by treating as a nullity the circumstances demonstrating standing at the time of the original complaint.

The panel compounded its error when it conflated the analysis of standing and mootness, which the Supreme Court and this Court have made clear are fundamentally different doctrines. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-92 (2000); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154-55 & n.4 (10th Cir. 2005). The difference between standing and mootness is not a mere technicality. A plaintiff must demonstrate that standing exists at the time a lawsuit is filed, while *defendants* asserting mootness have the "'heavy burden'" of demonstrating

[4] The amended and supplemental complaint added The Howling Pig as a plaintiff. Thus, arguably, The Howling Pig's standing could be evaluated as of the time of the

that "'subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Laidlaw*, 528 U.S. at 189 (citations omitted).

These legal errors, separately and certainly cumulatively, heighten the need for panel rehearing of the decision's standing and mootness holdings.

ARGUMENT IN SUPPORT OF REHEARING EN BANC

To fully appreciate the danger of the panel decision, it must be read in tandem with *Winsness v. Yocum*, 433 F.3d 727, 736 (10th Cir. 2006) (attached at Addendum B), in which the Court also rejected on jurisdictional grounds a First Amendment challenge to a state statute. There another panel held that plaintiff Winsness could not challenge Utah's flag-abuse statute because, even though the district attorney had brought criminal charges under the allegedly unconstitutional statute, he dismissed those charges before Winsness filed suit and, therefore, there was no credible threat of future prosecution. *Id.* at 734-38.

The panel decision here relies heavily on *Winsness*, equating the circumstances in the two cases. *See* Opinion at 16-23. In fact, the panel decision takes the *Winsness* panel's view of standing and mootness – itself unduly restrictive – to a new extreme. Unless this Court grants rehearing en banc, what was initially one troubling decision (*Winsness*) will become an emerging and disturbing trend in the Tenth Circuit, and it will

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amendment. But there is no basis for engaging in a *post hoc* analysis of Mr. Mink's standing.

be increasingly difficult to bring First Amendment challenges, even where, as here, the state has invoked the unconstitutional statute to punish the plaintiff's past speech and chill his future speech. The full Court should grant rehearing because (a) the panel decision conflicts with decisions of the Supreme Court and other decisions of this Court, which mandate a more permissive approach to standing and mootness, particularly in First Amendment cases, and (b) the panel decision will virtually insulate state criminal statutes from First Amendment challenge in federal court anytime a district attorney decides to backtrack from an unconstitutional prosecution. These issues are exceptionally important – particularly in light of the panel's misapprehension of the record and improper consideration of post-complaint events when determining standing, as discussed above.

In *Winsness*, the panel held that the following facts established that one of the plaintiffs faced no credible threat of prosecution: (1) he had been cited for flag abuse but prosecutors "immediately scuttled the . . . prosecution . . . without filing a criminal information," and submitted affidavits unequivocally stating that "the flag abuse statute will not be enforced against anyone," 433 F.3d at 735; (2) he "alleged neither an intent nor a desire to violate the flag-abuse statute in the future," *id.* at 736; (3) there was no evidence of other prosecutions under the statute, *id.* 735; and (4) the Supreme Court had invalidated the Texas flag-abuse statute in a decision that rendered prosecutions under the Utah statute "even more unlikely," *id.*

In the present case, by contrast: (1) the DA helped initiate the investigation that resulted in an illegal search and seizure of Mr. Mink's computer and a warning against future speech, Aplt. App. 78-79 (¶ 8), 81 (¶ 20); (2) the DA did not act "immediately," but instead ignored plaintiffs' counsel's early entreaties and issued the "no file" decision only in the face of a federal lawsuit, after the issuance of a TRO, and with a federal judge's explicit indication that the government's actions were unconstitutional,[5] *id.* at 84 (¶ 29), 85 (¶ 32), 126 (¶¶ 5-8), 129-31); (3) the DA did not unequivocally pledge he would not enforce the Colorado criminal libel statute "against anyone" in any circumstances, but limited his commitment to the first three issues of a single publication, for reasons that were specific to the content of those issues, *id.* at 88 (¶ 44(A)), 331-32; (4) Mr. Mink alleged both that he had published later issues and intended to publish additional articles that would violate provisions of the statute not discussed in the DA's "no file" memorandum, *id.* at 87 (¶ 40), 89 (¶ 47); (5) there have been other prosecutions, including recently, in Colorado, *id.* at 85-86 (¶¶ 34-36); and (6) no Supreme Court case definitively invalidates the entire statute on all bases argued by plaintiffs.

Given these enormous differences, the panel's treatment of the facts in this case as the equivalent of those in *Winsness* is cause for great concern. Indeed, if Mr. Mink and The Howling Pig cannot challenge the Colorado criminal libel statute in federal court, it is hard to envision who *could* make a federal challenge. Yet, in the face of these allegations, which the Court must accept as true at this juncture, the panel demeans

[5] The panel plainly erred in stating that the DA "*immediately* conclude[d] the statute

plaintiffs' legal challenge as "jumping the gun" and applauds the DA for his belated and limited "no file" decision: "The government should be encouraged, not dissuaded, from assuring citizens that it will not pursue prosecutions based on statutes that cannot be constitutionally enforced." Opinion at 19. That approach, however, contradicts the "well settled" rule that "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Laidlaw*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). "'[I]f it did, the courts would be compelled to leave "[t]he defendant . . . free to return to his old ways."'" *Id.* (alterations in *Laidlaw*).[6]

Moreover, the panel decision directly conflicts with Supreme Court cases holding that standing and mootness doctrines apply less restrictively when state statutes may chill First Amendment activities. *See, e.g.*, *Secretary of State v. Munson*, 467 U.S. 947, 956 (1984) ("Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged."); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (recognizing that "the Court has altered its traditional rules of standing"

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cannot be constitutionally enforced." Opinion at 19 (emphasis added).

[6] Beyond effectively negating the Supreme Court's historical standing analysis, the panel decision fails to support its assumption of a negative causal link between (a) allowing plaintiffs to bring First Amendment challenges to imminently threatened prosecutions, and (b) encouraging district attorneys and attorneys general to refrain from unconstitutional prosecutions. Prosecutors should fulfill their First Amendment duties irrespective of whether there is a pending legal challenge to the statute in question.

in First Amendment cases "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"). The panel decision also conflicts with prior Tenth Circuit decisions that have properly applied the well-established Supreme Court precedent. *See, e.g.*, *Ward v. Utah*, 321 F.3d 1265, 1266-69 (10th Cir. 2003); *Wilson v. Stocker*, 819 F.2d 943, 946-47 (10th Cir. 1987). (The panel purports to rely on *Faustin v. City & County of Denver*, 268 F.3d 942, 947-49 (10th Cir. 2001), and *D.L.S. v. Utah*, 374 F.3d 971, 974-76 (10th Cir. 2004), *see* Opinion at 12-23, but the different facts in those cases justified their conclusions that standing was lacking; they do not remotely support the outcome here.)

In this case, only by "making a federal case out of it" could plaintiffs challenge the constitutionality of the criminal libel statute in federal court. Had plaintiffs *not* "jumped the gun," in the words of the panel, charges likely would have been brought against Mr. Mink in state court and, as a result, the abstention doctrine would have deprived him of a federal forum. *Younger v. Harris*, 401 U.S. 37, 43-54 (1971). Nor is it "jumping the gun" when a citizen has been deprived of his means of communication for nearly a month. The First Amendment protects against unconstitutional restraint of free speech for one month, one week, one day, or even one hour. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Due to this Circuit's increasingly restrictive recent approach to standing and mootness, the Court has now failed to address First Amendment challenges to state criminal statutes punishing flag abuse and libel, even though the plaintiffs were subjected to adverse law enforcement actions – because prosecutors conveniently avoided the constitutional challenges by strategically retreating. *Winsness*, 433 F.3d at 729-30; Opinion at 4-7. Such mixed messages from law enforcement personnel chill free speech, and are the reason standing doctrine is more liberal in the free speech context. *Munson*, 467 U.S. at 956; *see also Wilson*, 819 F.2d at 946.

Here, the AG has acknowledged the unconstitutionality of some aspects of the Colorado criminal libel statute,[7] yet he also defends the statute, it remains on the books and continues to be used to intimidate and punish speakers. Thus, the panel decision, building on *Winsness*, has wrongly protected a concededly unconstitutional law from First Amendment challenge by an individual against whom the law was invoked and

[7] The AG admitted the statute is unconstitutional to the extent it applies to statements on matters of public concern related to public officials and figures, matters of private concern involving public officials and figures, and matters of public concern involving private persons, *see* John Suthers' Answer Br. at 27-31; to the extent it excludes falsity as an element in prosecutions related to public officials, public figures, or matters of public concern, *id.* at 34-35; and to the extent it excludes truth as a defense to charges of blackening the memory of the dead or exposing the natural defects of the living, *id.* at 35-36. He failed to respond to, and thereby conceded, plaintiffs' additional arguments that, even with respect to purely private speech, the statute is unconstitutional because it is impermissibly vague, imposes criminal liability without fault, permits conviction for hyperbole, satire, or opinion, and is an impermissibly broad content-based regulation of speech that serves no compelling governmental interest. *See also People v. Ryan*, 806 P.2d 935 (Colo. 1991) (partially invalidating statute, but not reaching multiple additional constitutional challenges).

credibly may be invoked again in the foreseeable future. The panel decision chills free speech rights beyond an acceptable level, thereby warranting en banc consideration.

CONCLUSION

For all the foregoing reasons, Thomas Mink and The Howling Pig respectfully request that the panel decision be reheard.

Dated: May 14, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 14, 2007, a true and correct hard copy of the foregoing **PETITION FOR REHEARING OR REHEARING EN BANC** was sent to the following persons in the manner indicated below:

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