NO. 04-1496

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS MINK and THE HOWLING PIG,

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees.

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

APPELLANTS' REPLY BRIEF

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

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Thomas Mink ("Mink") and The Howling Pig ("THP") respectfully submit this reply to the answer briefs filed by Susan Knox and Attorney General John Suthers (the "AG").

ARGUMENT

I. The District Court Wrongly Dismissed Plaintiffs' Constitutional Challenge to Colorado's Criminal Libel Statute.

A. Plaintiffs Have Standing.

The opening brief explained why Plaintiffs have standing to pursue their First Amendment challenge to the Colorado Criminal Libel Statute: Because the Amended Complaint alleges (1) their intention to violate the statute, and (2) a credible threat of prosecution for their publication of articles in addition to those in the first three issues of *The Howling Pig* ("*THP*"). OB 18-19.[1] Kenneth R. Buck (the "DA") has offered no response to this argument, thereby conceding Plaintiffs' standing.[2] The AG argues that Plaintiffs face no credible threat of prosecution because the Criminal Libel Statute cannot be constitutionally applied to the types of articles that

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1 Plaintiffs cite their opening brief as "OB," Knox's answer brief as "KAB," and the AG's answer brief as "AGAB."

2 Plaintiffs recognize that questions of standing go to the Court's subject matter jurisdiction, which it may address *sua sponte*. However, for the reasons stated in Plaintiffs' opening brief and above, Plaintiffs do have standing to bring their First Amendment claim against both the DA and the AG.

Plaintiffs allege they have published since the first three issues and intend to publish in future issues of *THP*. *See* AGAB 15-16. The AG further contends that, even if there is a credible threat of prosecution, he is not a proper defendant. Neither of those arguments, however, has merit.

1. Plaintiffs Face a Credible Threat of Prosecution.

The AG's initial standing argument, like his argument on the merits of the constitutionality of the Criminal Libel Statute, concedes the unconstitutionality of the statute facially and as applied in a variety of circumstances and for a variety of reasons. *See* AGAB 26-36. In his merits argument, the AG then says, essentially, "Okay, since everyone knows it's unconstitutional, we can ignore all its unconstitutional features and applications and just focus on what is left, which is constitutional." In his standing argument, the AG takes this zany reasoning a step further and says, "And you can't face a credible risk of prosecution for conduct that the statute can't reach – because it would be unconstitutional for law enforcement to rely on the statute under those circumstances." The necessary outcome of the AG's logic is that a plaintiff never would have standing to challenge an unconstitutional criminal statute – because, if it is unconstitutional, it cannot be constitutionally invoked; and if it cannot be constitutionally invoked, there is no risk of prosecution.

The AG's argument ignores the point of Plaintiffs' First Amendment Claim: That the DA already has used the Criminal Libel Statute to deny Plaintiffs their First Amendment rights with respect to the first three issues of *THP*, that other DAs have relied on the statute to proscribe protected speech, and that Plaintiffs have legitimate fears that the DA will rely on the statute yet again to violate their First Amendment rights. In other words, the AG's assumption of a perfect world – one where law enforcement knows better than to rely on unconstitutional statutes – is ludicrous. Plaintiffs were forced to bring this suit because it is *not* a perfect world, as confirmed by the allegations of the Amended Complaint. Those allegations make plain that Plaintiffs' fears of future prosecution are neither "imaginary nor wholly speculative." *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987) (citations omitted). Thus, Plaintiffs have standing.

2. The Attorney General Is a Proper Defendant.

Trying to avoid defending a facially unconstitutional statute, the AG half-heartedly argues that no "case or controversy" exists between him and Plaintiffs because he lacks "unilateral enforcement powers" over the Criminal Libel Statute. AGAB 10. The AG has set up a straw man, however, and the law defeats his argument.

The key case-or-controversy issue, as the AG concedes, is whether he is a "state enforcement official" so that his legal interests are sufficiently adverse to those of Plaintiffs. *Wilson*, 819 F.2d at 947-48; *see also Ward v. Utah*, 321 F.3d 1263, 1266-67 (10th Cir. 2002). Such an enforcement official, however, need not have "unilateral enforcement powers" as the AG assumes. On the contrary, under *Wilson*, the AG's *concurrent* powers, shared with district attorneys, to enforce the Criminal Libel Statute, his role as chief legal representative of the state, and his duty to defend the constitutionality of state statutes[3] render him a state enforcement official whose interests are adverse to Plaintiffs' interests in challenging the constitutionality of a state statute from which their injuries flow.

Wilson is dispositive on this issue. The plaintiff challenged the facial validity of an Oklahoma statute on First Amendment grounds seeking prospective relief only and sued both the district attorney and the attorney general in their official capacities. As in this case, the Oklahoma attorney general argued that there was no case-or-controversy against him because his office had not threatened to enforce the statute and did not intend to enforce it. 819 F.2d at 945-46. Concluding first that the plaintiff had

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[3] Contrary to the AG's allegations, *see* AGAB 11, 22, Plaintiffs rely on a combination of factors, not solely on the AG's role in defending the constitutionality of state statutes pursuant to C.R.S. § 18-13-105.

alleged a credible threat of prosecution, this Court held that there was a case-or-controversy – not because the attorney general was himself the source of the injury, but because he was a state enforcement official who *represented the state whose statute was being challenged as the source of the injury*. *Id.* at 947.

Thus, under *Wilson* and its progeny, a plaintiff challenging the statute has a sufficiently adverse legal interest to a state enforcement officer sued in his representative capacity, such as an attorney general, to create a substantial controversy when the plaintiff alleges an appreciable threat of injury flowing directly from a challenged statute. *Id.*; *see also Ward*, 321 F.3d at 1268-69 (generally discussing *Wilson*); *Mobil Oil Corp. v. Attorney General of Va.*, 940 F.2d 73, 76 (4th Cir. 1991); *Univ. of Utah v. Shurtleff*, 252 F. Supp. 2d 1264, 1279 (D. Utah 2003).

Applying the *Wilson* analysis here, the AG is a "state enforcement officer" who represents the state whose statute is being challenged as the source of the injury, thereby satisfying case-or-controversy requirements. As the state's chief legal representative, the AG – sued in his official capacity – is charged with defending the constitutionality of state statutes. *See* C.R.S. § 13-51-115; *People ex. rel. Salazar v. Davison*, 79 P.3d 1221, 1230 (2003). He retains all common law powers unless specifically

repealed. *Id.* Such powers include enforcing criminal statutes on the state's behalf:

> The attorney general . . . shall appear for the state and *prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor, and he shall prosecute and defend for the state all causes in the appellate courts in which the state is a party or interested*.

C.R.S. § 24-31-101(1)(a) (emphasis added).

Although the Colorado Supreme Court has interpreted Section 24-31-101(1)(a) as entitling DAs to initiate and prosecute crimes that take place in their judicial districts, *Tooley v. District Court*, 190 Colo. 486, 489, 549 P.2d 774, 777 (1976), the AG retains broad criminal enforcement authority. He remains the state's chief legal officer, defends the constitutionality of state statutes, maintains power to initiate criminal proceedings – including proceedings under the Criminal Libel Statute – upon the Governor's request, and is the primary enforcer of criminal statutes at the appellate level. *See also* C.R.S. § 24-31-105 (authorizing AG's creation of "criminal enforcement section" within Department of Law).

Criminal enforcement authority is not an "either-or" proposition in Colorado; on the contrary, Colorado's statutes provide for *concurrent* enforcement powers, as the AG concedes outside this litigation: "The

Attorney General's Office also works concurrently with Colorado's 22 district attorneys and other local, state and federal law enforcement authorities to carry out the criminal justice responsibilities and activities of the office." *See* http://www.ago.state.co.us/about_ag.cfm?cpyID=16 (AG's website).

The AG's attempt to distinguish *Wilson* and *Ward*, because the attorney generals in those cases supposedly had "unilateral enforcement powers," is unpersuasive. *First* when the Court decided *Wilson*, the Oklahoma Attorney General had enforcement powers similar to those of the current Colorado AG. The Oklahoma Attorney General could (a) "appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court and Court of Criminal Appeals in which the state is interested as a party," *see* 74 Okl. St. Ann. § 18b(a) (1988); and (b) "appear at the request of the Governor, the Legislature, or either branch thereof, and prosecute and defend in any court or before any commission, board or officers in any cause or proceeding, civil or criminal, in which the state may be a party or interested." *Id.* § 18b(b). Thus, as in this case, even though the Oklahoma attorney general had not initiated the challenged criminal proceedings, he was still a proper defendant under Article III.

Second, neither case holds that "unilateral enforcement power" or the power to "initiate proceedings" is dispositive. Rather, a plaintiff contesting a state statute's constitutionaliy has a legal interest sufficiently adverse to a state enforcement officer sued in his representative capacity to create a substantial controversy when the plaintiff alleges an appreciable threat of injury flowing directly from the statute. *Wilson,* 819 F.2d at 947; *see also Ward*, 321 F.3d at 1268-69. For the reasons explained in Plaintiffs' opening brief, such an appreciable threat of injury exists here. *See* OB 18.[4]

B. The Eleventh Amendment Does Not Bar Plaintiffs' Claim Against the AG.

The Eleventh Amendment does not bar this suit because Plaintiffs are suing the AG as a state officer in his official capacity, and seek only declaratory relief, in accordance with *Ex Parte Young*, 209 U.S. 123, 156-57 (1908). State officers are proper defendants so long they have "some connection with the enforcement of the act." *Id*. at 157. As shown above, the AG clearly has more than "some connection with the enforcement" of the Criminal Libel Statute. In fact, he has the power to *initiate* criminal

[4] The DA has not appeared in this appeal but he remains a proper defendant even if the Court determines that the AG is not. The DA's office asked the police to criminally investigate Mink, and the DA's "no file decision" did not renounce future reliance on the Criminal Libel Statute. On these facts, the DA is unquestionably a "state enforcement official" under *Wilson* whose interests are sufficiently adverse to those of Plaintiffs to confer standing.

libel proceedings at the Governor's request, he must appear in all criminal libel actions at the appellate level, he is charged with defending the statute's constitutionality, and he is the chief legal officer of the state. Colorado law grants the AG the power to enforce the Criminal Libel Statute, and thus there is no Eleventh Amendment bar in this case.

C. The Criminal Libel Statute Is Unconstitutional.

1. The AG Admits the Statute, as Written, Violates the First Amendment.

The AG's answer brief is full of concessions as to the Criminal Libel Statute's "unconstitutional applications." AGAB 28. First, the AG concedes that the statute is unconstitutional to the extent that 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. AGAB 27-31. He also admits that the statute is unconstitutional to the extent that it excludes falsity as an element in criminal libel prosecutions related to public officials, public figures, or matters of public concern, *id.* at 34-35, and to the extent that it excludes truth as a defense to charges of blackening the memory of the dead or exposing the natural defects of the living (the "truth exceptions"), *id.* at 35-36.

The AG fails to discuss any of Mink's additional arguments as to why the Criminal Libel Statute is facially unconstitutional. Thus, even with regard to purely private speech, the AG also implicitly concedes that the statute (1) is unconstitutionally vague, (2) unconstitutionally imposes criminal liability without fault, (3) unconstitutionally permits conviction for hyperbole, satire, or opinion, and (4) is a content-based regulation of expression that is not narrowly tailored to serve a compelling government interest. *See* OB 33-47.

After the AG – charged with *defending* the constitutionality of state statutes – makes these stunning concessions, he clings to the few circumstances in which he claims that the Criminal Libel Statute has no constitutional infirmities: Matters of private concern involving private persons and the omission of falsity as an element. He then makes the absurd argument that Plaintiffs cannot state a claim that the Criminal Libel Statute violates the First Amendment – because after its unconstitutional bulk is excised, its tattered remnants are constitutional. But the AG's arguments depend on a serious mischaracterization of several Colorado Supreme Court decisions. In fact, no limiting construction can remedy the statute, which is flawed through and through.

2. The AG's Attempts to Defend Certain Aspects of the Statute as Written Are Unpersuasive.

First, the AG emphasizes the single circumstance in which the First Amendment does *not* require proof of actual malice in order to establish civil defamation: When the challenged speech relates to "[m]atters of private concern involving private persons." AGAB 31. Therefore, he argues, the Criminal Libel Statute is constitutional to that limited extent, and that is what the Colorado Supreme Court held in *Ryan*. *Id.* This argument, however, ignores the statute's independent violation of both the First and Fourteenth Amendments even with respect to speech about private persons' private affairs. *See* OB 33-47. Because the AG, through his silence, has conceded that the statute is vague, imposes criminal liability without fault, permits prosecution for statements of opinion, hyperbole, etc., and is a content-based regulation of speech without sufficient justification, it fails regardless of the law on actual malice in the context of purely private speech.

Second, the AG attempts to defend the statute's omission of falsity as an element of the crime, because "no Supreme Court case has made 'truth' [*sic*] a required element to impose civil or criminal penalties in the context of purely private libels." AGAB 35. The AG argues that at common law the defendant had the burden of demonstrating truth, and, when purely

private speech is at issue in a damages case, the Supreme Court has not yet held that the First Amendment requires otherwise. *Id*.

This argument, too, is unavailing. A criminal prosecution is different from a common law tort claim. No matter how the evidentiary burdens may be assigned in a civil case, a criminal prosecution requires the state to bear the burden of proving all the elements of the offense. *In re Winship*, 397 U.S. 358, 364 (1970). A true statement cannot be libel, because libel is a "defamatory falsehood." *See, e.g., Gertz v. Robert Welch, Inc*, 418 U.S. 323, 341, 347 (1974). When falsity is not an element of the state's case, a defendant can be convicted of a felony for publishing the truth. The First Amendment, however, forbids that outcome. Accordingly, the state's burden must include proof of falsity.

In any event, again, regardless of whether the AG is correct on the harmlessness of the Criminal Libel Statute's omission of the element of falsity, it is indisputable that the statute fails independently because it is vague, it imposes criminal liability without fault, it punishes statements of hyperbole and opinion, and it impermissibly regulates content.

3. AG's "Revised and Improved" Version of the Statute Remains Constitutionally Invalid.

After highlighting purported "limiting constructions" by the Colorado Supreme Court, which supposedly justify two small aspects of the Criminal

Libel Statute, the AG asks the Court to apply the "rewritten" statute. This is wishful thinking. In *People v. Ryan*, 806 P.2d 935 (Colo. 1991), the Court did *not* "provide[ ]" "limiting instructions," AGAB 27, and it did not "insure constitutionality [of the statute] through limiting instructions." *Id.* at 28. Indeed, the Court declined to adopt a narrowing construction and instead relied on partial invalidation, holding the statute unconstitutional only as applied to "libelous statements about public officials or public figures involving matters of public concern." *Id.* at 29. Significantly even Defendant Knox (a prosecutor who, unlike the AG, acknowledges her authority to enforce the statute), construes *Ryan* as permitting convictions on the basis of statements on matters of public concern. KAB 42-43; *cf.*, OB 29 & n.7 (discussing ambiguities in *Ryan* on this issue).

The AG further contends, again erroneously, that *dicta* in *Gomba v. McLaughlin*, 180 Colo. 232, 504 P.2d 337 (1972), "refine[s] the truth defense" and "removes from the statute in their entirety the truth exceptions in 18-13-105(2)." AGAB 34, 35. *Gomba*, however, did not discuss the Criminal Libel Statute's truth exceptions. Nor do Colorado courts regard its *dicta* as narrowing or limiting the statute. To the contrary, without mentioning *Gomba*, the *Ryan* decision expressly declined to address the truth exceptions – implicitly recognizing as unresolved the question of the

constitutionality of that part of the statute. 806 P.2d at 940 n.11.[5] Moreover, after *Gomba*, the Colorado Supreme Court acknowledged that publishing facts from a coroner's autopsy report could blacken the memory of the dead and thus violate the statute, without concern for the unavailability of truth as an affirmative defense. *See Dreyfus v. Denver Publ'g Co.*, 184 Colo. 288, 520 P.2d 104, 109 (1974). Finally, that Court has approved pattern jury instructions that expressly preclude truth as an affirmative defense. *See* Amicus Brief of Associated Press, at 14.

As a result, there is simply no basis for the fundamental premise of the AG's argument: That the Colorado Supreme Court has "created a 'clear line' by which to distinguish the statute's constitutional and unconstitutional applications." AGAB 28. And even if that line existed, it would not be constitutionally sufficient. So much of the statute is unconstitutional, and the chilling effect of its broad text is so severe, that it must be invalidated in full.

If the Court were to adopt the "limiting construction" that the AG advocates, the statute would read:

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[5] The AG acknowledges this small problem with his reliance on *Gomba*, but treats the Colorado Supreme Court's statement in *Ryan* as apparently "inaccurate . . . given the same court's prior decision in *Gomba*." AGAB 34 n.5. Of course, it is not for the AG to pick and choose what he does and does not like in the *Ryan* decision.

> (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~~ **a private person** who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the natural defects of **a private person** ~~one~~ who is alive**, when the subject matter of the statement or object is not of public concern,** 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.

This Court, however, cannot adopt the AG's proffered "interpretation" of the statute. The federal courts are "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." *Steinberg v. Carhart*, 530 U.S. 914, 944 (2000) (citation omitted).

Two obvious examples demonstrate that the AG's proposed construction is neither reasonable nor "readily apparent." First, the Colorado General Assembly expressed its intent that it would be a felony to "blacken the memory," "impeach the honesty, integrity, virtue, or reputation or expose the natural defects" of *any* person – not merely a "private person" – and concerning any subject – not merely a matter of "private concern." Second, the legislature that enacted the statute clearly expressed its intent

that truth would *not* be a defense in certain cases. The AG's proposed constructions would "interpret" the statute to contradict those intentions, which this Court may not do. *See Phelps v. Hamilton*, 59 F.3d 1058, 1070 (10th Cir. 1995) ("the federal courts do not have the power to narrow a state law by disregarding plain language in the statute just to preserve it from constitutional attack"). It also violates Colorado's rules of statutory construction. *Whimbush v. People*, 869 P.2d 1245, 1248 (Colo. 1994) ("a court should not apply a saving construction when to do so would involve rewriting legislation in the face of contrary legislative intent"). Thus, a statute "must be *readily susceptible* to [a] narrowing construction," and the Court must reject a "proposed narrowing construction [that] really amounts to a wholesale rewriting of the statute. That [it] cannot do." *ACLU v. Johnson*, 194 F.3d 1149, 1159 (10th Cir. 1999) (emphasis added).

Moreover, even if this Court could "construe" the statute to incorporate the AG's express concessions, that would not resolve its constitutional problems. Even as "rewritten," the statute preserves all the flaws that the AG chose not to address in his answer brief. It is vague, it imposes criminal liability without fault, it permits conviction for hyperbole, satire, or opinion, and it is a content-based regulation of expression that is not narrowly tailored to serve a compelling government interest. Neither a

limiting construction nor partial invalidation can save the Criminal Libel Statute. This Court should declare it unconstitutional in its entirety.

II. Knox Is Not Entitled to Either Absolute or Qualified Immunity.

The district court dismissed Mink's Section 1983 claim (alleging First and Fourth Amendment violations) on the basis of absolute immunity. The opening brief demonstrated why that was wrong: Because Knox was not acting in an advocacy role but was instead advising police in the investigative phase of a criminal case. OB 47-52. In response, Knox disputes Mink's analysis of absolute immunity and also claims qualified immunity as a fall-back argument. The Court should reject Knox's position on both types of immunity – neither of which is applicable here – and should allow Mink his day in court.

A. Knox Has Not Rebutted Mink's Points on Absolute Immunity.

Knox tries to distance herself from *Burns v. Reed*, 500 U.S. 478, (1991), *see* KAB 21, but she cannot deny its holding: "[T]hat advising the police in the investigative phase of a criminal case is [not] so 'intimately associated with the judicial phase of the criminal process' . . . that it qualifies for absolute immunity." *Id.* at 493 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). In assessing whether absolute immunity attaches, "the determinative factor is 'advocacy' because that is the

prosecutor's main function and the one most akin to his quasi-judicial role." *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1490 (10th Cir. 1991) (quoting *Rex v. Teeples*, 753 F.2d 840, 843 (10th Cir. 1985)).

The district court correctly observed that this Court, like the Supreme Court, "has 'applied a continuum-based approach to these decisions, stating "the more distant a function is from the judicial process and the initiation and presentation of the state's case, the less likely it is that absolute immunity will attach."'" Aplt.App. 360 (quoting *Gagan v. Norton*, 35 F.3d 1473, 1475-76 (10th Cir. 1994) (further internal citation omitted). Knox accepts that approach, agreeing that a prosecutor has absolute immunity for "advocatory [*sic*] functions," but not for "administrative or investigatory functions." *See* KAB 20; *see also id.* at 24.

The only issue is where along the "continuum" Knox's conduct falls, based on the allegations of the Amended Complaint. Knox insists that she acted as an advocate and was involved in the presentation of the state's case when she approved the affidavit. Mink contends that she acted in an administrative and investigative role at a time when there was no case for her to have assisted in presenting. The district court simply got it wrong – it drew the line at the wrong place along the continuum – when it held that absolute immunity shielded Knox's actions.

1. Knox Was Giving Legal Advice, Not Acting as an Advocate.

Contrary to Knox's contention, she was *not* acting as an advocate in this case. In *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the Supreme Court squarely held that "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* at 274. *Buckley* controls here. When Warren drafted the affidavit, he did not even know who was responsible for publishing *THP*. The investigation was in an early stage, and there was not probable cause to have anyone arrested. Knox certainly did not have enough information to initiate a prosecution (and, indeed, no charge was ever filed). Under the bright-line principle articulated in *Buckley*, Knox could not have been acting as an advocate because she did not have probable cause to have anyone arrested.

This case is also on all-fours with *Burns*, where the prosecutor "advis[ed] police in the investigative phase of a criminal case." 500 U.S. at 493. Knox argues that the police in *Burns* took "direct action" in reliance on the prosecutor's advice (by arresting the plaintiff when the prosecutor advised that there was probable cause), while here, according to Knox, the police "took no direct action in reliance on Ms. Knox's advice." KAB 21; *see also id.* at 35 n.7. Knox contends her approval of the affidavit was

"merely an intermediate step between the drafting of the affidavit and its presentation to the judge for approval and signature." *Id.* at 21. But the facts do not support Knox's purported distinction: Detective Warren "acted directly" on Knox's legal advice by submitting the deficient affidavit to a judge, who then issued the requested search warrant.

Nor does the law support Knox's argument, which is really an argument about causation. In essence, Knox argues that the magistrate's decision to issue the warrant is an intervening cause that should relieve her of legal responsibility. However, the Supreme Court squarely rejected this argument in *Malley v. Briggs*, 475 U.S. 335 (1986), holding that a judge's decision to issue an arrest or search warrant does not break the causal chain between the deficient application and the resulting illegal action. To the contrary, Section 1983 "'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'" *Id.* at 344 n.7 (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)). In this case, the Amended Complaint alleges that Knox's objectively unreasonable legal advice caused the illegal search and seizure.

Knox argues that noted that "the Complaint did not say that Knox discussed the legal advisability of searching the Mink residence with the police or assisted the police in drafting the search warrant." KAB 24-25,

26. She overlooks the fact that approval, ratification, and authorization – or omissions and failures to act – are as legally significant as direct affirmative actions. Knox is liable even without conversation or a drafting role. The point is that she read and approved the affidavit, when she had the authority and opportunity to reject it and to prevent the illegal search and seizure. Her endorsement and approval of its content is as legally significant as if she had drafted the affidavit herself. Knox's attempts to distinguish *Eden v. Voss*, 2004 WL 153829 (10th Cir. 2004), and *KRL v. Moore*, 384 F.3d 1105 (9th Cir. 2004), *see* KAB 27-28, suffer from the same misunderstanding of the law. Thus, it is irrelevant whether she prepared or signed the search warrant (as did the prosecutor in *Eden*), or reviewed and approved the affidavit that Warren prepared (as did Knox in this case and prosecutor Riebe in *KRL*).[6]

Knox also argues that unlike the attorney in *Eden*, she did not engage in an investigative function because she was not involved in "the

[6] Knox suggests, erroneously, that what she regards as her minimal involvement in the investigation distinguishes this case from *KRL*. KAB 28. In fact, prosecutor Riebe in *KRL* did nothing more than review and approve two of the three affidavits for search warrants at issue. 384 F.3d at 1108-09. Nevertheless, he was not entitled to absolute immunity to the extent the warrants sought evidence of new crimes not charged in the pending indictment. *Id*. at 1113. The involvement of others in the prosecutor's office and their presence at the warrants' execution was not relevant to the court's analysis of the distinction between the advocacy and investigatory functions.

preliminary gathering of evidence." KAB 27. On the contrary, Knox *assisted* Warren as *he* was engaged in the preliminary gathering of evidence, and she did so by providing objectively unreasonable legal advice about whether a search and seizure was legally justified. "[A] prosecutor who assists, directs or otherwise participates with, the police in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities." *Rex*, 753 F.2d at 844 (citation omitted). In this case, Knox "assist[ed], direct[ed], or otherwise participate[d]" in a pre-arrest, pre-charge gathering of evidence. Indeed, without Knox's assistance, Warren would not have taken the affidavit to the judge and the search would not have occurred.

Knox's suggestion that she acted as an advocate because she was "'evaluating evidence already assembled,'" KAB 28 (quoting *Eden*, 2004 WL 1535829, at *7), ignores both the law and reality. The quoted reference in *Eden* to "evidence already assembled" comes from the Supreme Court's decision in *Buckley*, in which the Supreme Court distinguished "between those preparatory steps a prosecutor takes to be an effective advocate of *a case already assembled* and those investigative steps taken to gather evidence." 509 U.S. at 273, *quoted in Eden*, 2004 WL 1535829, at *7 (emphasis added). Here, Knox assisted police who were involved in

preliminary investigative steps to gather evidence. There was no "case already assembled" and ready for prosecution, and accordingly, Knox was not acting as an advocate.

2. C.R.S. § 20-1-106.1 Does Not Cloak Knox with Absolute Immunity.

Knox's reliance on C.R.S. § 20-1-106.1, *see* KAB 22, is misplaced. If the statute demonstrates anything, it is that when Knox reviewed the draft affidavit and search warrant, she was "render[ing]. . . legal advice to [a] peace officer[]," and that she was acting in an administrative rather than advocacy role. Hence, she is not entitled to absolute immunity. *See* KAB 20 (acknowledging that prosecutor "has only qualified immunity" for "administrative or investigatory functions").

Mink does not quarrel with Knox's statement that issuing a search warrant is a "judicial act." KAB 33. But Knox incorrectly characterizes the Colorado statute as requiring her to "assist in the judicial approval process." *Id.* at 34. In fact, the statute does not require her to assist judges; it compels her to provide legal advice to police, but *only* when police request guidance. C.R.S. § 20-1-106.1(1)(a). Knox's outside-the-courtroom review of an officer's application for a warrant is *not*, as Knox contends, "intimately associated with the judicial phase of the criminal process," KAB 34, quoting

Imbler;[7] *cf.*, *Malley*, 475 U.S. at 342-43 (police officer's application for a warrant is not "intimately associated with the *judicial* phase of the criminal process" and thus not entitled to absolute immunity) (emphasis in original).

According to Knox, the Colorado statute transforms what otherwise would be investigation-phase legal advice into judicial-phase legal advice, because the Colorado statute *requires* her to provide that legal advice when police officers request it. KAB 30-32, 34. She relies on what she labels "an implication" in *Kalina v. Fletcher*, 522 U.S. 118 (1997), where the Court held that a prosecutor was entitled to only qualified immunity for having certified the facts in one charging document that initiated a prosecution. By personally vouching for the facts under penalty of perjury, the Court explained, the prosecutor acted as a witness and not as an advocate for the state. *Id*. at 129-31. Fixating on the Court's comment that neither federal nor state law required prosecutors to make the certification themselves, *id.* at 129, Knox contends that the Court implied that the prosecutor would have been absolutely immune if state law had indeed required the prosecutor's certification. KAB 31-32. But Knox reads far too much into the Court's

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[7] In contrast, when prosecutors participate *in court* in hearings to determine whether a search warrant should issue, they are protected by absolute immunity. *Burns*, 500 U.S. at 492.

comment. Filing a criminal charge and initiating a prosecution are unquestionably protected by absolute immunity. By observing that prosecutors could initiate criminal cases without personally certifying the facts, the Court was simply confirming that its holding would not diminish the absolute protection from civil liability afforded to prosecutors who initiate charges without a personal certification.

Thus, neither *Kalina* nor any case supports Knox's suggestion that prosecutors are absolutely immune when performing a duty required by state statute.[8] Instead, the Supreme Court requires a prosecutor to bear the burden of demonstrating that the *function* at issue was protected by absolute immunity at the time that Congress enacted Section 1983. *Burns*, 500 U.S. at 492-93. Knox has not even attempted to demonstrate, with regard to a statutorily-required function of providing legal advice to police upon their request, "a tradition of immunity comparable to the common-law immunity from malicious prosecution." *Id.*

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[8] Significantly, another Colorado statute requires prosecutors to provide legal advice to any county officer who requests a legal opinion. C.R.S. § 20-1-105(1). Yet no serious argument could be made that a prosecutor providing such advice is acting in a quasi-judicial capacity that merits absolute immunity. Similarly, if a state statute required prosecutors to employ deputies and clerical assistants, that could not shield prosecutors with absolute immunity from accusations of racial discrimination in violation of the Fourteenth Amendment.

3. Policy Considerations Weigh Heavily Against Giving Knox Absolute Immunity.

The Court should reject Knox's argument that absolute immunity is necessary to encourage police to consult prosecutors about search warrants and to ensure that prosecutors remain willing to review them. *See* KAB 25, 34-36.[9] Qualified immunity, which "protects all but the plainly incompetent," *Malley*, 475 U.S. at 341, provides ample room for mistaken judgments. Contrary to Knox's position, public policy supports the denial of absolute immunity. After all, a prosecutor who knows that objectively unreasonable decisions will be actionable may be motivated to reflect upon whether she has a reasonable basis to believe that an affidavit is sufficient. "[S]uch reflection is desirable, because it reduces the likelihood that the [prosecutor's] request for a warrant will be premature." *Id.* at 343-44.[10] Applying that logic in *Burns*, the Court held that prosecutors are not

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[9] Denying absolute immunity will not affect police officers. Their liability is not at issue here, and the Supreme Court already has held that police may claim only qualified immunity for submitting a deficient affidavit to a judge. *Malley*, 475 U.S. at 340-41. Also, the suggestion that without absolute immunity, prosecutors might refuse to provide advice to police does not square with Knox's argument that Colorado law *requires* prosecutors to provide that advice upon request.

[10] *Malley* considered whether absolute immunity protects a police officer applying for an arrest or search warrant, but its logic applies equally to a prosecutor.

absolutely immune when they provide legal advice to police officers. 500 U.S. at 494-95. The same analysis applies here.

The Supreme Court has noted that when it shields prosecutors from damages actions for prosecutorial misconduct associated with the *judicial* phase of criminal cases, "[v]arious post-trial procedures are available to determine whether an accused has received a fair trial." *Imbler*, 424 U.S. at 427; *see also Mitchell v. Forsyth*, 472 U.S. 511, 522-23 (1985) ("The judicial process is largely self-correcting; procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results"). In contrast, the Court denied absolute immunity in a situation where those remedies are not available to persons injured as a result of the prosecutor's role in providing erroneous legal advice to police in the *investigative* phase of a case: "One of the most important checks, the judicial process, will not necessarily restrain out-of-court activities by a prosecutor that occur prior to the initiation of a prosecution, such as providing legal advice to the police" -- particularly "if a suspect is not eventually prosecuted." *Burns*, 500 U.S. at 496.

These considerations apply fully here. Mink sustained an illegal search and seizure because Knox provided objectively unreasonable legal advice in the investigative phase. Mink was never charged, and he therefore

could not have invoked any of the procedural protections available to criminal defendants. This civil action is his only avenue for redress.

Knox erroneously contends that when a prosecutor approves a deficient application for search warrant, the judge provides the judicial check discussed in *Burns*. KAB 35. The safeguards discussed in *Burns* and other absolute immunity cases, however, depend on the adversary process. A judge issues a search warrant in an *ex parte* proceeding, which "does not provide the adversarial safeguards associated with the judicial phase of criminal proceedings." *Higgs v. District Court*, 713 P.2d 840, 858 (Colo. 1985) (prosecutor's role in procuring search warrant not protected by absolute immunity).

B. Knox is Not Entitled to Qualified Immunity.

Qualified immunity must be denied when existing precedent provides a defendant with "fair warning" that her actions violate constitutional rights. *See Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002). The question is whether a defendant's actions were "objectively reasonable" in light of established law. In this case, it is clear that the prior case law provided Knox with "fair warning" that by approving the warrant application, she would cause a violation of Mink's rights.

Ordinarily, an allegedly unconstitutional arrest or search is deemed "objectively reasonable" when it is authorized by a warrant. *United States v. Leon*, 468 U.S. 897, 924 (1984). Reliance is not objectively reasonable, however, when (1) "the affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,'" or (2) when the warrant is so "facially deficient," for example, in "failing to describe with particularity the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume that it is valid." *Id.* at 923 (internal citations omitted). In such cases, "a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.* at 922 n.23. In *Malley*, the Court held that the *Leon* standard of objective reasonableness defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional search or arrest. 475 U.S. at 344-45.

In this case, the affidavit was deficient on its face. When evaluated in light of clearly-established First Amendment law, the affidavit failed to establish probable cause of any crime that could be the subject of a constitutional prosecution. In addition, the text of the proposed warrant, clearly violated the particularity requirement of the Fourth Amendment. Finally, clearly established law would have given a reasonable prosecutor in

Knox's position "fair warning" that her role in approving the affidavit would subject her to liability for the resulting warrant's unconstitutionality.

1. The Affidavit Failed to Establish Probable Cause Because It Violated Clearly Established First Amendment Law.

Plaintiffs' opening brief and this reply discuss the long and well-established body of Supreme Court and Tenth Circuit decisions that confirm the unconstitutionality of the Criminal Libel Statute under the First Amendment. *See* OB 25-38; *supra* at 9-18. Many of those decisions have been on the books for decades. They are not ambiguous, and the Supreme Court has reaffirmed their holdings time and again. This Court has applied those holdings in many decisions, and in *Ryan*, the Colorado Supreme Court even recognized and relied upon some of that authority with respect to the very statute at issue in this case.

A reasonable prosecutor applying this clearly established law would have known that the Criminal Libel Statute could not be constitutionally applied under the First Amendment to the circumstances described in the affidavit.

Specifically, when Knox approved the affidavit, she knew that Professor Peake was a professor at a public university, "nationally known for his work in the business world," and "consulted on questions of market

structure." Aplt.App. 45 (description of Peake on THP's website, which was attached to the affidavit). Based on this information, a reasonable prosecutor would have known that Peake was a public official or figure,[11] and that the Criminal Libel Statute could not be constitutionally invoked under *Ryan* and the long and well-established body of United States Supreme Court authority that precludes a challenge to speech concerning a public official or figure absent actual malice. *See* OB 26-32; *supra* at 11.

Even if Peake were a private figure, and he is not, a reasonable prosecutor nevertheless would have known that the statement that prompted Peake's complaint could not have been prosecuted for three reasons:

- First, a reasonable prosecutor should have known that the speech enjoyed virtually absolute First Amendment protection because it was obvious that all of the allegedly libelous statements

[11] Knox's citation of cases holding that particular professors or teachers were not public officials or figures is besides the point. *See* KAB 41. A "public official" includes "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). He or she holds a position of "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." *Id.* at 86. A reasonable prosecutor reviewing the affidavit would have known that Professor Peake fell within this clearly-established definition.

constituted rhetorical hyperbole, satire, parody, or opinion, and that none could be reasonably perceived as stating actual facts about Peake. The context of the challenged statements -- an obvious alternative newspaper, distributed irregularly, and with no publisher indicated -- rendered them incredible. The publication's website expressly announced an "aim[ ] for a combination of satire and commentary" and that "The Howling Pig is satirical in nature." Aplt.App. 44. The content made equally clear that the statements were not assertions of fact. No reader looking at the doctored photographs, both on the website and with each editorial column, could have reasonably concluded that Peake would have placed those photographs there himself; to the extent that any reader even could recognize Peake beneath the sunglasses and KISS makeup, he would know that the actual author was simply spoofing the professor. Similarly, the use of the word "Puke" rather than "Peake" and the irreverent biographical information could be construed only as a parody. Thus, it was clearly established that Mink could not be prosecuted for any of those statements. *See* OB 36-38.

- Second, the affidavit disclosed that the challenged issues of the *THP* addressed matters of public concern, to the extent that the articles could be taken as factual (as opposed to parody or opinion). The articles involving Peake are germane to his performance of his public duties as a professor, questioning his business ethics, qualifications to teach, and performance as a professor. Aplt.App. 46-48. They undeniably "touch[ed] on [his] fitness for office," *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964), and a reasonable prosecutor would have known that, under *Ryan*, they could not be prosecuted due to the absence of an actual malice standard in the Criminal Libel Statute.

- Finally, even if Knox could have conceivably construed some portions of some statements in *THP* issues attached to the affidavit as arguably communicating a libelous assertion of fact, no reasonable prosecutor could have concluded that those statements were false – and falsity is a well-established constitutional prerequisite to a libel prosecution. *See* OB 33-35; *supra* at 12. The affidavit provided nothing but Peake's conclusory assertion of falsity. *See* Aplt.App. 115. However, a conclusory statement is not sufficient to establish probable

cause. *Illinois v. Gates*, 462 U.S. 213, 239 (1983) ("Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.").

In short, clearly-established First Amendment law would have informed a reasonable prosecutor in Knox's position that the affidavit was hopelessly lacking in indicia of probable cause. Knox's objectively unreasonable approval not only caused an illegal search, but also chilled Mink's First Amendment rights through the threat of an unconstitutional prosecution and the seizure of Mink's computer, the equivalent of his printing press. Aplt.App. 17 (¶ 33). *See, e.g.*, *Nat'l Commodity & Barter Ass'n v. Archer*, 31 F.3d 1521, 1533 (10th Cir. 1994); *Faustin v. City and County of Denver*, 104 F. Supp. 2d 1280, 1288 (D. Colo. 2000), *aff'd in relevant part*, 268 F.3d 942, 950 (10th Cir. 2001).

2. The Warrant Violated Clearly Established Fourth Amendment Law Because It Failed to Satisfy the Particularity Requirement.

The Fourth Amendment demands that a warrant describe the things to be seized with "sufficient particularity." *Davis v. Gracey*, 111 F.3d 1472, 1478 (10th Cir. 1997). In *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988), this Court held that a search warrant violated the particularity

requirement in three distinct ways. First, it "contain[ed] no limitation on the scope of the search." Second, it was "not as particular as the circumstances would allow or require." Third, it "extend[ed] far beyond the scope of the supporting affidavit." *Id.* at 606. The affidavit that Knox approved requested a warrant that suffers from each of the flaws identified in *Leary*. As a result, Knox's approval violated clearly established Fourth Amendment law.

Facial Overbreadth. The warrant, as set forth verbatim in the affidavit, has no stated limitation on relevance. In addition to authorizing seizure of all computer-related equipment, computer software, and all hard drives and floppy disks, it directs police to seize any papers with names, addresses or telephone numbers, and "any and all correspondence, diaries, memoirs, journals, personal reminiscences[,] electronic mail . . . letters, notes, memorandum [*sic*], or other communications in written or printed form." Aplt.App. 34 (¶ 7).

The warrant's facial overbreadth is inescapable in light of the critical absence of any reference to a criminal statute, the specific crime under investigation, or even the general nature of the criminal activity to which the warrant was directed. *See Leary*, 846 F.2d at 601; *United States v. Kow*, 58 F.3d 423, 427 (9th Cir. 1995) ("We have criticized repeatedly the failure

to describe in a warrant the specific criminal activity suspected"). Absent this information, the warrant could not fulfill one of the chief purposes of the particularity requirement: To "ensure[ ] that a search is confined in scope to particularly described evidence *relating to a specific crime* for which there is demonstrated probable cause." *Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir. 1985) (emphasis added); *see also Stanford v. Texas*, 379 U.S. 476, 486 (1965) ("indiscriminate sweep" of warrant's description was "constitutionally intolerable," because it was the equivalent of a "general warrant" that left too much discretion to the officers conducting the search).

After authorizing this vast seizure of virtually everything in written form and everything computer-related, the final numbered paragraph of the warrant authorized a search of the written materials found on the computer and storage devices "as those items may relate to the allegations." Aplt.App. 34 (¶ 11). But the authorization to search electronically-stored materials only for items that "relate to the allegations" does not adequately limit the scope of the warrant, because the warrant does not describe the "allegations," nor does it mention criminal libel or any other criminal activity. As this Court has explained, "a warrant that simply authorizes the seizure of all files, whether or not relevant to a specified crime, is insufficiently particular." *Voss*, 774 F.2d at 406.

The warrant's deficiencies cannot be cured by the additional information appearing in the affidavit. "The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." *Groh v. Ramirez*, 540 U.S. 551, 557 (2004). In this Circuit, both attachment and incorporation are required for an affidavit to cure a warrant's lack of particularity.[12] *See Leary*, 846 F.2d at 603 & n.20; *United States v. Williamson*, 1 F.3d 1134, 1136 n.1 (10th Cir. 1993). However, the affidavit was not attached to the warrant nor incorporated by reference.

According to Knox, "the seizure of computer-related items was specifically limited under Paragraph 11, which tied the items sought to be seized to the Howling Pig website." KAB 47. But the text of the warrant itself refutes Knox's argument. Paragraph 11 did not limit the seizure of computer-related items; it simply identified the kind of information Detective Warren sought in those items, *all* of which were subject to seizure

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[12] Nowhere does the warrant "expressly refer to the affidavit and incorporate it by reference using suitable words of reference." *Leary*, 846 F.2d at 603. Although the Amended Complaint did not specifically allege that the affidavit was not attached, that inference is clearly supported by other allegations. For example, the Amended Complaint states that Detective Warren left a three-page warrant, Aplt.App. 82 (¶ 23), which clearly does not include the five-page affidavit. Additional allegations demonstrate that Mink and his counsel were not able to obtain a copy of the affidavit until after it appeared in the public court file several weeks after the search. Aplt.App.84 (¶ 30); *see also* Aplt.App. 129 (Mink's counsel called DA's office on December 23, 2003 to try to obtain the affidavit).

under the warrant. Moreover, Paragraph 11 did not limit paragraph 7, which authorized the seizure of any printed material in the entire home -- about any subject, written by anyone, at any time in history.

Governmental Failure to Narrow. This is not a case in which a broad description must be tolerated because the government has supplied all the detail that a reasonable investigation would allow. *See Leary*, 846 F.2d at 604. The warrant for the Mink residence, recited in the affidavit, refers to "the allegations" but fails to provide any information about them. Aplt.App. 35 (¶11). As a result, this warrant, like the defective warrant in *Leary*, "authorize[s] wholesale seizures of entire categories of items not generally evidence of criminal activity and provide[s] no guidelines to distinguish items used lawfully from those the government had probable cause to seize." 846 F.2d at 605 (citation omitted).

Scope in Excess of Affidavit. The search warrant also fails to meet the particularity requirement because it authorizes a search and seizure that extends far beyond the scope of whatever arguable probable cause is presented in the supporting affidavit. *See id*. Specifically:

- Nothing in the affidavit justifies a search of any and all letters, diaries, and "personal reminiscences" found in the Mink residence, yet the warrant authorizes searching these materials

without regard to whether they are arguably connected to *THP*. Aplt.App. 35.

∉# Nothing in the affidavit justifies seizing passwords for computers other than those found at the Mink residence, yet paragraph 6 of the warrant authorizes seizing passwords for any computer, no matter where it is located and without regard to any arguable connection to *THP*. *Id.* at 34.

∉# Even for material that is connected to *THP*, the warrant exceeds the arguable scope of the criminal investigation suggested by the affidavit. The gist of the crime of criminal libel is publication of statements that fall into a particular category. The statements at issue all appear on *THP's* website or in the first three issues, which are available at the website. Copies of those publicly-available materials were already in the DA's possession and were attached to the affidavit. *Id.* at 44-48. The apparent purpose of the search was to uncover evidence linking those already-published statements to a particular computer and to particular persons. Yet the warrant authorizes the search and seizure of electronic documents that do not reveal that

connection and have nothing to do with the statements at issue. *Id.* at 35.

Thus, even assuming that the affidavit provided probable cause to search for at least some evidence, the warrant language was "impermissibly overbroad" because it "extend[ed] far beyond the scope of the supporting affidavit." *Leary*, 846 F.2d at 605-06.

The applicable law governing the particularity clause was clearly established at the time of the search in this case. Because no reasonable prosecutor would have proceeded in the face of that clearly established law – yet Knox did exactly that – she may not claim qualified immunity from liability for the resultant Fourth Amendment violation.

3. Knox's Critical Role in the Warrant Application Process Subjects Her to Liability Under Clearly Established Law.

Knox argues that the case law did not put her on notice that she could be liable for her role in causing an illegal search and seizure that would be carried out by others. KAB 48-49. However, because Knox reviewed and approved the application and authorized and caused the subsequent search and seizure that violated Mink's rights, under clearly established law, she is responsible for that constitutional breach. She need not be the "moving force" when sued in her personal capacity. *Kentucky v. Graham*, 473 U.S.

159, 166 (1986) ("it is enough to show that the official . . . caused the deprivation of a federal right"). Knox had "fair warning" under clear Supreme Court and Tenth Circuit precedent 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. *See, e.g.*, *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); *Johnson v. Martin*, 195 F.3d 1208, 1219 (10th Cir. 1999) ("[a]llegations . . . of actual knowledge and acquiescence" are sufficient to establish violation of constitutional rights).

III. The Complaint States A Claim For Violation Of The Privacy Protection Act.

A. The Allegation That Knox Caused a Violation of the PPA Is Sufficient to State a Claim.

Knox does not deny that the Amended Complaint sets out a clear-cut violation of the Privacy Protection Act of 1980 (PPA). Nor does she deny her role as the "gatekeeper" whose approval of Warren's affidavit was a prerequisite to the search and seizure that violated the PPA. KAB 10. Instead, Knox argues that even if she knew that the proposed search and

seizure was illegal and had the power and opportunity to prevent it, she cannot be liable.

Relying on *Citicasters v. McCaskill*, 89 F.3d 1350 (8th Cir. 1996), Knox contends that the PPA provides for liability only if she "directed, supervised or otherwise engaged in the execution of the warrant to such an extent that a finding can be made that she 'searched for or seized' the tape." KAB 8; *Citicasters*, 89 F.3d at 1356 (quoting § 2000aa(b)). Knox insists that this Court should adopt the "reasoning" of *Citicasters*, KAB 6, but there is no reasoning to adopt. The quoted portion of the *Citicasters* decision did not follow any analysis of the statute's language, nor is there any other "reasoning" provided. This Court should reject the *Citicasters* phrasing as too narrow, because it unjustifiably constricts the scope of liability and undermines the intent and purpose of the PPA. Pursuant to widely-accepted rules of statutory construction, Knox's role in *causing* the violations of the PPA is sufficient to state a claim for relief.

Civil rights statutes like the PPA and Section 1983 create a type of tort liability. Like common-law tort actions, both statutes "provide redress for interference with protected personal or property interests" and "provide[] relief for invasions of rights protected under federal law." *City of Monterrey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999). The Supreme

Court has "repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability," *id.*, and it has often relied on tort principles in analyzing the statute. As the Court has explained:

> Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well.

Heck v. Humphrey, 512 U.S. 477, 483 (1994) (quoting *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978)). The Court looks to tort principles because it presumes that Congress intends that common-law principles will apply unless there is evidence to contradict that presumptive intent:

> Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well established . . . , the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident.

Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (internal quotations and citations omitted). Thus, courts rely on ordinary tort principles of liability to interpret not only Section 1983, but other civil rights statutes as well. *See, e.g.*, *Meyer v. Holly*, 537 U.S. 280, 285 (2003) (Fair Housing Act); *Schick v. Ill. Dept. of Human Services*, 307 F.3d 605, 615 (7th Cir. 2002) ("general tort principles governing causation . . . apply

equally to Title VII"). Accordingly, this Court should look to well-settled common law principles of liability in interpreting the PPA.

Those standard principles of liability have long included the rule that a person acting in concert with a tortfeasor is liable for the tort: "All who actively participate in any manner in the commission of a tort, or who command, direct, advise, encourage, aid or abet its commission, are jointly and severally liable therefore." 1 T. Cooley, Law of Torts 244 (3d ed. 1906). Similarly, a person is liable for the conduct of another when he "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself . . . ." Restatement (Second) of Torts § 876(b).

The Supreme Court explained another principle of liability that is clearly applicable here, when it held that a police officer who submits a deficient affidavit may be liable for the subsequent illegal arrest, despite the intervening decision of the court that issued the warrant:

> As we stated in *Monroe v. Pape*, 365 U.S. 167, 187 (1961), § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link.

Malley, 475 U.S. at 344 n.7. These principles of liability and causation are fully applicable here. Knox clearly provided substantial assistance and

encouragement to Warren. Indeed, the illegal search and seizure would not have occurred without Knox's approval and authorization. The PPA violations were the natural consequence of Knox's actions and omissions. The Amended Complaint clearly alleges that Knox caused PPA violations, and *Malley* flatly refutes her argument that the court's issuance of the warrant means that she "cannot be said to have 'caused' the search." KAB 9.

Knox contends, erroneously, that Mink seeks a theory of "but for" causation that would establish a "far more expansive scheme of liability never contemplated by the Congress." KAB 9-10. On the contrary, "[t]hough a person is ordinarily liable 'for the natural consequences of his actions,' [*citing Monell v. Dep't of Social Services*, 436 U.S. 658, 690-91 (1978)] neither traditional tort law nor § 1983 imposes liability where causation, though present in fact, is too remote. *Martinez v. California*, 444 U.S. 277, 285 (1980).'" *Shaw v. Stroud*, 13 F.3d 791, 807 (4th Cir. 1994). This Court reached the same conclusion in *Humann v. Wilson*, 696 F.2d 783, 784 (10th Cir. 1983), when it ruled that there was an insufficient causal link between the government's release of a prisoner on parole and the parolee's subsequent assault on the plaintiff. In this case, however, there cannot be any argument that Knox's role was too remote.

A portion of the PPA overlooked by Knox and the district court confirms that the *Citicasters* phrasing, with its emphasis on the *execution* of the warrant, is too narrow. Judges do not direct, supervise, or otherwise participate in executing search warrants. Nevertheless, the PPA clearly contemplates that judges are bound by the Act and that a governmental employer may be liable for a judge's violation. *See* 42 U.S.C. § 2000aa-6(c). The obvious conclusion is that the PPA's prohibitions apply to judicial officers. A judge who issues a warrant for a search and seizure that violates the PPA has authorized and caused a violation of the statute. Even if the judge's actions do not fit the narrowly-worded phrasing of *Citicasters*, the PPA clearly contemplates that the judge's actions violate the statute.

As Plaintiffs' opening brief explained, the allegation that Knox caused the PPA violation easily supports liability pursuant to well-recognized legal theories such as supervisory liability, bystander liability, and conspiracy. This is not a "new argument," as Knox contends, KAB 11, but simply illustrates that Knox is legally responsible based on the facts that Mink has alleged all along: By reviewing and approving Warren's defective application, Knox authorized and caused the search and seizure that violated the PPA as well as the Fourth Amendment. Knox acknowledges that the allegations support a Section 1983 claim based on theories of bystander or

supervisory liability. *Id.* Those legal theories are clearly consistent with the common law principles of liability discussed earlier, and they are therefore just as applicable to the PPA.

Knox contends that liability on a conspiracy theory is not possible because the Amended Complaint lacks "specific facts" showing agreement and concerted action. KAB 12-13. Knox relies on what this Court has called a "heightened pleading requirement" for conspiracy claims. *Scott v. Hern*, 216 F.3d 897, 907 (10th Cir. 2000). The cases requiring such specificity have been now been superseded, however, by a series of Supreme Court decisions, culminating in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), that reject judicially-created rules of heightened specificity. *See Currier v. Duran*, 242 F.3d 905, 912 (10th Cir. 2001) (prior precedent does not bind this Court "when that precedent is superceded by contrary decisions of the Supreme Court"). In *Swierkiewicz*, the Court reaffirmed that when Rule 9(b) of the Federal Rules of Civil Procedure ("F.R.C.P.") does not specify a more specific pleading requirement, the complaint must satisfy only the minimal notice pleading contemplated by F.R.C.P. 8(a)(2). 534 U.S. at 13. F.R.C.P. 9(b) does not state any special pleading rules for conspiracy. Therefore, as Judge Posner explained in the wake of *Swierkiewicz*:

> [T]here is no requirement in federal suits of pleading the facts or the elements of a claim, with the exceptions (inapplicable to this case) listed in Rule 9. Hence it is enough in pleading a conspiracy merely to indicate the parties, general purpose, and approximate date, so that the defendant has notice of what he is charged with.

Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002). In this case, the Amended Complaint is sufficient. It identifies the parties (Knox and Detective Warren), the general purpose (execution of the search and seizure described in Warren's affidavit), and the approximate date (identified in the complaint and attached documents). In addition, the Amended Complaint alleges facts that support the inference that Knox approved and agreed with Warren's plan and acted in concert with him by approving the defective warrant application.

The absence of the word "conspiracy" in the Amended Complaint is not dispositive. Even when a complaint fails to state a claim under the identified legal theory, which is not the case here, "the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *In re: Sac & Fox Tribe of the Mississippi in Iowa*, 340 F.3d 749, 766 (8th Cir. 2003) (citation omitted); *see also* 5A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1357 at 336-37 (2d ed. 1990) (same).

B. As a State Employee, Knox Can Be Sued in Her Individual Capacity.

Knox is sued in her individual capacity because she acted as an "officer or employee" of a state that has not waived its sovereign immunity. 42 U.S.C. § 2000a-6(a)(2). Knox cannot deny that a "district attorney is a state officer and a member of the executive branch of government." *Free Speech Defense Comm. v. Thomas*, 80 P.3d 935, 937 (Colo. App. 2003). Moreover, Knox does not refute that a deputy district attorney "has all the powers of the district attorney." C.R.S. § 20-1-202.

Knox contends only that a deputy district attorney is employed by an entity other than the state. Yet, Knox does not disagree that "district attorneys and their employees are not county employees." *Davidson v. Sandstrom*, 83 P.3d 648, 660 (Colo. 2004). Knox's singular argument is that municipal employees may not be sued in their individual capacity. *Davis*, 111 F.3d 1472. However, *Davis* does not state that a deputy district attorney is a municipal employee. Therefore, Knox, as an employee of the DA and a state employee, is not shielded from liability.

C. The Amended Complaint's Failure To Include The Words "Actual Damages" Is Not Grounds For Dismissal.

Finally, Knox contends that the PPA claim must be dismissed because Mink failed to allege "actual damages." In support, Knox relies solely on

Doe v. Chao, 540 U.S. 614 (2004); KAB 17-19. Not only is *Chao* distinguishable on multiple grounds, and thus not controlling here, but even if the PPA requires proof of "actual damages," Mink's allegations are sufficient to survive a motion to dismiss.

First, *Chao* involved an analysis not of the PPA but rather the Privacy Act of 1974, 5 U.S.C. § 552a *et seq* (the "Privacy Act"). The relevant damage provisions of the PPA and the Privacy Act are substantially different so as to make *Chao*'s analysis of the Privacy Act inapplicable. *See* KAB 17 (conceding the language is similar, but not "identical" in key respects). The Privacy Act states:

> In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall *a person entitled to recovery* receive less than the sum of $1,000 . . .

5 U.S.C. § 552a(g)(4)(A) (emphasis added). The Supreme Court construed this language as requiring a showing of actual damages by "a person entitled to recovery" as one of the necessary elements of a claim.

In contrast, the damages section of the PPA provides:

> A person having a cause of action under this section shall be entitled to recover actual damages but not less than *liquidated damages* of $1,000 . . .

42 U.S.C. § 2000aa-6(f) (emphasis added). Thus, the PPA does not make actual damages a part of a plaintiff's cause of action and refers to the minimum of $1,000 as "liquidated damages," which are key differences from the language of the Privacy Act. The use of "liquidated damages" language demonstrates Congress's intent that all victims should receive at least minimal compensation even if "actual damages" are too difficult or impossible to prove. *See Schmitz v. Commissioner*, 34 F.3d 790, 794 (9th Cir. 1994), *vacated on other grounds*, 515 U.S. 1139 (1995). Congress provided that even the most minor violations of the PPA would be compensated, at a minimum, with $1000 in damages, while ensuring that actual damages above that amount would also be compensated. Thus, *Chao* does not control this PPA case.

Second, even if *Chao* applies and Mink must prove actual damages to recover under the PPA, the Amended Complaint's failure to recite the magic words "actual damages" is not grounds for dismissal. *Chao* did not discuss the requirements for pleading a claim; it involved cross-motions for summary judgment. 540 U.S. at 616. In that procedural posture, the Supreme Court required the plaintiff to present *evidence* of "actual

damages" under the Privacy Act. *Id.* at 621. The minimal pleading requirement necessary to survive a motion to dismiss is critically distinct from the *evidentiary* requirement that applies at summary judgment or at trial. *See Swierkiewicz*, 534 U.S. at 510. "When a federal court reviews the sufficiency of a complaint, before the reception of evidence . . . its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Although it does not use the magic words "actual damages," the Amended Complaint alleges facts that, if proved, clearly constitute compensable harm. Mink was deprived of all use of his computer, which contained work products and documentary materials specifically protected by the PPA. Aplt.App. 82-83 (¶¶ 24-26). That deprivation lasted until after this action was filed and the district court issued a TRO ordering the return of the computer. *Id.* at 86-87 (¶¶ 37-38). That deprivation of a possessory interest, by itself, is a sufficient allegation of actual damages.

In addition, Mink supplemented the district court record with a declaration detailing additional damages sustained as a result of Knox's actions. Aplt.App. 226-27. Contrary to Knox's argument, KAB 19, a plaintiff may indeed invoke and rely on facts outside the complaint when

defending against a motion to dismiss. Indeed, it was not even necessary to submit these additional facts in evidentiary form. "A plaintiff is free, in defending against a motion to dismiss, to allege without evidentiary support any facts he pleases that are consistent with the complaint." *Early v. Bankers Life & Cas. Co*., 959 F.2d 75, 79 (7th Cir. 1992). This principle derives directly from the Supreme Court's instruction that dismissing a complaint is improper "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Thus, Mink's declaration outlines a supplementary "set of facts in support of his claim," that is consistent with the Amended Complaint and that further demonstrates that he sustained actual damages.

CONCLUSION

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

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

In accordance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, undersigned counsel certifies that this brief complies with the

type-volume limitation set forth in Rule 32(a)(7)(B), and that this brief, exclusive of the items listed in Rule 32(a)(7)(B)(iii), contains 11,895 words.

Dated July 22, 2005.

Respectfully submitted,

/s/ Valerie L. Simons
Marcy G. Glenn
A. Bruce Jones
Valerie L. Simons
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
vsimons@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 PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that on July 22, 2005, a true and correct hard copy of the foregoing APPELLANTS' REPLY BRIEF was sent to the following persons in the manner indicated below:

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William V. Allen
Assistant Attorney General
Litigation Section
1525 Sherman Street, 5th Floor
Denver, CO 80203
linda.whitaker@state.co.us

David R. Brougham
Gillian Dale
Hall & Evans, L.L.C.
1125 17th Street, Suite 600
Denver, CO 80202-2037
broughamd@hallevans.com
daleg@hallevans.com

Miles Madorin
Colorado District Attorneys' Council
1580 Logan Street, Ste. 420
Denver, CO 80203
Miles@cdac.state.co.us

S. Mark Goodman
Adam Goldstein
Student Press Law Center
1101 Wilson Boulevard, Ste. 1100
Arlington, VA 22209

Jane E. Kirtley
Silha Center for the Study of Media Ethics and Law
111 Murphy Hall
206 Church Street, SE
Minneapolis, MN 55455

Thomas B. Kelley
Steven D. Zansberg
Faegre & Benson, LLP
1700 Lincoln Street, #3200
Denver, CO 80203
tkelley@faegre.com

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