Trinity Jordan (15875)
Aaron B. Clark (15404)
Jacob R. Lee (17531)
ARMSTRONG TEASDALE LLP
222 South Main Street, Ste. 1830
Salt Lake City, Utah 84101
Telephone: (801) 401-1600
Email: tjordan@atllp.com
aclark@atllp.com
jrlee@atllp.com

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. JASON CHRISTOPHER HALL, Defendant.	**MOTION TO DISMISS COUNTS TWO AND THREE OF THE INFORMATION** Case No. 221906445 Judge Paul B. Parker

Defendant Jason Christopher Hall ("**Defendant**" or "**Mr. Hall**"), by and through undersigned counsel, hereby files this Motion to Dismiss Count Two of the Information pursuant to the Utah Rules of Criminal Procedure 25. This Court should dismiss Count 2 and Count 3 of the Information because, on their face, the underlying statutes (Utah Code §§ 76-5-106.5; 76-8-104) prohibit a wider range of conduct than the First Amendment permits, and as applied to Mr. Hall, the State unconstitutionally failed to allege any facts that shed light on Mr. Hall's mental state as required under the recent decision in *Counterman v. Colorado*, 143 S. Ct. 2106 (2023).

INTRODUCTION

"[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Nearly all speech is protected other than in a few limited areas, including where a person makes a "true threat," or a serious expression conveying that a speaker means to commit an act of unlawful violence. *Counterman*, 143 S. Ct. at 2113. But "a threat must be distinguished from . . . constitutionally protected speech," such as political hyperbole, to ensure that "debate on public issues [is] uninhibited, robust, and wide open." *See Watts v. United States*, 394 U.S. 705, 707-08 (1969). This "profound national commitment" to free speech allows for vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. *See id.* at 708.

In June 2023, *after the preliminary hearing in this case*, the Supreme Court analyzed a Colorado state stalking statute, and held that the First Amendment required Colorado to prove, in "true threats" cases, that the defendant had some subjective understanding of his statements' threatening nature by showing at the very least a reckless state of mind. *Counterman*, 143 S. Ct. at 2114-19. The Court held that, under the Colorado statute, the state needed to prove that the *defendant consciously* disregarded a substantial risk that his communications would be viewed as threatening violence. *Id.* at 2111-12 (emphasis added).

Here, the State has charged Mr. Hall with violations of Utah Code §§ 76-5-106.5 and 76-8-104, alleging that Mr. Hall engaged in a course of conduct that would cause a reasonable person to fear for their own safety. After *Counterman*, the plain text of both statutes— which, at most, require proof that the defendant *knows* or *should know* that their conduct would cause a reasonable person to fear for their safety — prohibits protected conduct by lowering the constitutionally

mandated bar for the State to prove both threatening a public official and criminal stalking. The First Amendment protects against the infringement of a person's right to make sharp, political hyperbole so long as that person does not subjectively or consciously disregard a substantial risk that his speech would be viewed as threatening violence. On their face, both Utah Code § 76-5-106.5 and § 76-4-108 prohibit a wider range of conduct than the First Amendment permits, allowing the State to prohibit and punish a person that engages in speech regardless of that person's subjective awareness of the speech's threatening nature or their likely impact on the victim.

The State also unconstitutionally applied the statutes to Mr. Hall by failing to allege any facts in the Information or at the preliminary hearing that shed light on Mr. Hall's mental state as required under *Counterman*. In order to prove that the threats alleged in the Information were "outside the bounds of First Amendment protection and punishable as crimes," the State was required to allege and show probable cause that Mr. Hall consciously disregarded a substantial risk that his speech would cause J.G. to fear for his own safety or to suffer emotional distress. *See Counterman*, 143 S. Ct. at 2112; *see also* Utah Code §§ 76-5-106.5, 76-4-108. The State, however, failed to provide any evidence of Mr. Hall's subjective mental state. As a result, the State alleged insufficient facts to prove that there is probable cause that Mr. Hall violated Utah Code §§ 76-5-106.5 and 76-4-108. Therefore, the Court should dismiss Count 2 and Count 3 of the Information because the State's application of the underlying statutes unconstitutionally punished conduct protected by the First Amendment.

STATEMENT OF FACTS

1. Mr. Hall was charged with the following crimes: (Count 1) Threatening Elected Officials-Assault (Utah Code §§ 76-8-313; 76-8-315; 76-5-102), a third degree felony; (Count 2)

Stalking (Utah Code §§ 76-5-106.5 (2) (a) (b), (6) (a); 76-2-202), a Class A misdemeanor; (Count 3) Threats to Influence Official or Public Action (Utah Code § 76-8-104, a Class A misdemeanor).

2. Under Utah Code § 76-5-106.5: "An actor commits stalking if the actor intentionally or knowingly: (a) engages in a course of conduct directed at a specific individual and knows or should know that the course of conduct would cause a reasonable person: (i) to fear for the individual's own safety or the safety of a third individual; or (ii) to suffer other emotional distress."

3. Under Count 2, the Information stated the following:

> On or about and between March 1, 2021 and December 31, 2021 in Salt Lake County, State of Utah the defendant did commit, solicit, request, command, encourage or intentionally aid another person by intentionally or knowingly engaging in a course of conduct directed at a specific person, and knew or should have known that the course of conduct would cause a reasonable person to fear for the person's own safety or the safety of a third person or to suffer other emotional distress, to wit: by engaging in two or more acts directed towards J.G., including surreptitious delivery of a numerous objects to J.G.'s place of employment, and by placing an object on or delivering an object to property owned, leased, or occupied by J.G., or to J.G.'s place of employment with the intent that the object be delivered to J.G., or appearing at J.G.'s workplace or contacting J.G.'s employer or coworkers, or sending material by any means to J.G. or for the purpose of obtaining or disseminating information about or communicating with J.G. to a member of J.G.'s family or household, employer, coworker, friend, or associate of J.G.

Information at 2.

4. Under Utah Code § 76-8-104: "A person is guilty of a class A misdemeanor if he threatens any harm to a public servant, party official, or voter with a purpose of influencing his action, decision, opinion, recommendation, nomination, vote, or other exercise of discretion."

5. Under Count 3, the Information stated the following:

> On or about and between March 5, 2021 and November 23, 2021 in Salt Lake County, Utah the defendant did threaten harm to a public servant, party official, or

voter, to wit J.G., with a purpose of influencing his action, decision, opinion, recommendation, nomination, vote, or other exercise of discretion.

Information at 2.

6. The Information also provided a list of the following communications that were allegedly sent by Mr. Hall to J.G.:

- **March 5, 2021 – Email**: In the email, the writer stated he/she now finds J.G.'s "paper-thin skin" and lack of experience to be a "poor combination for a politician." The writer accused J.G., among other things of "grandstanding", "schoolyard bully", "not a statesman", "lash out viciously at anyone who contradicts you", and "defensive." There were no overt threats of harm, but the language descriptions were distinctive. The email concluded: "should we not see an apology to the mayor AND to the city for your temper tantrum, there will be significant efforts made to replace you when you are up for reelection" and "you should know that the wheels are in motion to render you irrelevant."
- **March 9, 2021 – Package & Notes**: The package allegedly included a children's book on anger management and two notes. The first printed note read, "I hope this helps with your issues buddy." A second note read, "Hey Imbecile !!!!!! Move out of Bluffdale, apologize or kill yourself. It's time for you to start watching your back. This is your final warning. We are moving to the next phase. Do what we ask, or we will do what must be done."
- **March 9, 2021 – Gag gifts**: The package included gag gifts, labeled "City Council Meeting Survival Kit," with instructions on how and when to use the gifts to deal with J.G. during council meetings. The gifts came with notes attached to items explaining their purpose, such as reflective glasses with a note, "To hide your eye rolls at (J.G.'s) Posturing and Self-aggrandizement," a baby's bottle, "in case (J.G.) gets cranky and needs his ba-ba," a Baby's

"Binky," "To help sooth you in case someone says something you don't like. Poor little guy," (a "Blanky," a juice box, a binky, fruit snacks, "pull-up" diapers, etc.).

- **March 24, 2021 – Letter**: In the letter, the writer cited to J.G.'s "paper-thin skin," and then stated, "it has become very clear lately our messages are not getting across to you. We are ready to move to the next phase. You will no longer have the will to live in Bluffdale. It's time we put you down like the Dog you are, not a statesman."
- **June 14, 2021 – Email**: In the email, the writer encouraged J.G. to run for mayor and used comments/phrases like: "amusing to destroy you politically, sentiment of the city has turned against you, you're a joke, and Man-child for mayor."
- **July 20, 2021 – Email**: In the email, the writer mocked the candidates and called J.G. an imbecile.
- **November 2, 2021 – Package**: The package included a jester's hat and a message, "you've earned this."
- **November 23, 2021 – Letter**: In the letter, the writer stated: "You've really earned the hat we sent you." The letter then continues, "Unfortunately, (J.G.) you have shown that you will not change until something is done. It's time you leave Bluffdale or resign. If you don't you will end up dead."

ARGUMENT

Challenges to criminal statutes implicating freedom of speech generally take two forms: (1) the statue is overly broad (on its face and as applied to specific conduct); or is (2) the statue is vague (as applied and on its face). *See, e.g., Logan City v. Huber*, 786 P.2d 1372, 1375 (Utah Ct. App. 1990). This case involves the first form. Here, Mr. Hall first argues that this Court should

dismiss Counts 2 and 3 of the Information because, on their face, the underlying statutes (Utah Code §§ 76-5-106.5 and § 76-4-108) prohibit a wider range of conduct than the First Amendment permits. Second, Mr. Hall argues that the State unconstitutionally applied the statutes here by failing to allege any facts that shed light on Mr. Hall's mental state as required under *Counterman*.

I. BOTH UTAH CODE § 76-5-106.5 AND UTAH CODE § 76-4-108 ARE UNCONSTITIONAL ON THEIR FACE

The First Amendment overbreadth doctrine "gives a defendant standing to challenge a statute on behalf of others not before the court even if the law could be constitutionally applied to the defendant." *Salt Lake City v. Lopez*, 935 P.2d 1259, 1263 n. 2 (Utah Ct. App. 1997). "The rationale rests on the very real possibility that an overbroad statute will cause injury not only when applied to punish protected speech, but also in its 'chilling effect' on protected activity." *See Provo City Corp. v. Thompson*, 2004 UT 14, ¶ 10, 86 P.3d 735, 739. This doctrine provides that a court may invalidate a statute if (1) the statute reaches "a substantial amount of constitutionally protected conduct, even if the statute also has a legitimate application," and (2) "the statute is not readily subject to a narrowing construction." *See id.* (cleaned up).

Utah Code § 76-5-106.5 states: "An actor commits stalking if the actor intentionally or knowingly: (a) engages in a course of conduct directed at a specific individual and knows or should know that the course of conduct would cause a reasonable person: (i) to fear for the individual's own safety or the safety of a third individual; or (ii) to suffer other emotional distress." Utah Code § 76-8-104 makes it a class A misdemeanor if a person "threatens any harm to a public servant, party official, or voter with a purpose of influencing his action, decision, opinion, recommendation, nomination, vote, or other exercise of discretion." On their face, based on the

recent Supreme Court ruling in *Counterman*, these statutes criminalize a substantial amount of constitutionally protected conduct and are not readily subject to narrowing constructions.

A. Free Speech & *Counterman v. Colorado*

Under the First Amendment and within the context of statutes criminalizing true threats, the State has the burden to prove the defendant had some subjective understanding, that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The First Amendment of the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." *See also Stromberg v. California*, 283 U.S. 359, 368–69 (1931) (applying First Amendment to States). The Utah Constitution has separate speech protection, stating in article I, section 1, "All men have the inherent and inalienable right . . . to communicate freely their thoughts and opinions, being responsible for the abuse of that right."

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414. Nearly all speech is protected other than "in a few limited areas." *United States v. Stevens*, 559 U.S. 460, 468 (2010). These "limited areas" include speech expressed as part of a crime, obscene expression, incitement, and fraud. *See United States v. Alvarez*, 567 U.S. 709, 717 (2012). The First Amendment protects even "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "A free democracy is often messy and, in our country, those willing to serve in public positions and who are entrusted with appropriately spending the public's money must be '[individuals] of fortitude, able to thrive in a hardy climate,' and willing to put up

with robust, even sharp, criticism of their actions by members of the public whom they represent." *Davidson v. Baird*, 2019 UT App 8, ¶ 1, 438 P.3d 928, 931 (quoting *Sullivan*, 376 U.S. at 273).

Of course, the prohibition of content-based restrictions is not absolute. *See Connick v. Myers*, 461 U.S. 138, 147 (1983) (recognizing state power to prohibit certain narrow, well-defined classes of expression). States, for example, may regulate "true threats," defined to "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). The Court, however, has been careful to warn that "a threat must be distinguished from . . . constitutionally protected speech," such as "political hyperbole," to ensure that "debate on public issues" is "uninhibited, robust, and wide open," which "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts*, 394 U.S. at 707-08.

In *Counterman*, the petitioner sent hundreds of Facebook messages to a local musician. 143 S. Ct. at 2112. The musician did not respond and tried repeatedly to block him, but each time, the petitioner created a new account and resumed contact. *Id.* Several of his messages envisaged violent harm befalling her, which put the musician in fear and severely affected her daily existence:

> Some of his messages were utterly prosaic ("Good morning sweetheart"; "I am going to the store would you like anything?")—except that they were coming from a total stranger. Others suggested that Counterman might be surveilling C. W. He asked "[w]as that you in the white Jeep?"; referenced "[a] fine display with your partner"; and noted "a couple [of] physical sightings." And most critically, a number expressed anger at C. W. and envisaged harm befalling her: "Fuck off permanently." "Staying in cyber life is going to kill you." "You're not being good for human relations. Die."

Id. (internal citations omitted). The State charged the petitioner under a Colorado statute making it unlawful to "[r]epeatedly. . . make[ ] any form of communication with another person" in "a

manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." *Id.* (quoting Colo. Rev. Stat. § 18-3-602(1)(c)).

The petitioner moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and therefore could not form the basis of a criminal prosecution. *Id.* Following Colorado law, the trial court rejected that argument under an objective standard, finding that a reasonable person would consider the messages threatening. *Id.* The court sent the case to the jury, which found Counterman guilty. *Id.* at 2112-13. The petitioner appealed, arguing that the First Amendment required the State to show not only that his statements were objectively threatening, but also that he was aware of their threatening character. *Id.* at 2113. The Supreme Court held that the First Amendment requires the State to prove, in true-threats cases, that the defendant had some subjective understanding of his statements' threatening nature by showing at a minimum the defendant's reckless state of mind, that is, the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. *Id.* at 2111-12.

B. Utah Code § 76-5-106.5 prohibits constitutionally protected conduct

Under the Utah Code, the relevant portions of the criminal stalking statute provide:

> An actor commits stalking if the actor intentionally or knowingly: (a) engages in a course of conduct directed at a specific individual and knows or should know that the course of conduct would cause a reasonable person: (i) to fear for the individual's own safety or the safety of a third individual; or (ii) to suffer other emotional distress.

Utah Code § 76-5-106.5.

Before *Counterman*, Utah courts interpreted this statute to prohibit a person from engaging in a course of conduct "'directed at a specific person' such that a 'reasonable person' would suffer

emotional distress, and the defendant knows or should know that the specific person will suffer emotional distress." *Lopez*, 935 P.2d at 1264. Courts held that the statute involves a "solely objective standard," "requiring proof only that the actor's conduct would cause a reasonable person in the victim's circumstances to fear for his or her own safety or suffer other emotional distress." *Baird v. Baird*, 2014 UT 08, ¶ 25, 322 P.3d 728; *see also State v. Bingham*, 2015 UT App 103, ¶ 17, 348 P.3d 730, 736.

Now, Utah's criminal stalking statute's completely objective standard is at odds with *Counterman*'s holding that the First Amendment requires states to prove a defendant's subjective understanding of his statements' threatening nature (*i.e.*, at a minimum that they are reckless). Under *Counterman*, the First Amendment protects against the infringement of a person's right to make sharp, political hyperbole so long as that person does not subjectively or consciously disregard a substantial risk that his speech would be viewed as threatening violence. On its face, Utah Code § 76-5-106.5 prohibits a wider range of conduct than the First Amendment permits; it allows the State to prohibit and punish a person that engages in speech regardless of that person's subjective awareness of the speech's threatening nature or their likely impact on the victim.

Even prior to *Counterman*, the Utah Supreme Court cast doubt on the constitutionality of the stalking law: "Miller may ultimately have an argument about the breadth of the stalking statute. He certainly cites to other courts that have identified First Amendment problems with their jurisdictions' stalking statutes." *State v. Miller*, 2023 UT 3, ¶ 80, 527 P.3d 1087, 1099 (citing *People v. Relerford*, 422 Ill.Dec. 774, 104 N.E.3d 341, 349–51 (Ill. 2017); *State v. Shackelford*, 264 N.C.App. 542, 825 S.E.2d 689, 699 (2019)). In addition, a number of similar stalking statutes have been ruled overbroad and unconstitutional based on the First Amendment rights of the

defendant. *See, e.g.*, *People v. Ashley*, 2020 IL 123989, ¶ 39, 162 N.E.3d 200, 212, *as modified on denial of reh'g* (Mar. 23, 2020) (holding a stalking statute, which criminalized course of conduct directed at an individual that the defendant should know would cause a reasonable person to fear for their safety or suffer emotional distress was unconstitutionally overbroad, finding that a true threat exception to protected speech required proof that defendant knew that threat would cause person to fear for his or her safety or cause person to suffer emotional distress); *Relerford*, 2017 IL 121094, ¶ 34 (holding that stalking and cyberstalking statutes, which criminalized nonconsensual communications to or about someone that the defendant knew or should have known would cause reasonable person to suffer emotional distress, facially violated constitutional right of free speech); *Matter of Welfare of A. J. B.*, 929 N.W.2d 840 (Minn. 2019) (holding that a stalking statute requiring defendant to "know[ ] or ha[ve] reason to know" that the communication would cause the victim "under the circumstances" to feel "frightened, threatened, oppressed, persecuted, or intimidated" was overbroad and unconstitutional under the First Amendment).

Here, Utah Code § 76-5-106.5 will continue to cause injury when it is applied to punish protected speech and will create a chilling effect on protected activity. This statute punishes the speech of any person that does not consciously contemplate the effect of their speech on the recipient. Additionally, this statute does not mention subjective intent, but rather specifically articulates an entirely objective standard. This certainly makes a narrowing construction implausible. Therefore, this Court should invalidate Utah Code § 76-5-106.5 as overbroad because it reaches a substantial amount of constitutionally protected conduct and is not readily subject to a narrowing construction.

C. Utah Code § 76-8-104 prohibits constitutionally protected conduct

Utah courts have not yet interpreted Utah Code § 76-8-104, however, the required elements are not particularly complicated:

> A person is guilty of a class A misdemeanor if he threatens any harm to a public servant, party official, or voter with a purpose of influencing his action, decision, opinion, recommendation, nomination, vote, or other exercise of discretion.

Utah Code § 76-8-104. Thus, the State must prove: (1) that the defendant made a threat of harm to a public servant, and (2) that he did so with the purpose of influencing the public servant's action. *See State v. Hartmann*, 783 P.2d 544, 546 (Utah 1989) (defining "threat" as "the expression of an intention to inflict injury on another" through conduct or words). The statute does not explicitly require that the defendant have any particular mental state to cause the public servant to fear for their safety. *Counterman*, however, requires an additional element of the defendant's mental state.

The analysis under Utah Code § 76-8-104 is similar to the analysis under Utah Code § 76-5-106.5. The First Amendment requires proof a defendant's subjective understanding of his statements' threatening nature (*i.e.*, minimum of recklessness). This requirement protects against the infringement of a citizen's right to make sharp political hyperbole so long as do not subjectively or consciously disregard a substantial risk that the speech would be viewed as threatening violence. Therefore, on its face, Utah Code § 76-8-104 prohibits a wider range of conduct than the First Amendment permits, allowing the State to punish a person that engages in speech regardless of that person's subjective awareness of the speech's threatening nature or its likely impact on the victim.

Thus, this statute will continue to cause injury when it is applied to punish protected speech and will create a chilling effect on protected activity, particularly within the public arena where

political speech is entitled to strong protected. This statute essentially punishes the political speech of any citizen that does not contemplate the effect of their speech on the recipient. Of course, every citizen should take care in what they say to public officials. The Constitution, however, has carved out a large area of protection so that even thoughtless forms of political speech are not chilled. Additionally, this statute entirely omits any mental state of the speaker regarding the alleged threat's effect on the public official. This makes a narrowing construction implausible. Therefore, this Court should invalidate Utah Code § 76-8-104 as overbroad because it reaches a substantial amount of constitutionally protected conduct and is not readily subject to a narrowing construction.

II. UTAH CODE § 76-5-106.5 AND UTAH CODE § 76-8-104 ARE UNCONSTITIONAL AS APPLIED TO MR. HALL.

Further, both Utah Code § 76-5-106.5 and § 76-4-108 are unconstitutional as applied to Mr. Hall because the State failed to allege any facts in its Information against Mr. Hall or at the preliminary hearing that shed light on Mr. Hall's mental state, which is required to prove both statutes under *Counterman*.[1] In order to show that the threats alleged in the Information were "outside the bounds of First Amendment protection and punishable as crimes," the State was required to establish probable cause that Mr. Hall consciously disregarded a substantial risk that his speech would cause J.G. to fear for his own safety or to suffer emotional distress. *See Counterman*, 143 S. Ct. at 2112; *see also* Utah Code §§ 76-5-106.5, 76-8-104.

[1] And regardless of whether the State's application of the statutes was unconstitutional, the State has not and cannot show any facts that show that Mr. Hall consciously disregarded a substantial risk that his communications would be viewed as threatening violence.

The State, however, failed to provide any evidence of Mr. Hall's subjective mental state. Under Count 2 (Utah Code § 76-5-106.5), the State alleged the following conclusory allegations with no regard for the subjective requirement contemplated by *Counterman*:

> On or about and between March 1, 2021 and December 31, 2021 in Salt Lake County, State of Utah the defendant did commit, solicit, request, command, encourage or intentionally aid another person by intentionally or knowingly engaging in a course of conduct directed at a specific person, and knew or *should have known that the course of conduct would cause a reasonable person to fear for the person's own safety* or the safety of a third person or to suffer other emotional distress, to wit: by engaging in two or more acts directed towards J.G., including surreptitious delivery of a numerous objects to J.G.'s place of employment, and by placing an object on or delivering an object to property owned, leased, or occupied by J.G., or to J.G.'s place of employment with the intent that the object be delivered to J.G., or appearing at J.G.'s workplace or contacting J.G.'s employer or coworkers, or sending material by any means to J.G. or for the purpose of obtaining or disseminating information about or communicating with J.G. to a member of J.G.'s family or household, employer, coworker, friend, or associate of J.G.

Information at 2 (emphasis added). Under Count 3 (Utah Code § 76-8-104), the State alleged: "On or about and between March 5, 2021 and November 23, 2021 in Salt Lake County, Utah the defendant did threaten harm to a public servant, party official, or voter, to wit J.G., with a purpose of influencing his action, decision, opinion, recommendation, nomination, vote, or other exercise of discretion." *Id.* None of these allegations addressed Mr. Hall's state of mind. Instead, particularly under the criminal stalking charge, the State focused its attention on the reasonable person standard. Even in the subsequent "DECLARATION OF PROBABLE CAUSE" where the State provided 17 paragraphs of the alleged evidence against Mr. Hall, the State's alleged facts describing speech clearly protected by the First Amendment, and the State completely failed to mention any conscious disregard for a substantial risk that J.G. would view his communications as threatening violence.

A. Political Speech

First, a majority of the allegations made in the Information are clearly protected speech. "Political speech enjoys the broadest protection under the First Amendment." *Jacob v. Bezzant*, 2009 UT 37, ¶ 29. "[D]ebate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 376 U.S. at 270. "Intentionally using criminal charges as an instrument to oppress opposition to government is well within the prohibitions considered part of substantive due process." *Peak Alarm Co., Inc. v. Salt Lake City Corp.*, 2010 UT 22, ¶ 65.

A number of allegations in the Information are political speech and protected under the First Amendment. The March 5, 2021, email criticized J.G. as a politician, stating that J.G. had "paper-thin skin," and lacked experience, and it accused J.G. of "grandstanding," being a "schoolyard bully," and "not a statesman." It also stated that if J.G. did not apologize, there would be "significant efforts made to replace you when you are up for relection." The gag gifts sent to the city council meeting on March 9, 2021 included a number of items clearly meant to mock or criticize J.G.'s temperament and lack of experience (*i.e.*, baby bottle, binky, blanket, etc.). Similarly, the anger management coloring book sent on March 9, 2021, included a note that said, "I hope this helps with your issues buddy." The June 14, 2021, email stated that it would be "amusing to destroy you politically, sentiment of the city has turned against you, you're a joke, and Man-child for mayor." The July 20, 2021, email called J.G. an imbecile. And the court jester hat sent on November 2, 2021, included the message, "you've earned this."

All of these statements are protected by the First Amendment as they were made to a public official within the context of a clear disagreement with that public official's actions. These

statements are not obscene, nor do they incite violence. And the State certainly has not and cannot show that the author of these statements consciously disregarded a substantial risk that his communications would be viewed as threatening violence. Rather, they are more accurately identified as pure political speech, which lies at the core of speech protected by the First Amendment. *See Citizens United v. FEC*, 558 U.S. 310, 339 (2010). Thus, because these alleged communications are protected by the First Amendment, they do not amount to a violation of either Utah Code § 76-5-106.5 or § 76-4-108.

B. True Threats

Second, the State laid out a number of potentially threatening communications in the Information without demonstrating Mr. Hall's required state of mind. The State alleged that the anger management package sent on March 9, 2021, included a second note which stated: "Hey Imbecile !!!!!! Move out of Bluffdale, apologize or kill yourself. It's time for you to start watching your back. This is your final warning. We are moving to the next phase. Do what we ask, or we will do what must be done." A letter on March 24, 2021, said, "it has become very clear lately our messages are not getting across to you. We are ready to move to the next phase. You will no longer have the will to live in Bluffdale. It's time we put you down like the Dog you are, not a statesman." Finally, a letter sent on November 23, 2021, stated: "Unfortunately, (J.G.) you have shown that you will not change until something is done. It's time you leave Bluffdale or resign. If you don't you will end up dead."

At the preliminary hearing, the State presented evidence through 1102 affidavits from the alleged victim and his domestic partner on how they felt when they received the emails, packages, and letters. This is not enough as *Counterman* concluded.

The State did not allege or present evidence of Mr. Hall's subjective intent or conscious disregard of any substantial risk that his communications would be viewed as threatening violence. To be clear, the State only ever applied an objective standard in its presentation of facts at the preliminary hearing. It is best illustrated by the State's main witness, Special Agent Thomas Russell, who testified at the preliminary hearing. He testified that one of the return addresses of the gag gift boxes came back to an ax throwing club. He testified that law enforcement "assumed there was some veiled threat that whoever sent this threw axes." Preliminary Hearing Tr., 22:13-23:1. And on redirect of this same witness, Special Agent Russell was asked by the State "the envelope did have a return address to an ax throwing. Would you consider that an implied threat?" *Id.* at 58:12-19. And Special Agent Russell answered, "Yes, I would." *Id.*

These communications and the evidence of an ax throwing address are similar to some of the more shocking messages in *Counterman*, *see id.* at 2112 ("Fuck off permanently." "Staying in cyber life is going to kill you." "You're not being good for human relations. Die."), but just like that case, the State only provided evidence under the objective standard. Notwithstanding any potentially violent interpretation of these words, under current Supreme Court precedent, without more, these alleged communications are protected speech. The State therefore may not restrict their use no matter who much they dislike the speech or believe the speech has "veiled" or "implied" meanings.

Accordingly, both Utah Code § 76-5-106.5 and § 76-4-108 are unconstitutional as applied to Mr. Hall. In order to prove that the threats alleged in the Information were outside the bounds of First Amendment protection and punishable as crimes, the State was required to establish probable cause that Mr. Hall subjectively and consciously disregarded a substantial risk that his

speech would cause J.G. to fear for his own safety. The State, however, failed to provide ***any*** evidence of Mr. Hall's subjective mental state. As a result, the State alleged insufficient facts to show probable cause that Mr. Hall violated either Utah Code § 76-5-106.5 or Utah Code § 76-4-108. Thus, the State's application of Counts 2 and 3 of the Information unconstitutionally punished conduct protected by the First Amendment. Therefore, this Court should dismiss Counts 2 and 3.

CONCLUSION

For the reasons set forth above, Mr. Hall respectfully requests that this Honorable Court dismiss Count 2 and Count 3 of the Information and any other relief this Court deems proper.

DATED this 14th day of August, 2023.

ARMSTRONG TEASDALE LLP

/s/ Jacob R. Lee
Trinity Jordan
Aaron B. Clark
Jacob R. Lee
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2023, I caused a true and correct copy of the foregoing **MOTION TO DISMISS COUNTS TWO AND THREE OF THE INFORMATION** to be served using the Court's electronic filing system, to the following:

Steven A. Wuthrich
Sean D. Reyes
5272 South College Drive, Ste. 200
Murray, Utah 84123
sreyes@agutah.gov
swuthrich@agutah.gov

Attorney for Plaintiff, State of Utah

/s/ Shelby Irvin
Shelby Irvin