IN THE UTAH COURT OF APPEALS

DAVID AMMON JAKEMAN, Plaintiff/Appellant, v. **SPENCER J. COX, BEAU MASON, DEREK BROWN, STEVE EARL, JEFFREY S. GRAY, MIKE SCHULTZ, J. STUART ADAMS, DEPARTMENT OF PUBLIC SAFETY, UTAH HOUSE OF REPRESENTATIVES, UTAH STATE SENATE, UTAH JUDICIAL COUNCIL, ADMINISTRATIVE OFFICE OF THE COURTS, AND UTAH COUNTY ATTORNEY'S OFFICE, STATE OF UTAH,** Defendants/Appellees.	Appellate Case No. 20260371-CA ____ District Court No. 250401696 (consolidated with Nos. 250403944 and 250403945)

REPLY BRIEF OF APPELLANT TO THE BRIEF OF APPELLEES STEVE EARL AND JEFFREY S. GRAY

PUBLIC

Appeal from the *Judgment* entered March 28, 2026, by the Fourth Judicial District Court, Utah County, the Honorable Shawn R. Howell

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INTRODUCTION

Earl and Gray describe this appeal as one the Court lacks "jurisdiction" to decide because Jakeman did not challenge "the constitutionality of his sentence" in his criminal cases. E/G Br. 2, 46.[1] The district court had subject-matter jurisdiction over this declaratory action. The rule Earl and Gray invoke is a rule about waiver and the limits of habeas corpus after conviction. *See* Part I.A–B. This action asks whether subsections (3) through (5) of Utah Code § 78B-7-804 may authorize permanent orders severing a parent's relationship with non-victim minor children without the findings the right requires. It also asks whether every later change may be conditioned on subsection (4)'s standard, under which an order "may be modified or dismissed only if the court determines by clear and convincing evidence that all requirements of Subsection (3) have been met and the victim does not have a reasonable fear of future harm or abuse." Utah Code § 78B-7-804(4); *see* R.858–59 (Count I, ¶ 22); R.860–61 (¶ 24(1)).

On the merits, Earl and Gray state that the statute "authorizes the sentencing court" to include in a continuous protective order "any other order the court considers necessary to fully protect the victim and members of the victim's family or other household member." E/G Br. 29, 34. They defend the March 16 ruling's as-applied reasoning while stating that the district court's findings "relied on the criminal cases to develop the factual record." E/G Br. 27. And their party argument, which the district

[1] The Opening Brief was dated and served July 3, 2026 and filed July 7, 2026. This reply cites it as "Opening Br.," the Brief of Appellees Steve Earl and Jeffrey S. Gray (replacement version filed with the Notice of Errata) as "E/G Br.," and the State Appellees' Response Brief as "State Br." Commissioner Beau Mason is listed in place of Jess L. Anderson. Utah R. App. P. 38(d); *see* State Br. i.

court did not reach, is answered by their own statement that the statute is one "they are required to enforce." E/G Br. 46; *see* Part VI.

ARGUMENT

I. The collateral-attack rule is not jurisdictional and does not reach this challenge to the statute

Responds to E/G Br. 2, 6, 19–20, 23–28, 46; supports Opening Br. 12 and Parts I–IV.

A. The district court had subject-matter jurisdiction; the rule Earl and Gray invoke concerns waiver

Earl and Gray frame their first issue as one of "jurisdiction" and rely on the rule that subject-matter jurisdiction may be raised at any time. E/G Br. 2. This Court's jurisdiction rests on the final judgment, a timely notice of appeal, and the Utah Supreme Court's transfer of the appeal. Opening Br. 2. The district court "has original jurisdiction in all matters civil and criminal," except as otherwise provided by the constitution or by statute. Utah Code § 78A-5-102(1); *see* Utah Const. art. VIII, § 5. A declaratory action challenging the constitutionality of a statute falls within that grant. The Utah Supreme Court said the same of a civil "collateral attack" seeking to recover fines paid in criminal cases, even as it affirmed the dismissal of that action because the plaintiffs had waived their challenges in the criminal cases and stated no civil cause of action: "as a court of general jurisdiction, the district court had subject matter jurisdiction over this matter." *Bentley v. West Valley City*, 2001 UT 23, ¶¶ 1, 4–7. The *Bentley* plaintiffs sought reimbursement of fines paid in criminal cases they had resolved by plea or had not appealed. *Id.* ¶¶ 1–4. This action asks, under Utah Code § 78B-6-408, for a determination

of a statute's validity, including the standard that will govern proceedings not yet held. *See* Parts I.B–C. Because subject-matter jurisdiction may be raised at any time, "it makes sense to cabin the issues that fall under the category of subject matter jurisdiction." *Johnson v. Johnson*, 2010 UT 28, ¶ 10. In determining subject-matter jurisdiction, the Utah Supreme Court "focus[es] on whether the court has authority over the general class of cases to which the particular case at issue belongs, rather than on the specific facts presented by any individual case." *In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 33. Earl and Gray identify no decision treating the collateral-attack rule as a limit on a district court's subject-matter jurisdiction.

Andrews v. Morris, on which they rely, describes the rule as one of waiver. It states that the Utah Supreme Court "has traditionally applied a restrictive waiver doctrine . . . and has consistently held that a collateral attack by way of habeas corpus may not be utilized as a substitute for, or a duplication of, a direct appeal." 607 P.2d 816, 820 (Utah 1980) (plurality opinion). A waiver rule raised for the first time on appeal is an alternative ground for affirmance, not a limit on this Court's authority, and whether to reach it is discretionary: "[p]rudence counsels against considering an alternative ground if that ground was not ruled on by the lower court, was not adequately briefed on appeal, or deals with an unsettled area of law." *McCaffrey v. Anderson*, 2026 UT 14, ¶ 43. Earl and Gray did not raise it below; their motion to dismiss rested on other grounds. R.1107–19.

The collateral-attack rule does not deprive the district court of subject-matter jurisdiction over a civil action. *See Bentley*, 2001 UT 23, ¶ 6. Because Earl and Gray did not raise it below and the district court did not rule on it, the waiver rule they invoke is at

most an alternative ground for affirmance, and it is not one on which this Court should affirm. *McCaffrey*, 2026 UT 14, ¶ 43.

B. Earl and Gray's cases limit attacks on convictions and violated orders, not challenges to statutes

Andrews was a habeas corpus proceeding. 607 P.2d at 818. *Brown v. Turner* was a habeas proceeding by a prisoner seeking to overturn two judgments and sentences, and the passage Earl and Gray quote begins by addressing "the proper scope and the limitations upon the use of habeas corpus after conviction. It is not a substitute for and cannot properly be treated as a regular appellate review." 21 Utah 2d 96, 440 P.2d 968, 969 (1968); *see* E/G Br. 24–25, 28. Those decisions govern when a convicted person may use a collateral proceeding to re-examine a conviction or sentence. This action asks a different question. It seeks a declaration about the statute that governs continuous protective orders, including the subsection (4) standard on which every future request to modify or dismiss an order will be decided. R.2 ¶ 1; R.844 ¶ 1; R.766 ¶ 1; R.784 ¶ 1; R.858–59 (Count I, ¶ 22); R.860–61 (¶ 24(1)). What effect a declaration would have on orders already entered is a question of remedy for remand. *See* Opening Br. 52–53.

The other collateral-attack decisions Earl and Gray cite concern a protective order raised in a prosecution for violating it. E/G Br. 25. *State v. Baize* states that its rule "applies to situations in which a defendant seeks to attack the validity of a protective order in a criminal proceeding for addressing a violation of that same protective order." 2019 UT App 202, ¶ 12. *State v. Hegbloom* applied the same rule in a prosecution for violating a protective order. 2014 UT App 213, ¶¶ 10, 15. This action is not a prosecution

for violating an order, and no order is offered in it as the basis of a claim. *See Hegbloom*, 2014 UT App 213, ¶ 10. The decisions Earl and Gray cite limit collateral attacks on convictions, sentences, and violated orders; none bars a declaratory challenge to the statute that will govern future proceedings.

C. The rule's policy reasons concern challenges to a sentence, not standards for future proceedings

Earl and Gray add that the rule "protects criminal victims and the public interests behind the criminal process by allowing the criminal court and prosecution to address and resolve any error in the first instance," and that Jakeman "has presented no basis for this Court to determine that he was unable to raise his constitutional challenges before the criminal court." E/G Br. 27–28. Those reasons concern where a challenge to a particular conviction or sentence must be raised. This action seeks a declaration about the statute that will govern proceedings not yet begun: every future request to modify or dismiss a continuous protective order will be decided under subsection (4), and every future victim's petition under subsection (5). Utah Code § 78B-7-804(4), (5); *see* R.858–59 (Count I, ¶ 22). Any effect on orders already entered is a question of remedy on remand. Opening Br. 52–53. A person "whose rights, status, or other legal relations are affected by a statute" may ask a court "to determine any question of construction or validity arising under the . . . statute." Utah Code § 78B-6-408. The policy reasons Earl and Gray give for the rule therefore do not extend it to a declaratory challenge to the standards that subsections (4) and (5) will apply.

D. *Jakeman II*, the criminal appeal, declined to entertain the facial claim

Earl and Gray state that the facial challenge "was waived." E/G Br. 19; *see* E/G Br. 6, 26. *Orem City v. Jakeman*, 2025 UT App 187 (*Jakeman II*), addressed two unpreserved claims: that the orders were issued "without complying with" subsection (5), and that subsection (5) "is unconstitutional as applied." *Id.* ¶¶ 5, 13. As to the facial challenge to subsection (3), first raised in the reply brief, footnote 3 quotes the rule that such an issue "is waived and will typically not be addressed by the appellate court," and then states: "Accordingly, we decline to entertain this new assertion." *Id.* ¶ 13 n.3. As to the as-applied constitutional claim, the Court held that any error was not obvious because "the law in this matter is far from settled." *Id.* ¶ 14. Earl and Gray also say that this Court held that Jakeman "invited any error." E/G Br. 19; *see* E/G Br. 27. The invited-error holding concerned only the first claim, that the orders were issued without complying with subsection (5). *Jakeman II*, 2025 UT App 187, ¶¶ 11–12. Earl and Gray make the same "too late" point about the equal-protection claim. E/G Br. 44–45 (citing *Jakeman II*, 2025 UT App 187, ¶ 13 n.3). Footnote 3 declined to entertain that assertion too. Because footnote 3 declined to entertain the facial challenge to subsection (3) first raised in the reply brief, and the plain-error holding on the as-applied claim concerned whether any error was plain rather than whether the statute is valid, *Jakeman II* did not decide the facial claim this action presents. 2025 UT App 187, ¶¶ 13 n.3, 14–15. Earl and Gray's waiver point therefore rests on the rule of *Andrews* and *Brown v. Turner* for collateral attacks on convictions and sentences, which does not govern a declaratory challenge to a statute. *See* Part I.B.

In sum, the collateral-attack rule neither limits jurisdiction nor supports affirmance. Earl and Gray did not raise it below, and the district court did not rule on it. *McCaffrey*, 2026 UT 14, ¶ 43. The district court had subject-matter jurisdiction over this declaratory action. The rule Earl and Gray invoke limits collateral attacks on convictions, sentences, and violated orders, and no order is offered here as the basis of a claim or defense. And the claims concern the standards that subsections (4) and (5) will apply in future proceedings; any effect of a declaration on an existing order is a question of remedy for the district court on remand.

II. The claim is facial because it challenges what the statute authorizes and requires for every order

Responds to E/G Br. 28–30; supports Opening Br. Parts I–II.

Earl and Gray argue that "[l]abeling the claims 'facial' does not change their character." E/G Br. 19; *see* E/G Br. 28. They add that the extension of an order to a defendant's non-victim children "is not something section 78B-7-804 requires," and that whether an order should reach a particular child is "a judgment the sentencing court makes." E/G Br. 29–30. In the same passage they state that the statute "authorizes the sentencing court" to include "any other order the court considers necessary to fully protect the victim and members of the victim's family or other household member." E/G Br. 29 (quoting Utah Code § 78B-7-804(3)(d)(v)).

That authorization is what the claim challenges. Each complaint pleads a facial challenge. R.2 ¶ 1; R.844 ¶ 1; R.766 ¶ 1; R.784 ¶ 1. The claim targets the statute's operation "when 'continuous protective orders' are, will be, or may be issued pursuant to

them and such orders include, will include, or may include non-victim minor children as protected parties." R.858–59 (Count I, ¶ 22). The Utah Supreme Court states a facial claim the same way, by the operation it targets: "So we understand his argument to be that the Statute is unconstitutional to the extent it permits a person's domicile to be determined by the actions or location of a spouse." *Tischmak v. Utah State Tax Commission*, 2025 UT 24, ¶ 28. Earl and Gray say that a claim aimed at that kind of operation "targets only a subset of the statute's applications" and so "is not a facial challenge." E/G Br. 34. *Tischmak* treated the narrowed claim as facial; the opinion then states that a taxpayer could avoid the challenged operation by filing separately. 2025 UT 24, ¶¶ 27–28. Unlike that election, which the taxpayer alone controls, subsections (3) through (5) give the parent no election of his own. He may request a hearing, but the hearing asks whether the victim has a reasonable fear of future harm or abuse. Utah Code § 78B-7-804(3)(b)–(c). And subsection (4) permits a later change only if "all requirements of Subsection (3) have been met and the victim does not have a reasonable fear of future harm or abuse." *Id.* § 78B-7-804(4). Earl and Gray point to the Opening Brief's use of Jakeman's own orders. E/G Br. 29, 36. A challenger who "references the specific facts of his own case throughout his briefing" in "support of his facial constitutional challenge" still brings a facial challenge. *Tischmak*, 2025 UT 24, ¶ 27. In assessing a facial challenge, the United States Supreme Court "has considered only applications of the statute in which it actually authorizes or prohibits conduct." *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015). An offender with no children, or whose only children were victims of the offense, is not a person for whom the challenged

authorization operates. Earl and Gray call "no set of circumstances" "the test, not merely a description of the result." E/G Br. 20. Either way, a court cannot decide whether a statute would be valid in any circumstance without first deciding what validity requires. *Cf. Tischmak*, 2025 UT 24, ¶ 39.

Earl and Gray described the claim the same way below: "Put simply, Plaintiff does not challenge how Defendants enforce the statute; he challenges the statute itself." R.2670. And in its equal-protection order, the district court states that Jakeman "confirmed in the hearing that he has not brought an as-applied challenge; he brings only a facial challenge." R.3052 n.4.

The sentencing court's discretion does not change the character of the claim. The statute makes every continuous protective order "permanent in accordance with this Subsection (3)," Utah Code § 78B-7-804(3)(d), and provides that it "may be modified or dismissed only if the court determines by clear and convincing evidence that all requirements of Subsection (3) have been met and the victim does not have a reasonable fear of future harm or abuse," *id.* § 78B-7-804(4). That standard applies to every order, whatever its terms, and no sentencing court chooses it.

In sum, the claim is facial. It challenges what subsections (3) through (5) authorize and require for every order that reaches a parent's non-victim minor children: an order that is permanent, that gives the parent no election of his own, and that may be modified or dismissed only on the showing subsection (4) requires. The sentencing court's discretion over an order's terms does not convert a challenge to the statute's operation

into an as-applied challenge. Utah Code § 78B-7-804(3)(d), (4); *Tischmak*, 2025 UT 24, ¶¶ 27–28.

III. The Utah ruling cannot be affirmed on an as-applied claim this action does not present

Responds to E/G Br. 30–37; supports Opening Br. Part II (Utah Const. art. I, § 7).

A. Earl and Gray place any as-applied question in the criminal case, not in this action

Earl and Gray state that whether an order "should extend to a particular child is a judgment the sentencing court makes in the criminal case," and that a challenge to that judgment "is an as-applied challenge, and its home is the criminal case and the direct appeal from it." E/G Br. 29–30. They repeat that any concern arising from "how the statute is applied in a particular case" is one that "must be raised in the criminal case." E/G Br. 36. They then argue that "it is irrelevant whether Jakeman pleaded an as-applied challenge," because the facial claim "fails a fortiori" if the statute is constitutional as applied to him. E/G Br. 36–37. On their own account, then, an as-applied answer given in this civil action is not a ground for affirming the judgment on the facial claim this action presents. R.2 ¶ 1; R.844 ¶ 1; R.766 ¶ 1; R.784 ¶ 1.

B. *Herrera* rejected the facial claim a fortiori after upholding the statutes as applied

Earl and Gray rely on *State v. Herrera*, 1999 UT 64, ¶ 50. E/G Br. 36–37. In *Herrera*, the defendant challenged the statutes both on their face and as applied, and the Utah Supreme Court decided the as-applied challenge first: "Here, we have already

upheld the challenged statutes as applied to Herrera; thus, his facial challenge fails a fortiori." 1999 UT 64, ¶ 50. The rule follows from an as-applied claim that was raised and decided. Here each complaint pleads a facial challenge. R.2 ¶ 1; R.844 ¶ 1; R.766 ¶ 1; R.784 ¶ 1. *Herrera* applied its a fortiori rule after deciding an as-applied claim that had been raised; it does not support affirming the rejection of a facial claim on an as-applied analysis where no as-applied claim was pleaded.

The March 16 ruling's as-applied reasoning begins from the rule that "a facial challenge must fail a fortiori if the challenged statute is constitutional as applied to the plaintiff." R.3253. Its other premises are the convictions and the hearing, the statute's own trigger and procedure, and the evidence they produced, which the ruling calls "evidence of risk" and "objective evidence of danger." R.3253. The order form also prints, among the statements under the heading "The court finds," that the defendant "represents a credible threat to the physical safety of the protected person." R.24; *see* E/G Br. 30 (adopting the State's due-process arguments); State Br. 28–29. Subsection (3)(b) does not make that statement a condition of the order, and the March 16 ruling does not rely on it. Utah Code § 78B-7-804(3)(b); R.3253. Earl and Gray describe the statute's procedures: notice, a hearing on whether "the victim does not have a reasonable fear of future harm or abuse," discretion over the order's terms, and subsection (4)'s standard for modification. E/G Br. 34–35. The hearing and the modification standard each turn on the victim's fear, and none of these procedures requires a finding that the parent is unfit before an order reaches the parent's non-victim children. Utah Code § 78B-7-804(3)(b)–(d), (4). A ruling that the statute's procedure satisfies the Constitution because the

statute's procedure was followed decides the facial question by assuming its answer. Opening Br. 31–32.

C. The as-applied reasoning rests, in Earl and Gray's words, on the criminal cases' record

Earl and Gray state that "this civil action did not build the record for Jakeman's constitutional challenges. Indeed, all the motions filed and the findings of fact made by the district court relied on the criminal cases to develop the factual record." E/G Br. 27. That description fits the facts the March 16 ruling recites about the September 2024 hearing. The ruling's account of that hearing was drawn from "the briefing and attachments submitted by the parties," and the State's motion cited a transcript filed in the criminal case's docket. R.3250; R.2862 nn.30–33. That account is not the litigated as-applied determination on which *Herrera*'s a fortiori rule depends. Opening Br. 29–30. The ruling's other ground, that the statute applies to offenders who have no children or whose children were the victims, R.3253, measures the statute by applications in which it does not reach the operation the claim targets. *See* Part II. Neither ground supports affirming the March 16 ruling on the facial claim.

D. The rational-basis sentence Earl and Gray quote concerns orders not reaching non-victim children

Earl and Gray rely on the amended complaint's statement that when orders "do not, will not, or may not include non-victim minor children of the individual, or otherwise implicate a constitutional right, rational basis review applies." R.860; *see* E/G Br. 20, 34, 38–39. The sentence appears in Count II, the equal-protection claim, where it

identifies the level of scrutiny for applications that do not reach non-victim children. R.859–60. The due-process claim is Count I. R.858–59. A statement that rational-basis review governs applications outside the challenged operation identifies the operation the claim targets. *See Tischmak*, 2025 UT 24, ¶ 28.

In sum, the March 16 ruling on the Utah claim cannot be affirmed on an as-applied basis. This action pleads a facial claim; Earl and Gray place any as-applied question in the criminal case; and Earl and Gray state that "all the motions filed and the findings of fact made by the district court relied on the criminal cases to develop the factual record." R.2 ¶ 1; R.3253; E/G Br. 27, 29–30, 36. The Utah facial claim must be decided under the level of scrutiny the asserted right requires, applied to the operation the claim challenges.

IV. The federal dismissal is reviewed de novo on the complaint and the written order, without a transcript

Responds to E/G Br. 37–39; supports Opening Br. Part IV (U.S. Const. amend. XIV, § 1).

The August 4 order granted the State's motion to dismiss the federal due-process claim "either as a facial challenge or as an 'as-applied' challenge," and states no reason for that dismissal. R.687–88. Earl and Gray argue that "[t]he additional grounds provided by the district court at that hearing are not, but could have been, presented to this Court through that transcript." E/G Br. 39. Whether a complaint states a claim under Utah Rule of Civil Procedure 12(b)(6) is a question of law decided on the complaint. Earl and Gray state the same standard: "The propriety of a [Rule] 12(b)(6) dismissal is a question of law." E/G Br. 3; *see* Opening Br. 3. "Regardless of the language used during the hearing, the language in the court's final written order controls, and we will presume the order is

correct unless affirmatively shown otherwise." *Evans v. State*, 963 P.2d 177, 180 (Utah 1998). The order states no reason, and the complaint pleads the claim, so the showing *Evans* requires is made from those two documents. Opening Br. 39–43.

Earl and Gray also rely on *United States v. Rahimi*, 602 U.S. 680 (2024). E/G Br. 37–38. The Opening Brief addresses *Rahimi*. Opening Br. 19, 28. One further point answers Earl and Gray's use of it: in rejecting Rahimi's facial challenge, the Court relied in part on the fact that the restriction "was temporary as applied to Rahimi." 602 U.S. at 699; *see id.* at 713 (Gorsuch, J., concurring) ("We do not resolve whether the government may disarm an individual permanently."). The orders this statute authorizes are "permanent" and may be modified only under subsection (4). Utah Code § 78B-7-804(3)(d), (4). *Rahimi*, which relied in part on the temporary character of the restriction it upheld, therefore does not support affirming the dismissal of a challenge to a statute that authorizes permanent orders. Earl and Gray also say that, "[a]s with Rahimi, Jakeman's criminal case shows" a constitutional application. E/G Br. 38. That application was not pleaded, R.2 ¶ 1, and the August 4, 2025 order states no reason for dismissing the claim, R.687–88. *See* Opening Br. 42–43.

In sum, the federal dismissal is reviewed de novo on the complaint and the August 4 order. The order states no reason for dismissing the claim, the complaint pleads a facial claim, and under *Evans* the written order, not the hearing, controls. The dismissal should be vacated and the claim remanded for adjudication under the governing constitutional standard; at a minimum, the order's "with prejudice" designation and its disposition of an unpleaded "as-applied" claim should be vacated. *Evans*, 963 P.2d at 180; R.687–88.

V. The equal-protection rationales apply equally to an offender who served the same confinement before conviction

Responds to E/G Br. 39–45; supports Opening Br. Part V (U.S. Const. amend. XIV, § 1).

A. The comparator is similarly situated and is treated differently

The comparator is the offender "who served no post-conviction incarceration—including one who served an equal or greater period before conviction." Opening Br. 45. That offender has been convicted of the same offense and has served the same or a longer period of confinement. The difference is when the confinement was served. One offender is subject to a continuous protective order the court "shall issue" unless, after a hearing, it determines by clear and convincing evidence that the victim lacks a reasonable fear of future harm or abuse, and that order is "permanent in accordance with this Subsection (3)." Utah Code § 78B-7-804(3)(b), (3)(d). The other may be subject to a sentencing protective order, *id.* § 78B-7-804(2), and to a continuous protective order only if the victim petitions and the court, "after notice and hearing," finds one "necessary to protect the victim," *id.* § 78B-7-804(5). *See* Opening Br. 48.

Earl and Gray state that an equal-protection claimant must "first make the threshold showing that [he] was treated differently from others who were similarly situated." E/G Br. 40 (citing *Brown v. Montoya*, 662 F.3d 1152, 1173 (10th Cir. 2011)). The comparator makes that showing: it identifies offenders convicted of the same offense, sentenced, and confined for the same or a longer period, whom the statute treats differently by when that confinement was served.

B. The release-risk, incentive, and seriousness rationales apply equally to the excluded offender

The January 14 order's rationale distinguishes alleged offenders before conviction from adjudicated offenders after it. R.3054. The offender the comparator describes has also been convicted and sentenced. Earl and Gray add that offenders sentenced to post-conviction incarceration "are likely to have committed more violent crimes." E/G Br. 43 (citing R.2629–31). The State Appellees' opposition below said: "For one, that timing attaches a CPO to convicted domestic abusers sentenced to more time than what can be credited for time served—thus, on balance, a CPO attaches to dangerous domestic abusers." R.2630. An offender who served an equal or greater period before conviction received the same or a longer total confinement. The March 19 order states: "While Plaintiff correctly points out that an offender released on 'time served' may also pose a risk to a victim, the Equal Protection Clause does not require a legislature to strike at all evils at the same time or in the same way." R.3271. Earl and Gray call this an argument that the statute is underinclusive, and they say Jakeman bore the burden to negate "every conceivable basis which might support" the classification. E/G Br. 43–44 (quoting R.3270). The offender who served his confinement before conviction is released into the community after the same or a longer period of confinement than the offender the statute reaches, so the concern about the period after release applies to both. In *Cleburne*, concerns that "fail to explain why" other groups were treated differently did not justify the permit requirement. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985). *FCC v. Beach Communications, Inc.* accepts that a line may place on

different sides persons "who have an almost equally strong claim to favored treatment," 508 U.S. 307, 315–16 (1993) (quotation omitted), but only "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," *id.* at 313. A rationale that is equally true on both sides of the line does not provide one. The distinction between alleged and adjudicated offenders, the period after release, the end of the incentive at sentencing, and the seriousness reflected in total confinement apply equally to the offender the line excludes. Opening Br. 45–51.

Earl and Gray also note that the August 4 order's equal-protection reasoning came in an interlocutory ruling that rule 54(b) allowed the district court to revise. E/G Br. 44 (citing R.688–89, 3268). The Opening Brief relies on that reasoning for its force, not as a binding ruling. Opening Br. 51.

C. Subsection (4) turns on the victim's fear, not a non-victim child's

Earl and Gray also say: "If, and when, Jakeman's non-victim minor children no longer have a reasonable fear of harm from Jakeman, the criminal court can modify the CPOs." E/G Br. 41 (citing Utah Code § 78B-7-804(3)(d), (4)). Subsection (4) asks about the victim's fear: it permits modification "only if the court determines by clear and convincing evidence that all requirements of Subsection (3) have been met and the victim does not have a reasonable fear of future harm or abuse." Utah Code § 78B-7-804(4). Under subsection (4), whether an order continues to reach a child who was not the victim turns on the requirements of subsection (3) and the victim's fear, not the child's.

In sum, the line subsection (3) draws separates convicted offenders by when they serve their confinement. Each rationale offered for it—release risk, the distinction between alleged and adjudicated offenders, the end of the sentencing incentive, and seriousness—is equally true of an offender who served the same or a greater confinement before conviction. The January 14, 2026 and March 19, 2026 rulings should be reversed. Utah Code § 78B-7-804(3)(b), (5).

VI. Earl and Gray's improper-party argument was not decided below and fails because they enforce the statute

Responds to E/G Br. 45–46.

Earl and Gray acknowledge that "the district court did not reach Mr. Gray's and Mr. Earl's independent arguments." E/G Br. 46. They raised the argument in their motion to dismiss. R.1107–12. Whether to consider an alternative ground is discretionary, and "[p]rudence counsels against considering an alternative ground if that ground was not ruled on by the lower court." *McCaffrey*, 2026 UT 14, ¶ 43.

The argument also fails on the record. Earl and Gray describe the statute as one "they are required to enforce and are incapable of changing." E/G Br. 46; *see* E/G Br. 23. A declaration and an injunction run against the officers who enforce a statute, not only those who can amend it. Under *Kitchen v. Herbert*, on which Earl and Gray relied below, R.2664–65, a proper defendant "need only have a particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." 755 F.3d 1193, 1201 (10th Cir. 2014) (quotation omitted) (quoting *Chamber of Commerce of the U.S. v. Edmondson*, 594 F.3d 742, 760 (10th Cir. 2010)). The first substantive due-process

ground in their motion turned on whether their own conduct was "truly conscience shocking." R.1108, 1110. That is the test for executive action; legislation is measured differently. *County of Sacramento v. Lewis*, 523 U.S. 833, 846–47 & n.8 (1998).

In sum, the improper-party argument was not decided below, and Earl and Gray's own description of their role answers it. A proper defendant "need only have a particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty," and Earl and Gray describe the statute as one "they are required to enforce." *Kitchen*, 755 F.3d at 1201 (quotation omitted); E/G Br. 46.

CONCLUSION

For these reasons and those stated in the Opening Brief, the Court should reverse the district court's August 4, 2025, January 14, 2026, March 16, 2026, and March 19, 2026 rulings, and the March 28, 2026 final judgment, and grant the relief requested at pages 52–53 of the Opening Brief:

1. As to the substantive-due-process claims (Opening Br. Parts I, II, and IV): Vacate the August 4, 2025 dismissal and the March 16, 2026 summary judgment and remand both claims for adjudication under the governing constitutional standard; and, at a minimum, vacate the August 4 dismissal's "with prejudice" designation and its disposition of an unpleaded "as-applied" claim.

2. As to the merits of the Utah claim (Opening Br. Part III): Hold that sections 78B-7-804(3) through (5) are facially unconstitutional under article I, section 7 of the Utah Constitution to the extent they authorize the permanent severance of a parent's

relationship with non-victim minor children without the findings the fundamental right requires, and direct entry of judgment accordingly.

3. As to the equal-protection claim (Opening Br. Part V): Reverse the January 14, 2026 and March 19, 2026 rulings and direct entry of judgment for Jakeman, or, in the alternative, remand for application of the correct standard.

Dated: November 7, 2026

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Utah Rule of Appellate Procedure 24(g)(1) because the parts of this brief counted under rule 24(g) contain 5,625 words.

2. This brief complies with Utah Rule of Appellate Procedure 21 because it contains no non-public information.

Dated: November 7, 2026

/s/ David Ammon Jakeman
DAVID AMMON JAKEMAN

CERTIFICATE OF SERVICE

I certify that on November 7, 2026, I served a copy of this brief by email on the following:

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