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 STATE APPELLEES' RESPONSE BRIEF

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

The State Appellees lead with a ground that, in the State's words, "was not raised before or ruled upon by the district court." State Br. 16; *see* State Br. 2. That ground, the collateral-attack rule, governs attempts to undo a judgment by attacking it in a later proceeding. This action seeks, among other relief, a declaration and an injunction concerning what Utah Code § 78B-7-804(3) through (5) authorize and the standard that subsection (4) applies to every request to modify or dismiss a continuous protective order. R.858–59 (Count I, ¶ 22); R.861; R.782; R.797; *see* Part I.F. And in the earlier appeal from the protective orders, this Court declined to entertain the facial challenge to subsection (3) first raised in the reply brief. *Orem City v. Jakeman*, 2025 UT App 187, ¶ 13 n.3 (*Jakeman II*).

On the merits, the State acknowledges that the statute's discretionary terms "might conceivably limit contact with non-victims as well," and says that when an order limits contact with non-victim minor children, "that is a function of the CPO, not the CPO Statute." State Br. 22. A facial challenge tests what the statute authorizes. *See* Part II.A. On the federal claim, the State asks this Court to affirm a dismissal that states no reason for dismissing the due-process claim. It relies on an as-applied analysis that the State's summary-judgment motion grounded first in that same dismissal. And on equal protection, the release-risk rationale the State defends applies equally to an offender who served the same confinement before conviction, while the statute's line separates convicted offenders from one another by when they serve their time.[1]

[1] The Opening Brief was dated and served July 3, 2026 and filed July 7, 2026. This reply cites it as "Opening Br." and the State Appellees' Response Brief as "State Br."

ARGUMENT

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

Responds to State Br. 12–17, a ground for affirmance the State raises for the first time on appeal; supports Opening Br. 12 and Parts I–IV.

The State asks this Court to affirm on a ground the State did not raise below and the district court did not rule on: that this action is an improper collateral attack on the continuous protective orders entered in Jakeman's criminal cases. The ground fails for three reasons. It turns on questions the district court did not decide (Part I.A). The State's collateral-attack cases bar attacks on an order or judgment offered as the basis of a later claim or defense, and this action offers none on that basis. Nor did the State ask the district court to apply the discretionary *McRae* rule to this action (Parts I.B–E). And the claims concern the standard that will govern future proceedings under subsections (4) and (5) (Part I.F).

A. The State did not raise this ground below; its questions are undecided

The State does not contend it raised the collateral-attack rule below. State Br. 2, 16. It says it was "not unreasonable to defer such arguments while the criminal proceedings were not yet final," and it places that finality on April 7, 2026, after every ruling under review and after the March 28, 2026 judgment. State Br. 16–17; *see* R.3277–78. The State also says that *McRae* makes a collateral attack improper "even while the original proceeding is on-going." State Br. 17. On the State's account, the argument was

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Commissioner Beau Mason is listed in place of Jess L. Anderson. Utah R. App. P. 38(d); *see* State Br. i.

available throughout, and the State elected to "focus instead on the substance of Jakeman's claims." State Br. 17.

An appellate court may affirm on a ground apparent on the record, but it may not find new facts to do so. *Bailey v. Bayles*, 2002 UT 58, ¶¶ 10, 13, 20. And "[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. The State's ground turns on questions the district court did not decide: what relief the consolidated complaints seek against which orders, what each existing order provides, and whether a declaration about subsections (4) and (5) operates on any judgment at all. Prudence counsels against deciding them for the first time on appeal. *McCaffrey*, 2026 UT 14, ¶ 43.

B. The State's cases concern an order offered to support a later claim; none is offered here

The State's cases treat an attack as collateral when the judgment "is offered as the basis of a claim in a subsequent proceeding." *State v. Hegbloom*, 2014 UT App 213, ¶ 10 (quoting *Olsen v. Bd. of Educ. of Granite Sch. Dist.*, 571 P.2d 1336, 1338 (Utah 1977)). *Hamilton*, *Hegbloom*, and *Baize* fit that description. *State v. Hamilton* concerned a defendant whose defense to a criminal trespass charge was held to be an impermissible collateral attack on earlier civil judgments. 2003 UT 22, ¶¶ 11, 25, 31. *Hegbloom* concerned a defendant who challenged a protective order in the prosecution for violating it. 2014 UT App 213, ¶¶ 1, 7. *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; *see id.* ¶ 11.

This action is not a prosecution for violating an order, and no order is offered in it as the basis of a claim. Each complaint states that it challenges "the facial constitutionality" of the statute. R.2 ¶ 1; R.844 ¶ 1; R.766 ¶ 1; R.784 ¶ 1. The State's description of the consolidated cases as "an attack on the CPOs," State Br. 12, rests on the prayers for relief, which Part I.F addresses.

Because no protective order or other judgment is offered in this action as the basis of a claim or defense, the collateral-attack rule applied in *Hamilton*, *Hegbloom*, and *Baize* does not bar this action.

C. Below, the State invoked *McRae*'s discretionary rule only against later actions

This Court describes the authority recognized in *McRae & DeLand v. Feltch*, 669 P.2d 404, 405 (Utah 1983), as a matter of the district court's "discretion—grounded in the common law—to dismiss declaratory judgment actions in the name of efficiency and judicial economy," and holds that the case before it did not present "one of the rare instances in which a Utah court is empowered to entirely refuse to adjudicate a case pending before it." *Williamson v. Farrell*, 2019 UT App 123, ¶¶ 17, 22.

The State invoked *McRae* below for a different purpose: to argue that Jakeman's second and third civil actions duplicated this one. R.953; R.963. It did not ask the district court to decline this action in favor of the criminal cases, and the district court decided

the claims. A discretionary rule the State did not ask the district court to apply is not a ground on which this Court should affirm. *McCaffrey*, 2026 UT 14, ¶ 43.

D. No decision the State cites adopts its "past, present, or even future" rule

The State proposes that a collateral attack is barred whenever, "whether past, present, or even future," the challenger "had, ha[s], or will have a direct opportunity to challenge the protective order." State Br. 13–14. None of the decisions the State cites states that rule. Applied as written, it would bar a declaratory challenge to subsections (4) and (5) by any person subject to a continuous protective order, because any such order may be the subject of a later modification request under subsection (4). On that rule, no such person could ask a court "to determine any question of construction or validity arising under the . . . statute," as Utah Code § 78B-6-408 permits. Because no decision the State cites adopts the State's "past, present, or even future" rule, and because that rule would bar every person subject to a continuous protective order from seeking a declaration under Utah Code § 78B-6-408 about subsections (4) and (5), it is not a ground for affirmance.

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

The State says that Jakeman "had—and used—the opportunity to challenge the CPOs in *Jakeman II*," and that he "even raised the same facial constitutional challenges he now raises here." State Br. 14–15. *Jakeman II* addressed two unpreserved claims: that the district court erred in issuing the orders without complying with subsection (5), and that subsection (5) was unconstitutional as applied. 2025 UT App 187, ¶¶ 5–6, 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. The State's own footnote agrees that the facial claims "weren't raised until his appellate reply brief." State Br. 14 n.6.

The State also describes *Jakeman II* as holding that the statute "readily survived" plain-error review. State Br. 5. The opinion holds: "Given the absence of settled law on this point, the district court did not plainly err in failing to recognize the alleged unconstitutionality of Subsection (5) that Jakeman attempts to identify on appeal." 2025 UT App 187, ¶ 15 (footnote omitted); *see id.* ¶ 14. That is a holding about whether an error was plain, not about validity.

The State answers that the doctrine "does not turn on whether a specific challenge was raised in the original proceeding but whether it could be." State Br. 15. The decisions it cites for that point applied the doctrine to an order or judgment offered as the basis of a claim or defense in a later proceeding. *See* Part I.B. They do not address a claim about the standard that subsections (4) and (5) will apply in proceedings that have not yet occurred. *See* Part I.F.

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.

F. Subsections (4) and (5) govern future proceedings; effects on existing orders are a remand question

The State reads the prayers for relief as seeking "a determination that his existing CPOs are unenforceable." State Br. 12 (citing R.384, 782, 797). The phrase "no longer enforceable" appears in the first action's prayer. R.861; R.384. In all three actions, the requested injunction is limited to enforcement "in cases involving non-victim minor children who have been, will be, or may be included as protected parties." R.861; R.782; R.797. The relief requested on appeal is the relief set out at Opening Br. 52–53, which the Conclusion below repeats. Whether and how any declaration would affect an order already entered is a question of remedy for the district court on remand, after the merits are decided.

The merits themselves operate forward. A continuous protective 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). Jakeman asked the criminal court for a hearing to modify the orders. R.2863 ¶ 24. The State's summary-judgment motion reports that the criminal court later denied the request without a further hearing, applying subsection (4)'s fear standard. R.2863 ¶ 24. Every future modification request will be decided under subsection (4), and every future petition under subsection (5). A declaration about the standard that governs those future proceedings operates on those proceedings.

In sum, the collateral-attack rule does not support affirmance. The State did not raise it below, and it turns on questions the district court did not decide. *McCaffrey*, 2026 UT 14, ¶ 43. The collateral-attack decisions the State cites apply the rule to an order or judgment offered as the basis of a later claim or defense, and none is offered on that basis here. Nor did the State ask the district court to apply *McRae*'s discretionary rule to decline this action in favor of the criminal cases. 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 Utah facial claim tests what the statute authorizes, and it authorizes orders reaching non-victim children

Responds to State Br. 18–25; supports Opening Br. Parts I–III (Utah Const. art. I, § 7).

The Utah claim is Count I of the operative complaint in the lead action, and it challenges subsections (3) through (5). R.858–59 (Count I, ¶ 22); R.860 ¶ 23; R.861. The question the State raises about the complaints in the second and third actions, State Br. 18 n.8, therefore does not narrow the Utah claim.

A. A facial claim is measured by its targeted operation, which the parent cannot avoid

The State reads *Tischmak v. Utah State Tax Commission* as requiring a facial challenger to show that "no set of circumstances exists under which the [statute] would be valid." State Br. 19 (quoting 2025 UT 24, ¶ 27). In the same case, the Utah Supreme Court states the facial claim by the operation it targeted: "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." 2025 UT 24, ¶ 28. The opinion then states that the statute "allows taxpayers to avoid having a spouse's activity factored into their domicile status by filing their taxes 'married filing separately,'" and that this option is "likely sufficient, on its own, to dispose of Tischmak's constitutional claims." *Id.* (footnote omitted). Unlike the taxpayer's filing election in *Tischmak*, 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 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." *Id.* § 78B-7-804(4). The opinion then states the right asserted and the rule that sets the level of scrutiny: "if a fundamental right . . . is implicated, we apply strict scrutiny; if not, only rational basis review is required." *Tischmak*, 2025 UT 24, ¶ 39. It holds that the Utah due-process and uniform-operation claims fail because Tischmak "has not advanced any argument that the Statute fails rational basis review." *Id.* ¶¶ 30–33, 37, 39–41. The State acknowledges that "the court sometimes undertakes to identify the subject right and the appropriate level of review," and says that it does so "in the context of determining whether the challenger carried their burden." State Br. 19.

A court cannot decide whether any set of circumstances exists in which a statute "would be valid" without first deciding what validity requires. The March 16 ruling does not identify a level of scrutiny or apply one. Its first ground is that the statute "broadly

applies to perpetrators of domestic violence, many of whom do not have children, or whose children were the direct victims of the abuse," and therefore "undoubtedly operates constitutionally in at least some circumstances." R.3253. The ruling's premise, that a continuous protective order against an offender with no children "in no way burdens fundamental parental rights," *id.*, concerns applications outside the operation the claim challenges. The decision the State cites for the first ground, *In re E.K.S.*, measures validity within the operation challenged. State Br. 21 (citing 2016 UT 56, ¶ 19). *E.K.S.* considered the statute "solely as a prohibition on the appointment of counsel in privately initiated parental termination proceedings" and held that, even so read, "the statute would still not be facially unconstitutional," because due process requires appointed counsel only in some of those proceedings. 2016 UT 56, ¶ 19. The claim here is different in kind: it is that the statute authorizes every order reaching a non-victim child without the findings the right requires. R.858–59 (Count I, ¶ 22); Opening Br. 32–39. The ruling's second, as-applied ground is addressed in Part III.C and at Opening Br. 24–31. The operation challenged here is an order that reaches a parent's non-victim minor children, which the statute authorizes without requiring any finding of parental unfitness and permits to be lifted only on the showing subsection (4) requires. R.858–59 (Count I, ¶ 22); Utah Code § 78B-7-804(3)(d), (4).

Federal decisions measure a facial claim the same way. 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). For the statute in *Patel*, "the proper focus of the constitutional

inquiry is searches that the law actually authorizes, not those for which it is irrelevant." *Id.*; *see United States v. Supreme Court of New Mexico*, 839 F.3d 888, 914 (10th Cir. 2016). An offender with no children, or whose only children were victims of the offense, is not a person for whom the challenged authorization operates.

If the right is fundamental, "the proponent of legislation infringing parental rights must show (1) a compelling state interest in the result to be achieved and (2) that the means adopted are narrowly tailored to achieve the basic statutory purpose." *Wells v. Children's Aid Society of Utah*, 681 P.2d 199, 206 (Utah 1984) (quotation omitted). The State's brief makes no argument that subsections (3) through (5) meet that standard. *See* State Br. 18–25. The State reads *Utah Public Employees Ass'n v. State* as limited because the Utah Supreme Court declined to follow *Salerno* "in this instance." State Br. 20 (quoting 2006 UT 9, ¶ 25). The same sentence states that the court is "not required to follow *Salerno*'s 'restrictive' test for facial challenges." 2006 UT 9, ¶ 25. The State's footnote confines that sentence to takings claims. State Br. 20 n.9. The reason the court gave is not so limited: "states have the authority to create their own constitutional law when reviewing claims brought under their own state constitution." 2006 UT 9, ¶ 25. *See* Opening Br. 21, 23.

A facial challenge to subsections (3) through (5) is measured by the operation it targets (orders that reach a parent's non-victim minor children) and under the level of scrutiny the asserted right requires. The March 16 ruling identified no level of scrutiny and measured the statute by offenders who have no children or whose children were victims. R.3253. It therefore did not decide the facial claim under the governing standard.

B. The statute mandates the order, makes it permanent, lets it reach family members, and limits modification

The State says the statute requires only an order limiting contact "between the perpetrator and the victim," that its other terms are discretionary, and that if an order reaches a parent's non-victim children, "that is a function of the CPO, not the CPO Statute." State Br. 21–22. The statute's terms show what it authorizes:

- If a perpetrator is convicted of a domestic violence offense resulting in a sentence of imprisonment "that is to be served after conviction," the court "shall issue a continuous protective order at the time of the conviction or sentencing limiting the contact between the perpetrator and the victim unless" it conducts a hearing and "determines by clear and convincing evidence that the victim does not . . . have a reasonable fear of future harm or abuse." Utah Code § 78B-7-804(3)(b).
- The order "is permanent in accordance with this Subsection (3)." *Id.* § 78B-7-804(3)(d).
- It may include orders protecting "the victim or other family or household member," places frequented by "any designated family or other household member," and "any other order the court considers necessary to fully protect the victim and members of the victim's family or other household member." *Id.* § 78B-7-804(3)(d)(i), (iii), (v).
- 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).

The State's position below was that subsection (3)(d)(v) lets a court "tailor provisions to allow contact, visitation, or other interactions." R.2870. Discretion to tailor is discretion conferred by the statute. When the statute authorizes a court to include a parent's non-victim children in a permanent order without requiring any finding of parental unfitness, and then permits a later change only on the showing subsection (4) requires, the resulting

order is the statute operating as written. That is the operation the claim challenges. R.858–59 (Count I, ¶ 22).

A sentencing protective order under subsection (2) is a condition of probation or a plea in abeyance, Utah Code § 78B-7-804(2), and, as the State describes it, "expire[s] with the completion of [the] sentence," State Br. 31. A continuous protective order issues by mandate, is permanent, and can be lifted only under subsection (4). Utah Code § 78B-7-804(3)(b), (3)(d), (4). Those are the terms that turn a sentencing restriction into a permanent one for every child the order includes, and they are terms of the statute, not choices of the sentencing court. Subsection (4) applies to every continuous protective order, whatever its terms; the fear it asks about is that of "the victim," not that of the children whose relationship with a parent the order restricts. The State says that subsection (4) "contains no requirements for the contents of a CPO," State Br. 22, and that the orders "remain subject to modification and dismissal," State Br. 25. Those statements do not address whose fear subsection (4) asks about.

An order that reaches a parent's non-victim child is therefore the statute operating as written. When a perpetrator is convicted of a domestic violence offense resulting in a sentence of imprisonment to be served after conviction, the statute requires a continuous protective order limiting the perpetrator's contact with the victim unless, after a hearing, the court determines by clear and convincing evidence that the victim lacks a reasonable fear of future harm or abuse; it makes that order permanent; it authorizes that order to protect the victim's family and household members; and it permits modification or

dismissal only on the showing subsection (4) requires. Utah Code § 78B-7-804(3)(b), (3)(d), (4).

C. Whether Jakeman has non-victim children is irrelevant to a facial claim

The State argues for the first time on appeal that Jakeman has no non-victim children, relying chiefly on the order form's listing of each protected person under the caption "[v]ictim needing protection." State Br. 23 (citing R.23). The form prints that caption above every protected person it lists. R.23. The only child-abuse conviction the record identifies concerned A.J. *Orem City v. Jakeman*, 2025 UT App 107, ¶¶ 1, 25. The March 16 ruling itself describes the claim as one about a parent's relationship "with non-victim minor children" and treats offenders "whose children were the direct victims of the abuse" as a separate category. R.3253.

The point does not bear on the claim in any event. A facial challenge asks what the statute authorizes for parents of children who were not victims of the offense, R.858–59 (Count I, ¶ 22), and the State's own argument presupposes that such parents exist. State Br. 22; *cf.* State Br. 28 ("even assuming the existence of a non-victim child"). Whether Jakeman himself has a non-victim child therefore does not bear on whether the statute validly authorizes orders that reach such children.

D. Unlike *D.M.*'s temporary custody order, these orders are permanent

The State argues that a continuous protective order is not a termination of parental rights, relying on *In re D.M.*, 790 P.2d 562, 567–68 (Utah Ct. App. 1990). State Br. 24–25. The order in *D.M.* was a custody disposition that "is not permanent" and that

"provides for annual review; thus, all provisions are temporary." 790 P.2d at 568. Each continuous protective order in the record states, "This order does not expire." R.26; R.31; R.36; R.41; R.46. The statute makes such an order "permanent in accordance with this Subsection (3)," Utah Code § 78B-7-804(3)(d), and permits modification or dismissal only on the showing subsection (4) requires, *id.* § 78B-7-804(4). The residual rights the State lists, State Br. 25, omit the one these orders reach: "the right to reasonable parent-time unless restricted by the court." Utah Code § 80-1-102 (defining "[r]esidual parental rights and duties"). An order that bars contact and does not expire restricts that right permanently unless subsection (4) is satisfied. *D.M.*, which concerned a temporary disposition subject to annual review, therefore does not control.

In sum, the Utah facial claim must be decided under the level of scrutiny the asserted right requires, applied to the operation the claim challenges. When a perpetrator is convicted of a domestic violence offense resulting in a sentence of imprisonment to be served after conviction, subsection (3) requires a permanent order limiting the perpetrator's contact with the victim unless, after a hearing, the court determines by clear and convincing evidence that the victim lacks a reasonable fear of future harm or abuse; it authorizes that order to reach a parent's non-victim minor children without any finding of parental unfitness; and subsection (4) permits modification or dismissal only on the showing it requires. Because the March 16 ruling neither identified nor applied a level of scrutiny to that operation, it cannot be affirmed on the grounds it states. Utah Code § 78B-7-804(3)(b), (3)(d), (4); R.3253.

III. The federal dismissal cannot be affirmed under the facial standard or on as-applied reasons the order does not state

Responds to State Br. 25–30; supports Opening Br. Part IV (U.S. Const. amend. XIV, § 1).

A. *Doe* requires the constitutional test; the August 4 order identifies none

The State says *Doe v. City of Albuquerque* is "limited to its circumstances" because the city there submitted no evidence. State Br. 26 (citing 667 F.3d 1111, 1116–17, 1121–22 (10th Cir. 2012)). The evidence the city failed to submit was evidence on the factors of the governing constitutional test, and that failure is why the court was "bound to affirm." 667 F.3d at 1122. The court had first stated that the proper framework in a facial challenge is "to apply the appropriate constitutional test," *id.*, and it later stated: "The relevant constitutional test, however, remains the proper inquiry." *Id.* at 1127. The August 4 order states no reason for dismissing the due-process claim and identifies no constitutional test. R.687–88. Under *Doe*, a facial challenge is decided by applying the governing constitutional test. 667 F.3d at 1122, 1127. Because the August 4 order identifies no test, it cannot be affirmed on the facial standard alone.

B. *Rahimi* relied in part on a temporary restriction; these orders are permanent

The State relies on *United States v. Rahimi* for the rule that a facial challenger must show the statute has no valid application. State Br. 26 (citing 602 U.S. 680, 693 (2024)). 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 statute here authorizes an order that is "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. The credible-threat statement printed on the order form, on which the State also relies, is addressed in Part III.C. The Opening Brief addresses *Rahimi* and the remaining points. Opening Br. 15–24, 28, 39–43.

C. The as-applied alternative relies on the dismissal it would support and on another proceeding's facts

The State acknowledges that on the federal claim "there was never occasion to consider whether the CPO Statute would be constitutional as applied to Jakeman," and asks this Court to affirm on that ground by drawing on the March 16 ruling on the Utah claim. State Br. 27 (citing R.3253). That concession supports, at a minimum, vacating the August 4 order's disposition of an unpleaded "as-applied" claim. Opening Br. 52–53. Three features of the record weigh against affirming on the alternative ground.

First, the State's motion offered the as-applied ground by relying on the order the State now asks the Court to affirm. Its first summary-judgment ground on the Utah claim was that "[t]his Court has already concluded that, under the federal constitution's due process clause, the CPO Statute operated constitutionally as applied to Jakeman." R.2868; *see* R.2867. The August 4 order dismissed the federal claim "either as a facial challenge or as an 'as-applied' challenge" and states no reason for that dismissal. R.687–

88. The State now offers the March 16 ruling to supply the reasons the August 4 order does not state.

Second, the March 16 ruling recited its facts as undisputed and drew them, as the ruling states, from "the briefing and attachments submitted by the parties." R.3250. The State's motion quoted the September 2024 hearing in the criminal case by citing a transcript filed in that case's docket. R.2862 nn.30–33. Affirming a motion-to-dismiss ruling on the federal claim on those facts would rest that ruling on facts the August 4 order did not find, drawn from a hearing in another proceeding. *See Bailey*, 2002 UT 58, ¶ 20. The March 16 ruling's as-applied premises include the convictions, the hearing, testimony "regarding the family's fear," and the evidence the hearing produced, which the ruling calls "evidence of risk" and "objective evidence of danger." R.3253. The ruling does not state that including any particular child was necessary, and it does not mention the parent's fitness. *See* Opening Br. 29–30.

Third, each complaint states that it challenges "the facial constitutionality" of the statute. R.2 ¶ 1; R.844 ¶ 1; R.766 ¶ 1; R.784 ¶ 1.

The State also cites the order form, which 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* State Br. 28–29. Subsection (3)(b) does not make that statement a condition of the order, Utah Code § 78B-7-804(3)(b), and the March 16 ruling does not rely on it. R.3253.

Affirming on the as-applied alternative would rest the August 4 dismissal on facts that order did not find, drawn from a hearing in another proceeding. The as-applied

alternative is therefore not a ground on which the dismissal should be affirmed. *See Bailey*, 2002 UT 58, ¶ 20.

D. The State's description of the right adds a condition the statute omits

The State describes the interest at stake as "unrestricted, continuing contact with his minor children notwithstanding his domestic-violence convictions and a judicial finding that he 'represents a credible threat to the physical safety' of these children." State Br. 28–29 (quoting R.24). A careful description of the asserted right describes the right, not the justification offered for limiting it. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The right asserted is a parent's interest in a relationship with children who were not victims of the offense, which the statute permits an order to restrict permanently without a finding of unfitness. R.858–59 (Count I, ¶ 22); Utah Code § 78B-7-804(3)(d). The statute does not require the credible-threat statement the State builds into its description. *See* Part III.C.

The State also quotes *PJ ex rel. Jensen v. Wagner* for the statement that "when a child's life is under immediate threat, a state's interest in protecting the child is at its zenith, and a state has broad authority to intervene." State Br. 29 (quoting 603 F.3d 1182, 1198 (10th Cir. 2010)). The sentence continues: "in parental decisionmaking that produces the threat to the child's life." 603 F.3d at 1198. This statute permits an order to reach a non-victim child without any finding that the child's life or health is threatened. Utah Code § 78B-7-804(3)(b), (3)(d)(v).

The legislative finding the State cites rests continuous protective orders on "the need to provide ongoing protection for the victim." Utah Code § 78B-7-804(3)(a); *see* State Br. 29–30. Because the parent's interest is fundamental, the State's rational-basis argument applies the wrong level of scrutiny. Opening Br. 32–33, 39–43.

In sum, the August 4, 2025 dismissal of the federal due-process claim cannot be affirmed. The order identifies no constitutional test and states no reason for dismissing the claim, and the as-applied alternative would rest on facts the order did not find, drawn from another proceeding. 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. R.687–88.

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

Responds to State Br. 30–34; supports Opening Br. Part V (U.S. Const. amend. XIV, § 1).

The State says Jakeman "concedes" that rational-basis review applies. State Br. 31 (citing Opening Br. 45). The Opening Brief argues that the line fails rational-basis review and, in the alternative, that heightened scrutiny applies. Opening Br. 45, 51–52.

A. Each risk-based rationale applies equally to the excluded offender

The State relies on the district court's rationale that the period after release "can be especially fraught and be a risk point where victims feel increased danger." State Br. 33 (quoting R.3053). The January 14 order describes the line this way: "Prior to conviction,

an alleged offender has not been adjudicated as a domestic violence abuser, nor has the alleged victim been determined to be a victim. And prior to sentencing, the alleged offender has an incentive to maintain good behavior . . . . But after sentencing, that incentive diminishes." R.3054. The comparator the Opening Brief identifies has also been convicted and sentenced: the otherwise identical offender "who served no post-conviction incarceration—including one who served an equal or greater period before conviction." Opening Br. 45. That offender may be subject to a sentencing protective order, which the State describes as one that "expire[s] with the completion of [the] sentence," State Br. 31; *see* Utah Code § 78B-7-804(2), and to a continuous protective order only on the victim's petition and, after notice and hearing, a finding that the order "is necessary to protect the victim," *id.* § 78B-7-804(5). The distinction between alleged and adjudicated offenders, and the incentive that ends at sentencing, apply equally to both. A rationale that applies equally to the excluded class does not explain the line. *Cf. City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 449–50 (1985).

Take two offenders convicted of the same offense and given the same jail sentence. One served the whole term in pretrial detention and is released at sentencing. The other has one day left to serve after conviction. The second is subject to a continuous protective order that 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." Utah Code § 78B-7-804(3)(b), (3)(d). The first is subject to one only if the victim petitions and the court finds it "necessary to protect the victim."

Id. § 78B-7-804(5). Both have been convicted and sentenced, both are released into the community after the same confinement, and the release-risk rationale applies to both.

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. The comparator shows more than an imperfect fit: each risk-based rationale offered applies at least as strongly to the offender the line excludes. Opening Br. 46–50. *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. Release, adjudication, the end of the sentencing incentive, and the seriousness reflected in total confinement are each equally true of the offender who served his confinement before conviction. In *Cleburne*, concerns that "fail to explain why" other groups were treated differently did not justify the permit requirement. 473 U.S. at 450. The State's opposition to Jakeman's summary-judgment motion offered seriousness as one reason: post-conviction incarceration "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. The March 19 order relies on the same rationale. R.3271. The comparator answers that rationale too, because an offender who served an equal or

greater period before conviction received the same or a longer total confinement for the same offense. Opening Br. 45.

B. The comparator rests on the statute's text, not on evidence

The State says that the State and the courts "are allowed to speculate and make unsubstantiated claims in support of a statute," and that "Jakeman may not." State Br. 32–33. Under rational-basis review, a legislative choice "may be based on rational speculation unsupported by evidence or empirical data." *Beach*, 508 U.S. at 315. That is why the comparator matters: it is not a factual claim requiring evidence, but a showing from the statute's terms that the rationale offered applies to both groups the line separates.

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).

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,
/s/ David Ammon Jakeman
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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 6,736 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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