COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue Denver, Colorado 80203 **Plaintiff-Appellant:** TATTERED COVER, INC., d/b/a The Tattered Cover Bookstore, v. **Defendants-Appellees:** THE CITY OF THORNTON; and THORNTON POLICE OFFICER RANDY GOIN, in his official capacity. A. Bruce Jones, #11370 Susannah W. Pollvogt, #30321 Nicholas M. Billings, #32276 HOLLAND & HART LLP 555 Seventeenth Street, Suite 3200 Denver, Colorado 80202 Mailing Address P.O. Box 8749 Denver, Colorado 80201-8749 Phone: (303) 295-8000 Fax: (303) 295-8261 bjones@hollandhart.com spollvogt@hollandhart.com nbillings@hollandhart.com Mark Silverstein, #26979 ACLU Foundation of Colorado 400 Corona Street Denver, CO 80218 (303) 777-5482 msilver2@aclu-co.org **ATTORNEYS FOR THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO**	**▲ COURT USE ONLY ▲** Case No. 00-CA-2150

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF COLORADO

STATEMENT OF THE ISSUES

In addition to the issues presented by Plaintiff-Appellant Tattered Cover, the ACLU maintains this Court should consider the following:

Currently, there is no procedure in Colorado affording an innocent non-party bookseller the opportunity to contest a search of customer records before such a search is executed. In light of the fundamental expressive rights threatened by such a search, and in light of the Colorado Constitution's heightened protection for freedom of speech, should this Court determine that our state's constitution requires notice and an opportunity to be heard for the bookseller before such a search warrant is executed?

STATEMENT OF THE CASE

This case presents a powerful argument for basic procedural protections safeguarding the free speech rights of booksellers when they are served with a search warrant during the course of a criminal investigation. Here, only happenstance and good lawyering prevented law enforcement officers from executing a patently overbroad warrant upon the Tattered Cover. Free speech rights should not be so easily exposed to infringement. Without the minimal constitutional guarantee of notice and an opportunity to be heard, an innocent non-party bookseller cannot effectively protect its right -- or the right of its patrons -- to engage in expressive activity free from government oversight and investigation.

Defendants have failed to demonstrate a compelling need for the information sought by this search warrant; thus, under established federal First Amendment

principles, this Court should enjoin the execution of the entire warrant. Furthermore, the Colorado Constitution, through its free speech and search and seizure clauses, provides heightened protection of civil liberties not otherwise available under the federal constitution. The case law of this state, interpreting our own constitution, provides ample precedent for this Court to require basic procedural rights to protect the free speech of booksellers and the public at large.

STATEMENT OF FACTS

Amicus Curiae incorporates the Tattered Cover's Statement of Facts, but writes separately to briefly highlight the investigatory history of the case and the unfortunate genesis of the warrant giving rise to this proceeding.

In late 1999, law enforcement officials began an investigation of a small-scale methamphetamine operation in Adams County. R.II.79:6-9.[1] By March 2000, law enforcement officials had identified a particular trailer home as the suspected site of this lab. R.II.80:15-18. On March 13, during a surveillance of the area surrounding the trailer, an officer with the Drug Enforcement Administration located a mailing envelope from the Tattered Cover in an exterior garbage can. R.II.80:11-14. The following day, the DEA agent, along with Adams County and City of Thornton officers, conducted a search of the trailer, pursuant to a warrant, during which they obtained two books concerning the production of methamphetamine and the operation of a methamphetamine lab. R.II.82:3-5; R.II.138:16-139:1.

[1] Citations to the record will appear as follows: R.[volume].[page]:[line].

There were two individuals present in the trailer during the search. R.II.83:24-84:1. However, the officers concluded that neither individual lived in the trailer and gathered no information from these individuals about who operated the small methamphetamine laboratory. R.II.88:20-93:13. Rather than pursue interviews with the actual occupants of the trailer, the officers chose instead to investigate the book-buying habits of one of the suspects.

On March 17, 2000, law enforcement officials attempted to serve an administrative subpoena on the Tattered Cover to discover the book purchases made by one of the suspects. R.II.48:4-9. The Tattered Cover, through counsel, communicated its intention to file a Motion to Quash in order to raise the privacy and free speech issues inherent in the subpoena. R.II.48:10-24; R.II.181:6-10. Faced with the prospect of an adversarial hearing, the officers abandoned the subpoena and proceeded instead with the *ex parte* process of obtaining a search warrant. R.II.113:1-114:14.

The officers first sought permission from the Adams County District Attorney's Office to execute a search warrant upon the Tattered Cover. R.II.115:21-23. However, three different prosecutors within the office, all apparently recognizing the free speech interests at play, voiced concerns about the scope and subject matter of the warrant. R.II.115:24-118:3.[2] The chief deputy prosecutor advised the officers that he intended to

[2] The Adams County district attorney, Bob Grant, has publicly expressed his concerns about the "constitutional dimensions of the situation":

> This is not where we're going to some drug guy's house to find the fruits of his criminal endeavors. . . . This is going into a legitimate business where there are First Amendment issues involved.

contact counsel for the Tattered Cover prior to any approval of the warrant. R.II.120:13-121:10.

The officers, twice foiled, were not deterred. On April 5, without disclosing that Adams County officials were in negotiations with the Tattered Cover over the warrant, these same officers convinced a Denver Deputy District Attorney and a County Court Judge to approve the warrant. R.II.122:3-123:10. The warrant as issued not only authorized a search of the Tattered Cover for records tied to the particular transaction (i.e., which books were ordered and shipped in the confiscated mailing envelope), but also authorized a search for records of any other transaction involving the suspect during a thirty-day period. R.I.98-99.

When the officers attempted to execute the warrant, the owner of the Tattered Cover contacted her counsel, who immediately contacted the Denver Deputy District Attorney. R.II.50:3-11. When the Denver Deputy D.A. learned of the duplicitous forum-shopping undertaken by the officers, he contacted the officers on scene and persuaded them not to execute the warrant until the Tattered Cover could seek judicial protection of its constitutional rights and those of its patrons. R.I.2. The Tattered Cover sought a restraining order, the resolution of which gave rise to this appeal.

Howard Pankratz, *Bookstore Search on Hold*, Denver Post, April 13, 2000 at B1.

ARGUMENT

I. THE SEARCH WARRANT APPROVED BY THE DISTRICT COURT DOES NOT MEET THE REQUIREMENTS OF THE FIRST AMENDMENT

In the ruling below, the district court announced and applied a four-part balancing test. This test purports to provide the "exacting scrutiny" required when the government intrudes upon the First Amendment freedoms of its citizenry. However, as discussed more fully in the briefs of Tattered Cover and other *amici*, the four-part test devised by the district court misinterprets settled First Amendment case law. The district court required the City of Thornton to come forward merely with a "legitimate and significant government interest" served by the warrant, rather than holding the city to the heightened and controlling standard of "compelling need."

Moreover, in its application of all four factors, the district court minimized the First Amendment implications of the warrant. The essential law enforcement premise underlying this warrant is as follows: if you buy a book concerned with illegal activity, you are likely to commit such illegal activity.[3] This premise is inconsistent with the First Amendment, which protects the free exchange of ideas, both popular and unpopular, controversial or otherwise. The ACLU joins the First Amendment analysis set forth by the Tattered Cover and other amici and urges this Court to reverse the district court in light of its misapplication of First Amendment principles. As addressed in the following section, however, it is the ACLU's position that the enhanced

[3] R.II.152:22-153:2; R.II.179:12-18. This dangerous premise was undermined when it was established that the books had never been read. R.II.108:21-181:19. Defendants' focus then shifted to a strained effort to establish that identifying the purchaser of the books would help establish who resided in the bedroom where the methamphetamine lab was found. R.II.107:3-10.

protections of the Colorado Constitution control this case and mandate basic procedural protections for booksellers and their patrons. Absent these protections, the warrant should have been declared invalid at its inception.

II. COLORADO'S CONSTITUTION PROVIDES HEIGHTENED PROTECTION FOR FREE SPEECH

In its legal analysis, the district court referenced only the First Amendment and cited only federal case law, despite Tattered Cover's simultaneous reliance on the state constitution. State and federal courts have afforded First Amendment freedoms a "preferred position," *see, e.g.*, *Marsh v. Alabama*, 326 U.S. 501, 509 (1946), among the constellation of civil liberties, and therefore the district court's focus on federal law is not surprising.

However, the First Amendment to the United States Constitution is phrased solely as a negative command: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. By contrast, the text of the Colorado Constitution goes beyond the negative command of its federal counterpart and affirmatively confers free speech rights upon all Colorado citizens:

> No law shall be passed impairing the freedom of speech; *every person shall be free to speak, write or publish whatever he will on any subject*, being responsible for all abuse of that liberty . . . .

Colo. Const. art. II, § 10 (emphasis added).

Thus, Colorado citizens enjoy an enhanced dual guarantee of free speech rights. Article II, Section 10 not only serves to "guard the press against the trammels of political power" (as does the First Amendment), but also "secure[s] to the whole people

a full and free discussion of public affairs." *Cooper v. People*, 22 P. 790, 798 (Colo. 1889). The *Cooper* decision, issued 13 years after enactment of our free speech clause, confirms that the Framers of the Colorado Constitution valued a robust public dialogue in which citizens could speak, write and publish without fear of government reprisal.

From 1889 forward, Colorado courts have issued an uninterrupted string of decisions reiterating this principle. *See, e.g.*, *People v. Ford,* 773 P.2d 1059, 1066 (Colo. 1989) ("We have previously stated, and reaffirm today, that our constitution extends broader protection to freedom of expression than does the first amendment to the United States Constitution."); *Parrish v. Lamm*, 758 P.2d 1356, 1365 (Colo. 1988), *People v. Seven Thirty-Five East Colfax Inc.*, 697 P.2d 348, 356 (Colo. 1985); *People v. Berger*, 521 P.2d 1244, 1245 (Colo. 1974); *In re Hearings Concerning Canon 35 of the Canon of Judicial Ethics*, 296 P.2d 465, 466-67 (Colo. 1956).

More recently, in *Bock v. Westminster Mall*, 819 P.2d 55, 56 (Colo. 1991), the Colorado Supreme Court considered whether Article II, Section 10 prevents the private owner of an enclosed shopping mall from excluding citizens engaged in non-violent political speech. The United States Supreme Court had ultimately concluded, after a series of cases, that the First and Fourteenth Amendments to the United States Constitution do not protect such activity. *See Hudgens v. NLRB*, 424 U.S. 507, 518 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968).

The *Bock* court, however, was "unpersuaded" by the "various reasonings" in the federal cases culminating with *Hudgens*. 819 P.2d at 58. Given its dissatisfaction with

the federal doctrine, and its independent duty to construe the state constitution, the *Bock* court ultimately found that the free speech clause of the Colorado Constitution prohibited the owners of the mall from suppressing non-violent speech within the common areas. *Id.* at 62-63.

It is entirely proper and appropriate for a state to provide additional constitutional protections for free speech. The Supreme Court's interpretation of the First Amendment "does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980); *see also State of Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.").

III. THE COLORADO STATE CONSTITUTION ALSO PROVIDES HEIGHTENED PROTECTION OF PRIVACY RIGHTS

Article II, Section 7 of the Colorado Constitution provides that:

> The people shall be secure in their persons, papers, houses and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

Although the wording of Article II, Section 7 is substantially similar to the Fourth Amendment, the Colorado Supreme Court has, on more than one occasion, broken with the United States Supreme Court and construed Article II, Section 7 more broadly than its federal counterpart.

For example, in *People v. Sporleder*, 666 P.2d 135 (Colo. 1983), the defendant was charged with several misdemeanor counts of harassment by telephone. *Id*. at 136. The defendant sought to suppress the records of all telephone numbers dialed by her that were obtained by the warrantless installation of a pen register.[4] The United States Supreme Court had previously considered "whether the installation and use of a pen register constitutes a 'search' within the meaning of the Fourth Amendment." *Smith v. Maryland*, 442 U.S. 735, 736 (1979). The *Smith* majority reasoned that "telephone users realize that they must 'convey' phone numbers to the telephone company," *id*. at 742, and that any subjective expectation of privacy in telephone numbers dialed is not "one that society is prepared to recognize as 'reasonable.'" *Id*. at 743. The Court concluded that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," and therefore no Fourth Amendment violation occurred upon the installation and use of a pen register. *Id*. at 743-44.

The *Sporleder* court acknowledged -- and then rejected -- the rationale of *Smith v. Maryland*, declaring that "we are not bound by the United States Supreme Court's interpretation of the Fourth Amendment when determining the scope of state constitutional protections." 666 P.2d at 140. The court was "convinced that the defendant's expectation that the numbers dialed on her telephone would remain free from governmental intrusion is a reasonable one," *id*. at 141, and the court ultimately concluded that the defendant's expectation of privacy is one "we are prepared to

[4] "A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released without, however, recording or monitoring the telephone conversation." *Id*. at 137.

recognize as reasonable under Article II, Section 7 of the Colorado Constitution." *Id*. at 142.

In *Charnes v. DiGiacomo*, 612 P.2d 1117 (Colo. 1980), the defendant-taxpayer claimed an expectation of privacy in his bank records that protected him from unreasonable search and seizure by the Department of Revenue. Again, the United States Supreme Court had previously held that a bank depositor has no reasonable expectation of privacy under the Fourth Amendment in checks and deposit slips voluntarily conveyed to the bank and exposed to bank employees in the ordinary course of business. *United States v. Miller*, 425 U.S. 435 (1976). The Colorado Supreme Court, as in *Sporleder*, declined to follow this analysis. "*Miller* limits our application of the Fourth Amendment to the facts before us, but it does not determine the scope of protection provided to individuals in Colorado by the constitution of this state." *DiGiacomo*, 612 P.2d at 1120. The court ultimately concluded that, notwithstanding *Miller*, an individual has an expectation of privacy in records of his financial transactions subject to protection from unreasonable searches and seizures under the state constitution. *Id*. at 1124.

Time and again Colorado courts have determined that "the Colorado proscription against unreasonable searches and seizures protects a greater range of privacy interests that does its federal counterpart." *People v. Oates*, 698 P.2d 811, 815-16 (Colo. 1985) (holding that the installation and continued presence of a beeper infringed upon defendant's legitimate expectation of privacy notwithstanding contrary United States Supreme Court precedent).

In light of the foregoing case law, under both the free speech and search and seizure provisions of the Colorado Constitution, this Court can -- and should -- conclude that the state constitution requires greater protection of civil liberties than that afforded by the court below. To do so, this Court should impose reasonable procedural protections to safeguard the speech and privacy rights of third parties in circumstances such as those presented in the instant case. As part of its analysis, this Court needs to address *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), yet another instance in which the United States Supreme Court failed to adequately protect citizens' civil liberties.

IV. THE UNITED STATES SUPREME COURT DECISION IN *ZURCHER V. STANFORD DAILY* IS NOT ONLY DISTINGUISHABLE ON ITS FACTS, BUT ALSO INAPPLICABLE AS A MATTER OF CONSTITUTIONAL DOCTRINE GIVEN THE ENHANCED PROTECTIONS OF THE COLORADO CONSTITUTION

A. The *Zurcher* Decision

In *Zurcher*, the United States Supreme Court considered whether the Fourth Amendment of the United States Constitution permitted warrants to search third-party non-suspects, and whether special considerations might be involved if such searches implicated the non-party's First Amendment rights. In that case, several police officers had been injured while intervening to break up a demonstration. *Id.* at 550. Photographers from a student newspaper, the *Stanford Daily*, had been present at the demonstration, and the District Attorney's Office subsequently secured a warrant to search the newspaper's offices for negatives, film or photographs capturing the event. *Id.* at 551. There was no allegation that the *Daily* staff was involved in the criminal assault. *Id.* The *Daily* and certain members of its staff later brought suit, alleging violation of their First, Fourth, and Fourteenth Amendment rights. *Id.* at 552.

The federal district court held that a warrant to search the premises of a third-party non-suspect could not be issued unless a sworn affidavit indicated there was probable cause to believe that it would be impracticable to obtain the evidence through a *subpoena duces tecum* -- for instance, because the non-party intended to remove or destroy the evidence. *Id.* The district court further held that, when a search warrant implicates the First Amendment interests of a non-party, the warrant should only be executed upon a "*clear showing* that (1) important materials will be destroyed or removed from the jurisdiction; *and* (2) a restraining order will be futile." *Id.* (emphasis in original). The Court of Appeals affirmed the lower court's holding and adopted its rationale. *See* 550 F.2d 464 (9th Cir. 1977).

The Supreme Court, however, disagreed, concluding that a non-party's privacy and free speech interests did not merit such heightened protection. The Court expressed concern that, under the district court's rule, evidence from non-parties would be available by warrant only in very rare circumstances, and otherwise would have to be obtained by subpoena. *Id.* at 553. The Court concluded that nothing on the face of the Fourth Amendment prevented the search of *any* property, so long as there was probable cause to believe evidence of a crime was to be found there, reasoning that "[s]earch warrants are not directed at persons; they authorize the search of place[s] and the seizure of things." *Id.* at 555 (internal quotations marks omitted; second alteration in original). In other words, "whether the third-party occupant is a suspect or not, the State's interest in enforcing the criminal law and recovering the evidence remains the same." *Id.* at 560.

The *Zurcher* Court did acknowledge that where a Fourth Amendment search would implicate materials protected by the First Amendment, the requirements of the Fourth Amendment must be observed with "scrupulous exactitude." *Id.* at 564 (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)). The Court further observed that the "unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Id*. (quoting *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961)). Nevertheless, the Court concluded that the *ex parte* warrant process was sufficient to safeguard the First Amendment interests of non-parties.

B. The *Zurcher* Decision is Based on Assumptions Not Borne Out by the Facts of the Instant Case and Not Applicable to Bookstores

While acknowledging that the seizure of First Amendment materials might raise additional constitutional concerns, the *Zurcher* Court ultimately concluded that the *ex parte* procedure before a neutral magistrate would be sufficient to protect a non-party's interests. This conclusion was based on a number of assumptions of questionable validity that are clearly not borne out by the facts of this case.

First, the *Zurcher* Court asserted that "[t]here is no reason to believe . . . that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper." *Zurcher*, 436 U.S. at 566. However, in the instant case, a neutral magistrate validated a patently overbroad search implicating the core free speech rights of the Tattered Cover and its patrons, as well as of the suspect. The warrant authorized a search of records not only pertaining to a single purchase by an individual suspect, but additionally allowed a search of all the suspect's purchases over a one-month period. It was the district court,

reviewing the application for a temporary restraining order, that narrowed the warrant, and the court did so only at the Tattered Cover's urging and upon a showing of the paramount free speech interests implicated. This case vividly demonstrates that standard Fourth Amendment procedure does not protect the speech rights of non-parties. To receive due consideration, the free speech interests of non-parties must be represented by an advocate for those interests. To so advocate, adequate notice is needed.

Second, the *Zurcher* decision was premised on the notion that members of the press would not be easily intimidated so as to change their investigative techniques in response to the threat of unannounced searches. *Id.* This rationale is not readily applied to the case of booksellers or libraries, where the concern is that *patrons* will be chilled in seeking out controversial ideas for fear that their reading habits will be subject to investigation. *See United States v. Rumely*, 345 U.S. 41, 57 (1952) (Douglas, J., concurring) ("Once the government can demand of a publisher the names of the purchasers of his publication, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads."). Even accepting the premise that journalists would not be intimidated by the prospect of unannounced searches, there is no basis for assuming that either booksellers or individual citizens act with similar bravado. This concern is evidenced in the instant case by testimony before the district court concerning the chilling effect of warrants upon bookstore customers and library patrons. R.II.54-57; R.II.188-98; R.II.202-04.

Third, the *Zurcher* Court observed that notice and a hearing are typically required only where a prior restraint on speech is threatened, and that prior restraint would not necessarily result from a search of a newspaper's offices. *Id.* at 567. At issue in this case, and other cases involving booksellers and libraries across the country, is not so much the initial publication of ideas, but the dissemination and consumption of them. The most basic harm to the freedom to publish may indeed be prior restraint, but the primary threat to the freedom to disseminate and read books is exposure of the identities of individuals who pursue the consumption of controversial thought. Thus, while law enforcement officials in *Zurcher* sought evidence that held First Amendment value only inasmuch as the *Stanford Daily* wished to publish the subject photographs, the warrant originally issued in the instant case was intended to confirm that the suspect had sought access to certain *ideas*. This is a direct assault on individual freedom that merits heightened protection. Moreover, that one patron's rights could be invaded so easily necessarily chills the exercise of those rights by other Tattered Cover patrons. R.II.54-57; R.II.188-98; R.II.202-04.

Finally, the *Zurcher* Court noted "that if the evidence sought by the warrant is sufficiently connected with the crime to satisfy the probable-cause requirement, it will likely be sufficiently relevant to justify a subpoena and to withstand a motion to quash." *Id.* at 567. This conclusion ignores the central question spotlighted by this case: under what circumstances will it be determined whether a given warrant, even if supported by probable cause, has nonetheless been subjected to the "scrupulous exactitude" necessary to protect First Amendment and free speech interests. A motion to quash may not only

defeat the search altogether but also provide an opportunity to narrow the search to the least intrusive scope in light of free speech concerns. In fact, the district court here did narrow the scope of the warrant issued by the magistrate. However, the Tattered Cover was afforded the opportunity to challenge the scope of the warrant only by the grit of its counsel and the grace of the prosecution. Since a warrant issued under the circumstances of this case must be narrowly tailored, there must be an opportunity for an adversarial process by which that tailoring can occur.

C. *Zurcher* Is Also Inapplicable to the Instant Case Given the Enhanced Protections of the Colorado Constitution and the Presence of a Non-Party Bookseller

As discussed in Parts I and II, *supra*, the Colorado Constitution affords a higher level of protection for both free speech and privacy rights than does its federal counterpart. When faced with United States Supreme Court decisions that present a cramped view of the First and Fourth Amendment, Colorado courts have departed from federal precedent and articulated a body of state law that provides meaningful protection for free speech and meaningful protection from unreasonable searches and seizures.

The *Zurcher* framework, as outlined above, provides virtually no protection to the innocent non-party. Enhanced procedural protections are necessary and should be available because a central rationale for the *ex parte* warrant process does not apply when a non-party is being searched. In the case of a typical warrant procedure, the magistrate must consider two competing factors: the interests of law enforcement and the privacy rights of the suspect. An *ex parte* procedure is typically justified in such a

case because of the exigencies of law enforcement and the practical reality that a suspect, if notified ahead of time, has a motive to destroy evidence or otherwise frustrate a search. This justification does not apply, however, when the subject of the search is an institutional, third-party non-suspect, such as a bookseller, library, or other record keeper, which has a business rationale to preserve such records.

An additional concern highlighted by this case is that a third-party non-suspect has no remedy without the criminal process in the event of an abuse of the warrant procedure. As has been frequently noted, the exclusionary rule is designed to deter unlawful police conduct by excluding evidence that is the fruit of that conduct. *See, e.g., People v. Banks*, 655 P.2d 1384, 1386 (Colo. App. 1982). The exclusionary rule is of no benefit, however, to anyone but the criminal defendant.[5] Thus, a non-party bookseller has no access to this crucial check on the abuse of the warrant procedure. The facts of this case beg for minimal procedural protections for such non-parties.

V. THERE IS NOT ONLY CONSTITUTIONAL AUTHORITY FOR, BUT ALSO CLEAR PRECEDENT IN FAVOR OF, NOTICE AND AN OPPORTUNITY FOR A HEARING WHEN PROTECTED MATERIALS ARE SOUGHT FROM NON-PARTIES

As demonstrated by the foregoing analysis, the standard *ex parte* warrant procedure does not adequately protect the constitutional rights of non-parties subjected to a warrant. The Colorado Constitution and our constitutional case law express a heightened substantive protection for these freedoms. However, these substantive rights are rendered hollow without a procedural mechanism by which to enforce them. At a minimum, basic concepts of due process require notice and an opportunity for a

[5] In fact, ordinarily even a criminal defendant does not have standing to challenge the lawfulness of a search of a non-party. *People v. Knapp*, 505 P.2d 7, 9-10 (Colo. 1973).

hearing before these rights are invaded. Furthermore, both Colorado and federal law offer ample precedent for additional procedural safeguards in analogous situations.

In *People v. Mason*, 989 P.2d 757 (Colo. 1999), the Colorado Supreme Court held that a *subpoena duces tecum* was a valid alternative procedure for compelling production of a defendant's telephone and banking records, which are protected from unreasonable searches and seizures pursuant to Article II, Section 7 of the Colorado Constitution. *See Charnes v. DiGiacomo*, 612 P.2d 1117 (Colo. 1980). In *Mason*, the defendant argued that the prosecution was required to proceed through a warrant supported by probable cause. However, the Court concluded that the subpoena process was sufficient, "as long as the defendant has the opportunity to challenge the subpoena for lack of probable cause." *Id.* at 760. A subpoena satisfies constitutional mandates because it "invokes procedural safeguards that even the issuance of a warrant cannot provide." *Id.* at 761.

In *McKevitt v. Harvey*, 491 P.2d 563 (Colo. 1971), the Denver Police Department had seized allegedly obscene materials pursuant to a search warrant obtained through the usual *ex parte* procedure. The Colorado Supreme Court followed the United States Supreme Court's decision in *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), to hold that "a search for obscene materials may not be conducted until an adversary hearing has been held to determine whether the materials sought are obscene." 491 P.2d at 564. Absent such a procedure, the search constitutes an impermissible prior restraint on speech and therefore violates the First Amendment. *Id.*

In considering what procedures would comply with the requirements of the First Amendment, the *McKevitt* court cited New York's injunctive procedure, which provided notice, a hearing, and a prompt judicial determination of obscenity (i.e., a determination of the First Amendment rights involved) as "[a]n example of a procedure which provides adequate safeguards against undue inhibition of protected expression." *Id.* at 565. The Court further noted that the revised Colorado Criminal Code, which authorizes injunctive relief following notice, the opportunity for an immediate adversary hearing, and a prompt, final judicial decision on the merits, would also probably pass constitutional muster on this point. *Id.*[6]

Case law concerning searches implicating the attorney-client privilege also provide an apt procedural model. In *Law Office of Bernard D. Morley v. MacFarlane*, 647 P.2d 1215 (Colo. 1982), law enforcement officials obtained a search warrant for the Morley law offices, which were suspected to contain evidence of a criminal violation in which the attorney purportedly participated. The Court recognized that "[a]ny search of a law office for client files and materials must be precisely limited and restricted to prevent an exploratory search," because "there is an enhanced privacy interest underlying the attorney-client relationship which warrants a heightened degree of judicial protection and supervision when law offices are the subject of a search for client files or documents." *Id.* at 1222. Therefore, the Court concluded that "[i]n order to assure that intrusions into client files and materials do not unreasonably interfere

[6] The procedure, originally codified at C.R.S. § 40-7-105(b) & (d), can now be found at C.R.S. § 18-7-103 (4).

with the attorney-client relationship, an adversary hearing is desirable when the attorney-client privilege or work product doctrine is invoked to bar the dissemination of documents seized as a result of a law office search." *Id.*

Justice Quinn wrote separately to emphasize

> the need for procedural safeguards, over and above those traditional procedures associated with the issuance and execution of a search warrant, in order to prevent unjustified intrusions, likely to occur during a law office search without these safeguards, upon the privacy interests underlying the lawyer-client relationship . . . . A law office search, without special protective procedures, will inevitably cause a chilling effect on attorney-client communications and pose a significant threat to a client's constitutional right to the effective assistance of counsel guaranteed by the United States and Colorado Constitutions.

Id. at 1224 (Quinn, J., specially concurring). In the instant case, the presence of non-party free speech rights (rather than the attorney-client privilege) enhances the constitutional concerns at issue and similarly counsels for fundamental procedural safeguards.

Federal law also provides at least two examples of heightened procedural safeguards employed when First Amendment interests are at stake. The Privacy Protection Act of 1980, 42 U.S.C. § 2000aa, was passed by Congress in response to the *Zurcher* decision to provide newspapers and other publications with the protection that the *Zurcher* court rejected.[7] In essence, the Act requires that when law enforcement officers seek documentary materials from persons engaged in the publication of

[7] The existence of these statutory protections would explain why the assumptions underlying *Zurcher* have not been further tested in subsequent case law.

information, they must employ a subpoena process first, rather than proceeding immediately with a search warrant.

The Privacy Protection Act, as finally enacted, mandates the subpoena-first procedure for "any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of communication." *Id*. § 2000aa(a). While booksellers arguably do not prepare the type of "work product" protected by the text of the Privacy Protection Act, the rationale of the protection is readily applicable to the instant case. Booksellers are frequently the intermediaries between speakers and their audiences, and as a result, restraints on their ability to perform this function has the effect of chilling the exchange of ideas overall. In fact, leading up to the passage of the Privacy Protection Act, at least one lawmaker anticipated the constitutional concerns highlighted by this case:

> Mr. President, much has been made of the impact of *Zurcher* on the press in our country. Certainly this interpretation of the 1st and 14th amendments could have a chilling effect on the news gathering activities of reporters. I am concerned, though, that *Zurcher* may result in an erosion of the 4th amendment rights of all Americans. Among the likely targets of third-party searches are those who maintain files relating to numerous individuals . . . . [T]he search of third parties for evidence relating to a criminal suspect needlessly exposes the files of unrelated, nonsuspects to police scrutiny.

Congressional Record (June 22, 1978) S. 9452 (statement of Sen. Dole).

Finally, the Department of Justice has issued guidelines for obtaining "documentary materials" held by a "disinterested third party":

> A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party unless it appears that the use of a subpoena, summons, request, or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought . . . .

28 C.F.R. § 59.4(a)(1) (2000). The guidelines further require that, if a warrant is sought concerning such third-party documentary materials, the application must be approved by an attorney for the government. *Id*. § 59.4(a)(2). Thus, under this federal regime, even if a warrant is ultimately sought, there is still some effort to involve an independent viewpoint that can consider the First Amendment implications of such a warrant. Here, defendants effectively skirted independent viewpoints that ran counter to their own; no procedural mechanism currently exists to prevent such an approach.

CONCLUSION

The United States Supreme Court in *Zurcher* ultimately stopped short of finding that the minimal protections of notice and an opportunity for a hearing were required to protect the free speech and privacy rights of non-parties. In light of Colorado's heightened protection for *both* speech and privacy interests, and in light of the unique issues posed by this case, there is no reason for this Court to stop short of that step.

Without some mechanism to afford basic procedural due process rights to non-parties, the heightened substantive protections of our state constitution ring hollow. As the procedural and investigative history of this case demonstrates, law enforcement officers, intent on building a criminal case, are not primarily concerned with the free speech rights of non-parties.

In the feverish prosecution of the war on drugs, federal and state law enforcement officials have chipped away at the historic safeguards of the Fourth Amendment. This case warns of another potential casualty: the freedom of innocent non-parties to disseminate and gain access to controversial information without fear of government intrusion. Without basic procedural protections, the freedoms of Colorado citizens will invariably yield to the investigative passion of law enforcement.

For the foregoing reasons, the ACLU of Colorado respectfully requests that this Court both reverse the decision of the district court and clarify that the Colorado Constitution requires procedural protections with respect to searches implicating the free speech and privacy interests of third-party non-suspects.

Dated this 11 day of June, 2001.