UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Case No. 04-B-0023 (CBS)

THOMAS MINK, and
THE HOWLING PIG, an unincorporated association,

Plaintiffs,

vs.

KEN SALAZAR, in his official capacity as the Attorney General of the State of Colorado,
A.M. DOMINGUEZ, JR., in his official capacity as the District Attorney for the Nineteenth Judicial District of the State of Colorado,
SUSAN KNOX, in her individual capacity,

Defendants.

BRIEF OF *AMICI CURIAE* THE COLORADO PRESS ASSOCIATION AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF THE PLAINTIFF

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Amici Curiae, the Colorado Press Association, and the Reporters Committee for Freedom of the Press, by and through their undersigned counsel (Thomas B. Kelley and Steven D. Zansberg of Faegre & Benson LLP), respectfully hereby file this brief in support of the plaintiffs' Motion for Summary Judgment, and respectfully ask this honorable Court to enter a Declaratory Judgment that the Colorado Criminal Libel Statute, Colo. Rev. Stat. § 18-13-105, is unconstitutional on its face.

INTEREST OF *AMICI CURIAE*

Amicus curiae Colorado Press Association is an unincorporated association of approximately 150 newspapers throughout Colorado, including the state's ten largest daily newspapers, all having a combined circulation in excess of 1,000,000 copies. Because these newspapers daily publish myriad stories on private individuals (and on individuals they believe to be "public figures" who might later be deemed *not* to be such figures by the courts) and on private figures or matters they believe to be of public concern (but may later be deemed to be of purely private concern), these *amici* are profoundly concerned that a statute remains in force in the state of Colorado that subjects them to criminal prosecution for exercising their rights to freedom of speech and of the press.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the free speech, free press rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Reporters Committee's interest in this case is in preserving the

right of journalists to gather news and publish without threat of criminal defamation penalty. Amicus curiae sees the Colorado criminal defamation law as a serious threat to constitutionally protected news gathering and publishing activities. Thus, amicus curiae submits this brief in support of the appellant's argument that Colo. Rev. Stat. § 18-13-105 violates constitutional requirements under the First Amendment of the U.S. Constitution.

SUMMARY OF ARGUMENT

Colorado's criminal libel statute authorizes the People, acting through local District Attorneys, to charge, prosecute and jail (for up to two years) individuals who speak unfavorably or unflatteringly about persons living or dead. As explained in greater detail below, the anachronistic and archaic statute is fatally flawed in several respects; as a result of these multiple and incurable infirmities, the statute causes a substantial "chilling effect" – it significantly inhibits members of the public from exercising their rights of free speech and of the press that are the foundational guarantees of the First Amendment. Accordingly, the statute is unconstitutional on its face.

The Colorado Supreme Court's ruling in 1991 that struck down the statute – but only as it applies to prosecutions for libelous statements concerning public officials or public figures on matters of public concern – allows the statute to be applied, unconstitutionally, against those who speak poorly – but *truthfully* – of the dead or the living, and even permits prosecution on the basis of statements of pure opinion that are incapable of being proven true or false. Moreover, the combination of the Colorado Supreme Court's ruling in *People v. Ryan*, 806 P.2d 935 (Colo. 1991), and the hopelessly vague and ambiguous language of the

criminal libel statute, results in the inability of citizens, (and in particular members of the press), from being able to predict in advance whether their publications will subject them to prosecution and incarceration. Even were the Attorney General correct (which he is not), that judicial decisions have restricted application of the statute only to provably false statements about a private individual on a matter of purely private concern, the substantial chilling effect that the statute's nebulous terms produces on the exercise of fundamental liberties cannot be justified by the asserted state interest of preventing breaches of the peace. In sum, the criminal libel statute must be declared facially unconstitutional, so that debate on matters of public concern in Colorado can be "uninhibited, robust, and wide-open."[1]

ARGUMENT

Colorado's Criminal Libel Statute is Facially Unconstitutional

Colorado's criminal libel statute provides:

> (1) A person who shall knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule, commits criminal libel.
>
> (2) It shall be an affirmative defense that the publication was true, except libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living.
>
> (3) Criminal libel is a class 6 felony.

Colo. Rev. Stat. § 18-13-105 (2004).

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[1] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

In *People v. Ryan*, 806 P.2d 935 (Colo. 1991), the Supreme Court of Colorado addressed a criminal defendant's facial challenge to the criminal libel statute. The court held the statute was unconstitutionally overbroad, but only to the extent that it applied to claims of libeling a public official or public figure on a matter of public concern. *Id*. at 940. The court did *not* decide, however, whether (a) the statutory provision stating that truth was *not* an affirmative defense for "libels tending to blacken the memory of the dead . . . [or] tending to expose the natural defects of the living" rendered the statute unconstitutional. *Id*. at 940 n.11. Furthermore, the court impliedly found, that since "[t]ruth shall remain an affirmative defense" for certain non-public official/public figure cases, the government is not required to prove the falsity of the libelous statement(s) beyond a reasonable doubt as an element of the offense. *See id*. at 942 (Quinn, J., dissenting) (noting that by shifting the burden to the defendant on the issue of falsity, the statute is unconstitutional).[2] Finally, as authoritatively construed by Colorado's highest court, the statute permits criminal liability to be imposed upon one who "knowingly publish[es] or disseminate[s] . . . any statement or object tending to blacken the memory of one who is dead," even in cases where such "statement or object"

[2] Justice Quinn's dissent points out that shifting the burden on the defendant to prove the truth of the statement "will inexorably induce silence as an alternative to avoiding entrapment in the amorphous and uncertain zone of criminality created by the statute. *Ryan*, 806 P.2d at 942 (Quinn, J., dissenting) (citations omitted); *Id*. (noting that under the majority's opinion, "a person arguably would be subject to criminal prosecution for the knowing publication or dissemination of a defamatory statement even though the statement was true and the person making the statement knew it to be true").

does not contain a provably false factual assertion *and* is a statement reasonably understood as conveying a provably false assertion of fact.

In a series of decisions, beginning with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court of the United States has carefully and clearly demarcated the constraints that the First and Fourteenth Amendments impose on state statutes imposing either civil *or criminal* liability on defamatory statements. Because Colorado's criminal libel statute plainly violates several of those constitutional limitations, it cannot withstand judicial scrutiny, and must be struck down, lest a great deal of constitutionally-protected speech be driven from the marketplace of ideas. Specifically, Colorado's criminal libel statute, on its face, (1) permits criminal prosecutions for publication of *truthful* statements about persons, deceased or living, (2) authorizes the imposition of sanctions (including incarceration) for speech that may not be reasonably understood as conveying an assertion of fact and that is capable of being proven true or false, (3) in those cases where the statute declares that truth *is* relevant, it nevertheless impermissibly places the burden upon the defendant to prove it, and (4) the terms of the statute are so vague as to render it impossible for a person of reasonable intelligence to predict, in advance, whether his statements will transgress the boundaries of the law. As a result of these unavoidable and clear infirmities, the statute constitutes a facially unconstitutional restriction on the freedom of speech and of the press.

1. By Permitting the Prosecution of Truthful Statements, Colorado's Criminal Libel Statute Violates the First Amendment

On its face, the criminal libel statute authorizes the prosecution of individuals who publish *truthful* statements "tending to blacken the memory of one who is dead . . .or expose

the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule." Indeed, the statute plainly states that truth shall not be an affirmative defense in any cases involving "libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living." Colo. Rev. Stat. § 18-13-105(2) (2004).

In fact, the current version of Colorado's Criminal Jury Instructions, which are formally approved by the Colorado Supreme Court for use in all state courts in Colorado,[3] expressly preclude the raising of truth as an affirmative defense in cases involving "libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living." *See* COLJI-Crim 7:64 Note on Use (1993) ("This affirmative defense [of truth] does not apply to libels tending to blacken the memory of the dead [or] to expose the natural defects of the living.") (attached hereto as Exhibit B).[4]

Colorado's Attorney General, appearing as *amicus* in this case, has suggested that truth remains an affirmative defense in *all* cases of criminal libel (*see* Att'y Gen'l Amicus Br. at 17-18). With all due respect, the Attorney General is demonstrably mistaken. The

[3] *See* Order of Colorado Supreme Court (Apr. 28, 1983) ("It is ordered that these jury instructions and notes on use are approved by this Court for the use in jury trials in criminal cases in the State of Colorado . . . .") (attached hereto as Exhibit A).

[4] Notably, when the Criminal Jury Instruction Committee of the Colorado Supreme Court adopted supplemental changes to the 1983 instructions in 1993 (two years after the *Ryan* decision), it did not alter or amend COLJI-Crim 7:64.

dicta contained in *Gomba v. McLaughlin*, 180 Colo. 232, 504 P.2d 337 (1972),[5] was not embraced nor acknowledged in any way by the Colorado Supreme Court's subsequent actions: (1) in *Ryan*, the Court expressly left open the question whether the statutory provision precluding assertion of truth as an affirmative defense was unconstitutional, *see Ryan*, 806 P.2d at 940 n.11; (2) in 1974 (after *Gomba*), the Colorado Supreme Court acknowledged that the publication of *truthful* information contained in a coroner's autopsy report could constitute criminal libel under the statute, *see Dreyfus v. Denver Publ'g Co.*, 520 P.2d 104, 109 (Colo. 1974), and (3) in 1983 (and again in 1993), the Colorado Supreme Court formally approved of pattern jury instructions that expressly preclude truth as an affirmative defense in certain prosecutions brought under the criminal libel statute. *See* Ex. A. Thus, to date, the Colorado Supreme Court has by no means limited the reach of the criminal libel statute to only false (or even provably false) publications.[6] Accordingly, the statute on its face (and the Court-approved jury instructions to be applied under the statute)

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[5] *Gomba* involved a claim of civil defamation, not a prosecution under Colorado's criminal libel statute. Hence, any statements concerning the law of criminal libel contained therein are clearly *dicta*.

[6] A further indication that the statute means what it says is the failed effort of one state legislator, during the 1998 session of Colorado's General Assembly, to amend the statute so that truth would, upon passage of the failed amendment, be an affirmative defense in *all* criminal libel prosecutions. *See* SB-98096, available at <http://www.state.co.us/gov_dir/leg_dir/sess1998/sbills98/sb096.htm>.

expressly authorizes the imposition of criminal sanctions upon the publication of entirely *truthful* statements.[7]

Thus, published newspaper stories about the Columbine High School killers, Dylan Klebold and Eric Harris (both private figures at the time of their crimes), that reported on their homicidal tendencies, their having taken prescription medications for depression, or their professed admiration of Adolph Hitler – or even that they had committed the worst school shooting homicide in United States history – are all unquestionably statements "tending to blacken the memory of one who is dead" and thereby subject the reporters and editors to prosecution under the statute.

For this reason, Colorado's criminal libel statute is facially unconstitutional. The Supreme Court of the United States has made clear that prosecutions cannot be based upon truthful statements, absent the most compelling state interests, which are clearly not present in any enforcement of a criminal libel statute.[8] *The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding that "when a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, *if at all*, only when narrowly tailored to a

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[7] It is telling that this was the interpretation given to the statute by the Chief District Judge for La Plata County, Colorado. *See* Shane Benjamin, *Man Faces Criminal Charges*, DURANGO HERALD, May 16, 2004, at A-1 (quoting Judge Gregory Lyman as stating that a prosecutable crime under the statute is where "A person posts signs around town saying another person is retarded, and the person *actually is* retarded.") (emphasis added) (attached hereto as Exhibit C).

[8] *See infra* Section 6 (demonstrating that there is practically no state interest in criminalizing libel).

state interest of the highest order."). Indeed, in *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), the Court expressly held, "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned."[9] Accordingly, under settled Supreme Court precedents, Colorado's criminal libel statute is facially unconstitutional.

2. By Permitting Prosecution for Statements That Are Not Provably True or False (And Are Not Also Reasonably Understood as Conveying a Provably False Assertion of Fact), the Statute Violates the First Amendment

Not only does Colorado's criminal libel statute authorize the prosecution and punishment of speakers who utter completely truthful statements about individuals, living or dead, it also, on its face, authorizes the imposition of criminal sanction upon those who utter a statement of opinion that "tend[s] to blacken the memory of one who is dead . . . or expose[s] the natural defects of one who is alive, and thereby to expose[s] him to public hatred, contempt, or ridicule." Colo. Rev. Stat. § 18-13-105(2) (2004). Colorado's criminal libel statute, unlike that of other states,[10] does not even include falsity among the elements of

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[9] Arguing as *amicus*, the Colorado Attorney General suggests that the import of the *Ryan* decision is that the criminal libel statute is limited in its application only to statements about private individuals on matters of purely private concern. Att'y Gen'l Amicus Br. at 9, 16. The Attorney General has misread the *Ryan* decision, which plainly precludes the statute from being used *only* in cases involving statements "about public officials or public figures on matters of public concern." *Ryan*, 806 P.2d at 940 (announcing the Court's holding). Thus, *Ryan* permits the criminal libel statute to be applied in cases of libelous statements (a) about public officials or public figures on matters of purely private concern, *see* RESTATEMENT (SECOND) TORTS § 652D cmts. b, e, h (1977), and (b) about private individuals on matters of *public* concern.

[10] *See, e.g*, Kan. Stat. Ann. § 21-4004 (1988) (defining criminal defamation as "false information"), as cited in *Phelps v. Hamilton*, 59 F.3d 1058, 1062 n.4 (10th Cir. 1995).

the offense. This is because, as originally enacted in 1883, "the law makes the publication of a libel a crime, not because of injury to the reputation of an individual, but because such publication tends to affect injuriously the peace and good order." *Bearman v. People*, 91 Colo. 486, 492, 16 P.2d 425, 427 (1932); *see also Leighton v. People*, 90 Colo. 106, 110, 6 P.2d 929, 930 (1931) (noting that at common law the crime was committed even if not published to a third party, so long as indictment indicated the libel was conveyed to the prosecutor with "an intention to provoke . . . a breach of the peace"). Similarly, the pattern jury instruction applicable in all state court prosecutions for criminal libel[11] noticeably omits any mention of the truth or falsity of the statements at issue. *See* COLJI-Crim 35:20 (1993) (attached hereto as Exhibit D). Accordingly, a newspaper food critic's review of a new (or established) restaurant, that describes the local chef (not a public figure) as "past his prime," or "taste-bud challenged" would be subject to prosecution for having "expose[d] the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule." Similarly, a news report on the recent tragic death of the family who were killed when their S.U.V. was hit by a steel girder that fell off the C-470 overpass onto I-70 (all three individuals were undoubtedly private figures), which observed that the father was a club-footed golf pro and the mother a tone-deaf voice instructor,[12] would plainly satisfy the

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[11] *See supra* at 6; *see also People v. Bowen*, 182 Colo. 294, 296, 512 P.2d 1157, 1158-59 (1973) (referring to a previous version of pattern jury instructions, approved by Supreme Court, as the ones that "should now be used in the trial courts").

[12] Both of these allegations are completely hypothetical; there is no basis in fact for such either assertion.

statutory criterion of "tending to blacken the memory of one who is dead"[13] and thereby subject the reporters and editors to prosecution under the statute.

The Supreme Court of the United States has left no uncertainty that in *all* cases in which a state cause of action (or criminal sanction) is premised upon allegedly defamatory statements that are "of and concerning" another individual (regardless of that individual's status as a public or private figure), there can be no liability imposed for statements which do not *both* (a) contain a provably false assertion of fact, *and* (b) convey to the reasonable reader a connotation that the statement is intended to be understood as an assertion of fact. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-21 (1990); *see id.* at 20 ("[Our prior decisions] ensure[] that a statement of opinion relating to matters of public concern which does not contain a provably false connotation will receive full constitutional protection."); *see also Hustler Magazine v. Falwell*, 485 U.S. 46, 56-57 (1988) (the First Amendment prohibits the imposition of civil damages on the basis of expression that "could not reasonably be understood as describing actual facts about [the plaintiff]"); *Pring v. Penthouse Int'l Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982) (same).

Nor can the government claim that despite that lack of any provably false assertion of fact, it is justified in prosecuting and punishing those who, through statements of opinion, "blacken the memory of the dead" or "expose the natural defects" of the living, because such

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[13] Other punishable statements that would "blacken the memory of the dead" include, *e.g.*, the decedent was "ugly," "overweight," "mean," "a bad cook," "not a nice person," or

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statements are inherently *offensive* and hurtful to the listener or to the "target" of such statements. As the Supreme Court of the United States has stated, "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11 (1975); *see also Texas v. Johnson*, 491 U.S. 397, 413 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (refusing to adopt a rule of law that would prohibit the publication of information "if offensive to the sensibilities of the supposed reasonable man"); *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) (offensiveness of speech "is not a sufficient reason for suppressing it . . . [but instead] is a reason for according it constitutional protection"); *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

Because Colorado's criminal libel statute, on its face, authorizes the imposition of punitive sanctions on the basis of statements of "pure opinion" (which are not capable of being proven true or false), the statute is facially unconstitutional.

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"not a good person." None of the above, of course, is capable of being verified as a false statement of fact.

3. By Placing the Burden of Proof of Truthfulness on Criminal Defendants (in Those Cases Where Truth is Statutorily Permitted to Be Raised as An Affirmative Defense), the Criminal Libel Statute Violates the First Amendment

Even with respect to the prosecutions of libels criminalized by the statute for which truth is a permitted defense,[14] the Colorado Supreme Court's ruling in *Ryan* leaves the burden of proof and persuasion for that "affirmative defense" squarely (and unconstitutionally) on the shoulders of the criminal defendant. *See also* COLJI-Crim 7:64 (1983). However, Judge Quinn's dissent in *Ryan* correctly noted that the First Amendment requires the government to sustain the burden of proving falsity in all prosecutions for criminal libel. *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964); *Ashton v. Kentucky*, 384 U.S. 195, 200-01 (1966). Settled Supreme Court precedents again leave no doubt that imposing upon a criminal defendant the burden of proof to establish that his speech is protected (truthful) is itself unconstitutional. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the Court held that even in cases of civil libel "a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages from a media defendant," as are the *amici* here, at least when the speech is on a matter of public concern. *Id.* at 777. *Hepps*, of course, was a case of *civil* defamation, in which the maximum penalty was a damages judgment; it is beyond cavil that the First Amendment is violated by a statutory scheme, as here, that requires a criminal defendant to prove the truth of his

[14] Under the statute, this category includes only "any statement or object tending . . . to impeach the honesty, integrity, virtue, or reputation . . . of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule."

statements to avoid being incarcerated for the crime of libel. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the [defendant] engaged in criminal speech."); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-41 (1974) ("Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. The First Amendment requires that we protect some falsehood in order to protect speech that matters.") (internal quotation marks and citation omitted). Because it shifts the burden of proof onto the criminal defendant to demonstrate the truthfulness of his statements, Colorado's criminal libel statute is facially unconstitutional.

4. By Permitting the Prosecution of Individuals Based Upon Statements on a Matter of Public Concern Without Requiring the People to Prove, Beyond a Reasonable Doubt, That the Defendant Published with Actual Malice, the Criminal Libel Statute Violates the First Amendment

In any case in which allegedly false and defamatory statements are made on a matter of public concern, a state may not impose any punitive sanctions on the speaker without requiring proof that the statements were made with actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). The United States Supreme Court has held that states may impose *civil damages* liability upon one who publishes statements concerning a private figure on a matter of public concern only upon proof that the defendant published false

statements with at least negligence;[15] however, the Supreme Court has held, states may not impose punitive sanctions (either monetary penalties or incarceration) without a showing, by clear and convincing evidence, that the defendant published such statements either with knowledge of falsity or while entertaining serious doubts as to the truth. As indicated above, when faced with a facial challenge to Colorado's criminal libel statute, Colorado's Supreme Court held that it was only unconstitutional to the extent that it did not incorporate an "actual malice" element in cases involving "public officials or public figures on matters of public concern." *See Ryan*, 806 P.2d at 940 (holding that the statute may not be applied *only* in cases involving statements "about public officials or public figures on matters of public concern."). Because under the Colorado Supreme Court's authoritative interpretation, the criminal libel statute allows for prosecutions for publishing statements *on matters of public concern* (when the subject of those statements is a private figure) without requiring the State to prove that the defendant published those statements with actual malice, the criminal libel statute is facially unconstitutional.

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[15] *Gertz*, 418 U.S. at 350. The Colorado Attorney General's assertion that the "knowingly" element of the crime satisfies the "fault" requirement under the First Amendment is sadly mistaken. The "knowingly" element of the crime merely requires that the defendant was aware that his conduct was practically certain to result in the publication of the challenged speech, *see* COLJI-Crim. 6:01 (1983). This element does not in any way require the State to prove, beyond a reasonable doubt, that the defendant's statement was *knowingly false*. Unlike the criminal defamation statute at issue in *Phelps v. Hamilton*, 59 F.3d 1058 (10th Cir. 1995), in which the Tenth Circuit construed "knowingly" to modify "false," *id*. at 1072-73, Colorado's criminal libel statute has no textual "falsity" component which the "knowingly" adjective may be construed to modify.

5. The Statute is Not "Readily Susceptible" to a Limiting Construction That Might Save it From its Unconstitutional Overbreadth

Once a statute is found to encompass a substantial amount of protected conduct, as is true here, if no limiting construction can narrow the statute to permissible applications, the statute must be declared "substantially overbroad." *See United States v. Gaudreau*, 860 F.2d 357, 360 (10th Cir. 1988) (a statute "may be challenged on its face when it threatens to chill constitutionally protected conduct"). As indicated above, contrary to the Attorney General's contention that truth remains a "defense" (as opposed to an *element* of the People's case) in *all* prosecutions under the act, the language of the statute is plain and unambiguous: in cases where the charge is that the defendant "blacken[ed] the memory of the dead" or "expose[d] the natural defects" of the living, truth is *not* available as a defense.[16] Given this plain and unambiguous statutory language, the Court is not empowered to engraft onto the statute any "limiting construction" that would rescue it from constitutional infirmity.[17] *See, e.g., City of Houston v. Hill*, 482 U.S. 451, 468 (1987) (a law is not susceptible to a limiting construction where "its language is plain and its meaning unambiguous"); *ACLU v. Johnson*, 194 F.3d 1149, 1159 (10th Cir. 1999) (holding that a statute "must be *readily susceptible* to [a] narrowing construction," and rejecting the "defendants' proposed narrowing construction [that] really amounts to a wholesale rewriting of the statute. That we cannot do.") (citing

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[16] *See* Section 1, *supra*.

[17] *See Aguilar v. People*, 886 P.2d 725, 729 (Colo. 1994) (no limiting construction permissible where the intent of the General Assembly is clearly expressed).

Reno v. ACLU, 521 U.S. 844, 884 (1997)). Nor does the language of the statute permit the court to impose upon the Act a requirement that only provably false assertions of fact (as opposed to "pure opinions") may be the basis of prosecution. "To graft the ["verifiable statement of fact" or "falsity"] standard[s] onto the criminal statute would constitute more than statutory interpretation; it would require [the court] to re-write the law by adding an essential element to the definition of the crime."[18] Thus, there is no basis for this Court to impose any limiting construction upon the plain and ambiguous (and facially overbroad) terminology of Colorado's criminal libel statute.

CONCLUSION (OVERBREADTH)

By authorizing a conviction and incarceration based upon the publication of truthful speech, *and* by placing the burden of proof as to truth on the criminal defendant, *and* for authorizing prosecution and conviction for statements of pure opinion that are not capable of being verified as true or false, *and* by not requiring the state to prove actual malice as to libels on a matter of public concern, Colorado's criminal libel statute, on its face, is unconstitutionally overbroad. "[W]here [a] statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 n.19 (1984) (citation omitted); *see also*

[18] *In re I.M.L.*, 61 P.3d 1038, 1045 (Utah 2002) (citing *Phelps v. Hamilton*, 828 F. Supp. 831, 848-49 (D. Kan. 1993)).

Houston v. Hill, 482 U.S. at 467 (statute is unconstitutionally overbroad if it "is *susceptible* of regular application to protected expression") (emphasis added).[19]

In this regard, the Supreme Court has spoken with abundant clarity: "The objectionable quality of . . . overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon **the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute *susceptible of* sweeping and improper application.** These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963) (emphasis added).

6. There is No Compelling Government Interest That Justifies Maintaining Such a Blatantly Unconstitutional and Substantially Chilling Statute on the Books

The criminal libel statute is unquestionably a content-based restriction on the freedom of speech.[20] Statutes that impose sanctions on the basis of the content of one's speech are

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[19] "In considering whether a statute suffers from overbreadth, 'a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.' *Houston v. Hill*, 482 U.S. 451, 458, (1987) (quoting *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)). In making this determination, '[c]riminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.' *Id.* at 459 (citations omitted)." *In re I.M.L.*, 61 P.3d 1038, 1043 (Utah 2002).

[20] A statute is deemed a "content-based restriction" on speech if "enforcement authorities must necessarily examine the content of the message that is conveyed to

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subject to the strictest level of judicial scrutiny.[21] *See Turner Broad. Sys., Inc., v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.") (citations omitted); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible."); *Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a . . . burden on speakers because of the content of their speech."); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) ("a law imposing criminal penalties on protected speech is a stark example of speech suppression"); *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972) ("Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

"A content-based restriction on speech is presumptively invalid, and the [Government] therefore bears the burden of demonstrating that the [statute] is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end."

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determine" whether the statute has been violated. *See FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984).

[21] Even if the criminal libel statute were capable of being limited in application to speech on a matter of purely *private* concern, "such speech is not totally unprotected by the First Amendment." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985).

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Interactive Digital Software Ass'n. v. St. Louis Cty., Mo., 329 F.3d 954, 958 (8th Cir. 2003) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)). This "strict scrutiny" standard was very recently reaffirmed by Supreme Court, when it again explained the *reason* for this constitutionally-compelled level of judicial scrutiny: "[c]ontent-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. ACLU*, 524 U.S. ___, ___ S. Ct. ___ , 2004 WL 1439998 at *3 (June 29, 2004). Here, a statute that criminalizes libels that "tend to blacken the memory of the dead or expose the natural defects of the living" is supported by virtually no state interest whatsoever. Numerous states have recognized that "criminal libel laws serve very little, if any, purpose." *State v. Powell*, 839 P.2d 139, 144 (N.M. Ct. App. 1992). Indeed, the criminal defamation laws in at least 33 states have been repealed or invalidated by courts. In most of the remaining seventeen states, criminal defamation has been effectively abandoned. *See Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S. After Sullivan and Garrison*, MLRC BULLETIN (March 2003).

As recognized in *People v. Ryan*, 806 P.2d 935, 938 n.8 (Colo. 1991), the rationale for the criminal libel law is to avoid a breach of the peace,[22] (which is more likely to occur

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[22] Although the criminal libel statute presently is codified in the article of the Criminal Code headed "Miscellaneous Offenses," prior versions of the statute were contained in the article headed "Offenses Against Public Peace." *See, e.g.*, Colo. Rev. Stat. § 40-8-13 (1953).

when the statement is true than when it is not). The breach-of-the-peace rationale[23] for the criminal libel statute is not only outmoded,[24] but, in fact, *unconstitutional* under the doctrine of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which requires that speech-restricting statutes that purportedly aim at preventing breaches of the peace must be limited in their application to speech that is "directed to and likely to incite [an] imminent" breach of the peace, more or less "fighting words." Here, plainly, the criminal libel statute contains no such limitation.

Indeed, in *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Supreme Court quoted the statement by the drafters of the Model Penal Code explaining why they had decided not to include a criminal libel provision:

> "It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. . . . It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private

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[23] "The rationale supporting criminal libel seems counterintuitive to modern sensibilities. At its heart, criminal libel was believed to be an essential weapon to avert breaches of the peace, by dueling or vigilantism, by those who sought satisfaction for affronts to their honor or dignity. 'Defamation, either real or supposed, is the cause of most of those combats which no laws have yet been able to suppress.'" Jane E. Kirtley, *Criminal Defamation: An "Instrument of Destruction,"* Nov. 18, 2003, available at <http://www.silha.umn.edu/oscepapercriminaldefamation.pdf> (quoting Livingston, Edward, "A System of Penal Law for the State of Louisiana," (1833), cited in *Garrison v. Louisiana*, 379 U.S. 64, 68 (1964)).

[24] As Professor Kirtley put it, "Criminal libel . . . is an unfortunate and outdated legacy of autocratic, totalitarian, or colonial states, and has no place in any society that claims to support the concept of freedom of expression. It is inimical to democracy because it strangles dissent and debate . . . ." *Id.*

> criminal libel legislation in this country. . . ." Model Penal Code, Tent. Draft No. 13, 1961, § 250.7, Comments, at 44.
>
> The Reporters therefore recommended only narrowly drawn statutes designed to reach words tending to cause a breach of the peace . . .

Garrison, 379 U.S. at 69-70. However, "it can hardly be urged that the maintenance of the peace requires a criminal prosecution *for private defamation*." *Id.* at 69.[25] Thus, even if Colorado's criminal libel statute were "readily susceptible" to the limiting construction urged by the Colorado Attorney General – one that relegated the statute's application only to *purely private libels* (statements about private figures on matters of purely private concern) – there would be no substantial state interest justifying such a narrowly confined statute, and certainly not one that outweighed the substantial chilling effect the statute's vague language imposes on constitutionally protected speech – speech on "matters of public concern."

7. The Vagueness of Colorado's Criminal Libel Statute Renders it Constitutionally Infirm

The facial invalidity of Colorado's criminal libel statute, as demonstrated above, is greatly exacerbated and compounded by the inescapable and intolerable vagueness of the statute's terms.[26] Ordinarily, a criminal statute is deemed unconstitutionally vague if it "fails

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[25] "Although the rights of private individuals to protect their reputations may appear superficially more compelling, even in those cases, providing appropriate monetary damage awards to compensate for actual losses suffered is more than sufficient to address the interests at stake." Jane E. Kirtley, *Criminal Defamation: An "Instrument of Destruction,"* Nov. 18, 2003.

[26] Notably, in his brief as *amicus curiae*, the Colorado Attorney General does not even address the plaintiff's challenge to the criminal libel statute on grounds that it is unconstitutionally vague.

to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (citation omitted); *see also City of Chicago v. Morales*, 527 U.S. 41, 52, 58 (1999) (stating that a criminal statute must provide fair notice of the conduct prohibited "to enable the ordinary citizen to conform his or her conduct to the law"). However, the "void-for-vagueness" doctrine is applied more stringently when construing statutes that criminalize conduct or expression protected by the First Amendment's free speech guarantee. *See*, *e.g.*, *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Ashton v. Kentucky*, 384 U.S. 195, 200-01 (1966); *see also Tollett v. United States*, 485 F.2d 1087, 1099 (8th Cir. 1973) ("Because First Amendment freedoms need breathing space to survive, government may regulate in this area only with narrow specificity.") (quoting *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)); *Fitts v. Kolb*, 779 F. Supp. 1502, 1516 (D.S.C. 1991) ("To avoid chilling the exercise of vital First Amendment rights, restriction of expression must be expressed in terms which clearly inform citizens of prohibited conduct and in terms susceptible of objective measurement.").

As the United States Supreme Court has recognized, there is an inevitable chilling effect that comes from a vague statute that criminalizes an indeterminate quantum of expression: "In addition to the opprobrium and stigma of a criminal conviction . . . the severity of criminal sanction may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 872 (1997). Indeed, Justice Quinn of the Colorado Supreme Court recognized this very infirmity in Colorado's criminal libel statute. *See People v. Ryan*,

806 P.2d 935, 941-42 (1991) (Quinn, J., dissenting) ("Because ambiguous statutory terminology causes citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked,' . . . the vagueness of a statutory enactment affects overbreadth analysis;" the statute's vague terms "will inexorably induce silence as an alternative to avoiding entrapment in the amorphous and uncertain zone of criminality created by the statute.") (internal citations omitted).

Here, a reasonable person in the State of Colorado (or any publisher of a nationally distributed newspaper or website available in Colorado) must guess at the meaning that a prosecutor and/or judge and/or jury may in the future ascribe to the terms "any statement . . . *tending to* . . . blacken the memory of the dead . . . impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive." *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 432-33 (1963) ("If the line drawn . . . between the permitted and prohibited activities . . . is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For **standards of permissible statutory vagueness are strict in the area of free expression.** . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.") (citations omitted) (emphasis added); *see also Smith v. Goguen*, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts."); *see also Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (holding unconstitutionally vague city ordinance prohibiting conduct

"annoying to persons passing by" because the ordinance subjects the exercise of fundamental rights "to an unascertainable standard"); *Cohen v. California*, 403 U.S. 15, 24-25 (1971) (offensiveness of speech an unacceptable basis for restricting speech; "because governmental officials cannot make principled distinctions in this area . . . the Constitution leaves matters of taste and style largely to the individual.").[27] Under the holdings of the authorities cited above, a statute that criminalizes speech on the express grounds that it "tends to blacken the memory of the dead," does not provide a sufficiently clear guide to forewarn the public about what conduct the statute proscribes.[28]

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[27] The Court has made abundantly clear that the "offensive" or "outrageous" nature of the proscribed speech is an impermissible standard by which to distinguish between constitutionally protected and unprotected speech. "'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others . . ."). *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988).

[28] State criminal libel law have been found unconstitutionally vague and/or overbroad in the following cases: *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003); *In re I.M.L.*, 61 P.3d 1038 (Utah 2002); *Ivey v. State*, 821 So. 2d 937 (Ala. 2001); *State v. Powell*, 839 P.2d 139 (N.M. Ct. App. 1992); *Fitts v. Kolb*, 779 F. Supp. 1502 (D.S.C. 1991); *Williamson v. State*, 295 S.E.2d 305 (Ga. 1982); *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978); *Eberle v. Municipal Court, Los Angeles Judicial Dist.*, 127 Cal. Rptr. 594 (Ct. App. 1976); *Weston v. State*, 528 S.W.2d 412 (Ark. 1975); *Commonwealth v. Armao*, 286 A.2d 626 (Pa. 1972); *Boydstun v. State*, 249 So. 2d 411 (Miss. 1971); c*f. Tollett v. United States*, 485 F.2d 1087, 1094 (8th Cir. 1973) (holding unconstitutionally vague and overbroad a federal law criminalizing the mailing of "scurrilous" and "defamatory" language and stating that in the aftermath of *Garrison* and *Ashton*, *supra*, "a strong argument may be made that there remains little constitutional validity to criminal libel laws").

In *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978), the Alaska Supreme Court struck down the state's criminal libel statute as unconstitutionally vague. Considering the same issue of whether archaic common law terms adequately defined criminal conduct, the court held:

> "What is defamatory or scandalous is not defined in AS 11.15.310; therefore, the common law definition must be relied on. At common law, any statement which would tend to disgrace or degrade another, to hold him up to public hatred, contempt or ridicule, or to cause him to be shunned or avoided was considered defamatory. (citation omitted) In our view this falls far short of the reasonable precision necessary to define criminal conduct." *Id.* at 292.

In *Boydstun v. State*, 249 So. 2d 411 (Miss. 1971), the Mississippi Supreme Court struck down a statute that criminalized "libels" where no court decision defined criminal libel in understandable terms. This alone was sufficient to strike down the statute without consideration of the standard of fault.

Nor is the dividing lines between "public figures" and "private figures"[29] or between "matters of public concern" and "matters of purely private concern" readily discernible. For

[29] *See, e.g.*, Tracey A. Bateman, Annotation, *Who is [a] "Public Figure" For Purposes of [a] Defamation Action*, 19 A.L.R. 5th 1 (1999) (collecting case law with disparate outcomes from all across the nation and concluding that "courts have not consistently held that a particular occupation, activity, or status was sufficient or insufficient to make a plaintiff a public figure, but *have made the determination on a case-by-case basis depending on the circumstances of the particular case*") (emphasis added); *see also Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440, 443 (D. Ga. 1976) ("Defining public figures is much like trying to nail a jellyfish to the wall."), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

example, when the *Denver Post* and *Rocky Mountain News* both reported,[30] on December 7, 1994, that a Jewish couple in Evergreen, Colorado had accused their neighbors (in a federal lawsuit filed the previous day) of conspiring to drive the Jewish family out of the neighborhood on account of their religion, the reporters and editors undoubtedly believed they were reporting about a matter of public concern. Nevertheless, this Court[31] and the United States Court of Appeals for the Tenth Circuit later held that on the date of those newspaper accounts (prior to the filing of criminal charges against the neighbors) the allegations contained in the federal lawsuit were *not* a matter of public concern, (and, thus, could properly be the subject of a criminal libel charge under Colorado's law). *See Quigley v. Rosenthal*, 327 F.3d 1044, 1061 (10th Cir. 2003), *cert. denied*, 124 S. Ct. 1507 (Mar. 1, 2004).[32] Similarly, when Colorado newspapers reported on the allegations that an officer in

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[30] *See* Peter G. Chronis, *Jewish Couple Claim Neighbors Harassed Them Anti-Semitic Campaign Launched To Drive Them From Home, Suit Says*, DENVER POST, Dec. 7, 1994 at B-1; Gary Gerhardt, *Jewish Family Sues Neighbors Civil Rights Action Filed In Federal Court Claims Harassment Because Of Religion*, ROCKY MOUNTAIN NEWS, Dec. 7, 1994 at A26 (attached hereto as Exhibit E).

[31] *See Quigley v. Rosenthal*, 43 F. Supp. 2d 1163, 1176-77 (D. Colo. 1999).

[32] *See id.* at 1059 ("Unfortunately, Colorado law provides no clear set of guidelines for determining whether a matter is of 'public concern.'"); *id.* at 1075 (Hartz, J., dissenting) ("Reasonable people can therefore differ on how to apply Colorado law here."). Indeed, one previous *conviction* under Colorado's criminal libel statute appears to have been founded upon a publication on a matter of public concern – allegations that children were being molested. *See Suburban News Briefing: False Charges Earn Jail Time*, ROCKY MOUNTAIN NEWS, Jan. 6, 1996, at 24A (reporting on the conviction for criminal libel of an Arapahoe County man for publishing fliers that falsely accused his daughter's grandparents of molesting children; the man was sentenced to 45 days in jail and 200 hours of community service) (attached hereto as Exhibit F).

the Boulder Police Department had allegedly mishandled the investigation into the murder of JonBenét Ramsey, those papers undoubtedly believed that they, too, were reporting on matters of public concern. Nevertheless, this Court and the Tenth Circuit later held that such statements, (or, at least the officer's intended responses to those criticisms in the media), were purely of private concern. *See Arndt v. Koby*, 309 F.3d 1247, 1254 (10th Cir. 2002), *cert. denied*, 538 U.S. 1013 (2003).

As these examples demonstrate, there is a great deal of difficulty on the part of the press accurately to predict, at the time of publication, whether news stories they deem to be "matters of public interest and concern," (which according to the Attorney General are "exempt" from prosecution under the criminal libel statute), will be viewed differently by the local District Attorney and by the judge(s) presiding over the prosecution and appeal.[33] Such uncertainty and inability to predict judicial outcomes in advance is what inevitably produces a "chilling effect."[34] *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)

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[33] Nor is it sufficient to counter that the First Amendment rights at stake can be vindicated after a lengthy trial. *See Dombrowski v. Pfister*, 380 U.S. 479, 489 (1965) (stating that "the chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure"). Moreover, the inherent uncertainty about what type of activity may be deemed to violate the statute gives journalists throughout Colorado every incentive to engage in self-censorship simply to avoid the threat of prosecution. "The threat of sanctions may deter [the] exercise [of protected liberties] almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1962).

[34] The chilling effect that is produced by such a blatantly vague and ambiguous statute is by no means a theoretical one: In 2000, the Boulder Police Department referred to a special prosecutor a complaint seeking the filing of criminal libel charges against a Colorado Press Association member, *The Boulder Daily Camera* newspaper, for having

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("[W]here a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.") (internal quotation marks and citations omitted); *see also Ashton v. Kentucky*, 384 U.S. 195, 200-01 (1966). Perhaps the clearest explication of why vague criminal statutes, such as the one at issue here, so offend the First Amendment, was provided by the Supreme Court of the United States, when it struck down the federal statute that criminalized "indecent" speech on the Internet:

> The vagueness of the [statute] is a matter of special concern for two reasons. First, the [statute, (as here)] is a content-based regulation of speech. *The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.* . . . Second, the [statute] is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the [statute] threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. . . . As a practical matter, this increased deterrent effect, coupled with the "risk of discriminatory enforcement" of vague regulations, poses greater First Amendment concerns than those implicated by [a] civil regulation . . . .

Reno v. ACLU, 521 U.S. 844, 871-72 (1997) (internal citations omitted).

For the reasons set forth above, Colorado's criminal libel statute is unconstitutionally vague on it face; to allow it to serve as the basis for future prosecutions in the State of

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published an article concerning the murder of JonBenét Ramsey. *See* Karen Abbott, *Criminal Libel Inquiry Targets Journalists in Ramsey Case*, ROCKY MOUNTAIN NEWS, Aug. 26, 2000; Elizabeth Mattern, *Libel Complaint Filed Against Newspaper*, BOULDER DAILY CAMERA, Aug. 24, 2000 (attached hereto as Exhibit G).

Colorado would "cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." Put simply, the statute is incompatible with our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).[35]

CONCLUSION

Amici, the Colorado Press Association and the Reporters Committee for Freedom of the Press, respectfully ask this Honorable Court to enter a declaratory judgment declaring that Colorado's criminal libel statute is facially unconstitutional, and, in accordance with that declaration, to further order that the statute cannot serve as the basis for any criminal prosecution in the State of Colorado.[36]

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[35] As one commentator, discussing this very case, succinctly stated: "There's no justification for keeping these laws on the books. A free society doesn't threaten citizens with jail for exercising their freedom of speech. If someone writes an article that is defamatory, a plaintiff can sue and recover monetary damages. The system works." Ken Paulson, *Jailed for Speech: Criminal Libel is an Old – and Bad – Idea*, FIRST AMENDMENT CENTER, Jan. 18, 2004, available at <http://www.firstamendmentcenter.org/commentary>.

[36] "[I]t is in the public interest to vindicate First Amendment rights by enjoining the enforcement of statutes that infringe upon them." *Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1183 (D. Colo. 2001) (citing *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001)).

DATED:_____

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