IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-B-0023

THOMAS MINK and
THE HOWLING PIG, an unincorporated association,

Plaintiffs,

vs.

KEN SALAZAR, in his official capacity as Attorney General of the State of Colorado; A.M. DOMINGUEZ, JR., District Attorney for the 19th Judicial District, in his official capacity; and
SUSAN KNOX, Deputy District Attorney working for the 19th Judicial District Attorney's Office, in her individual capacity,

Defendants.

PLAINTIFFS' MEMORANDUM BRIEF IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiffs Thomas Mink and The Howling Pig move for partial summary judgment on their First Claim for Relief, which seeks a declaratory judgment that the Colorado criminal libel statute, C.R.S. § 18-13-105, is unconstitutional under the First and Fourteenth Amendments.

I. INTRODUCTION

This case involves protected speech that is punishable as a felony pursuant to an unconstitutional criminal libel statute. Plaintiff Mink is a former student at the University of Northern Colorado ("UNC"). With the assistance of an unincorporated association of persons named The Howling Pig ("THP", also a plaintiff), Mink created a website for the purpose of publicizing and posting an internet-based publication also known as "*The Howling Pig*" ("*THP*"). Plaintiffs have published nine issues of *THP* and they intend to publish future issues.

The first three issues of *THP* spoke out on topics of public concern to the UNC community and also poked fun at a prominent UNC professor, Junius W. Peake. *THP* identified an obvious fictional character named "Junius Puke" as the purported editor of the publication. Peake took offense, and, at his request, the Greeley Police Department and the Office of the District Attorney for the 19th Judicial District began a criminal investigation, relying on Colorado's outdated criminal libel statute:

> **18-13-105. Criminal libel.**
>
> (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.

The Police Department obtained an overbroad search warrant, conducted an unconstitutional search of Mink's home, confiscated a computer, and advised Mink's counsel that the Police Department would recommend that the District Attorney's Office pursue criminal libel charges. The criminal investigation, search and seizure, and threatened prosecution initially chilled plaintiffs from exercising their rights to freedom of expression and the press--publication of *THP* temporarily ceased.

Mink filed suit against the District Attorney seeking, among other relief, a declaratory judgment that the criminal libel statute is unconstitutional. This Court issued a temporary restraining order, providing partial relief from the chilling effect of the criminal libel statute. The District Attorney later announced he would not file criminal libel charges based on the first three issues of *THP*. The Court then vacated its temporary restraining order as the threat of prosecution was no longer sufficiently immediate to warrant interim injunctive relief.

However, for plaintiffs the threat of prosecution for engaging in constitutionally-protected expression remains. Specifically, Mink and The Howling Pig have published six additional issues of *THP*. These issues, which are clearly outside the scope of the

District Attorney's original "no file" decision, contain articles that could be construed as violating provisions of the criminal libel statute.

In short, Section 18-13-105 establishes criminal penalties for the statements and articles that plaintiffs publish and thus they seek a declaratory judgment that Section 18-13-105 is unconstitutional under both the First and Fourteenth Amendments of the U.S. Constitution.

First Amendment: Section 18-13-105 facially violates the First Amendment for a panoply of independent reasons:

- It does not require proof of actual malice.
- As a content-based regulation of speech, it is subject to strict scrutiny; but it is unjustified by any compelling state interest, and it is not the least restrictive means to further whatever interest the state might articulate.
- It does not include falsity as an element of the crime, and it does not even permit a defense of truth for certain types of statements; it thereby permits prosecution and conviction for the publication of true statements.
- It permits prosecution and conviction for speech that cannot be proven objectively false, including opinion, parody, hyperbole, and satire.

Fourteenth Amendment: Beyond these First Amendment violations, Section 18-13-105 violates the Due Process Clause of the Fourteenth Amendment because it is unconstitutionally vague.

Overbreadth/Remedy: The nature and number of constitutional infirmities in Section 18-30-105 render complete invalidation of the statute the only appropriate

remedy. There is no legitimate way to judicially limit the current statute so as to make it constitutional. The Colorado Supreme Court attempted to do so in *People v. Ryan*, 806 P.2d 935 (Colo. 1991), but that effort failed, both because the Court did not reach a number of the problems that plaintiffs raise in this case and because subsequent history reveals that the courts and district attorneys have failed to understand and accept even the partial invalidation which occurred in that case. Here, the Attorney General concedes many of the statute's constitutional defects yet tries to carve out very narrow circumstances in which he contends the statute may be lawfully applied, but that effort fails too: Section 18-301-5 is rotten to the core; once the rot is cut away, there is nothing left to enforce.

II. STATEMENT OF UNDISPUTED FACTS

A. Plaintiffs

1. Mink is 24 years old and recently completed his studies at UNC. He lives in Ault, Colorado. Ex. 1 at 1,¶ 1 (May 17, 2004 Mink Declaration); Ex. 2 at 1 (Incident Report). THP is an unincorporated association of persons engaged in organizing, editing, and circulating an internet-based publication also known as *THP*. Ex. 3 at 1, ¶ 2 (July 3, 2004 Mink Declaration).

B. The First Three Editions of *THP*

2. In the Fall of 2003, Mink and THP published three editions of *THP*, which featured satirical and sarcastic commentary about matters of public concern to the UNC community, including the UNC newspaper, the lack of diversity in the administration and faculty, budget cutbacks, spending priorities, and campus "free

speech zones." Ex. 4 (first three issues); Ex. 1 at 1, ¶ 2 (May 17, 2004 Mink Declaration).

3. Each of the first three issues also included an "editorial column" by *THP's* purported editor-in-chief "Mr. Junius Puke," a parody of UNC's Monfort Distinguished Professor of Finance, Junius Peake. Ex. 4 (first three issues).

4. Based on the first three editions of *THP,* Peake complained to the District Attorney's Office and then the Police Department. Ex. 2 at 1 (Incident Report).

5. When Peake went to the police to request the investigation of criminal charges, he told a Detective "that the articles [in *THP*] have brought him embarrassment and exposed him to public hatred, contempt and ridicule. . . [and] he feels they have impeached his honesty, integrity, virtue, and reputation within the community." Ex. 5 at 3 (Affidavit for Search Warrant under Rule 16).

C. The Initial Criminal Investigation and the Threat of Prosecution

6. Following Peake's complaint, the Police Department initiated a criminal investigation pursuant to Section 18-13-105. Ex. 2 at 3 (Incident Report).

7. In December 2003, three police officers appeared at Mink's home, which he shared with his mother, to execute a search warrant. Ex. 6 (Search Warrant); Ex. 2 at 6 (Incident Report).

8. The police searched the Minks' home and seized the computer that plaintiff Mink used for his work on *THP*. Ex. 2 at 7 (Incident Report); Ex. 1 at 1, ¶ 4 (May 17, 2004 Mink Declaration).

9. Shortly thereafter, the Police Department informed counsel for Mink that it would recommend that the District Attorney file a charge of criminal libel pursuant to Section 18-13-105. Ex. 7 at 2, ¶ 4 (Silverstein Declaration).

10. The criminal investigation, the search and seizure, and the threatened prosecution chilled plaintiffs from exercising their rights to freedom of expression and the press, and publication of *THP* temporarily ceased. Ex. 3 at 2, ¶ 5 (July 3, 2004 Mink Declaration).

D. Partial Relief from the Threat of Prosecution

11. Consequently, Mink filed an initial complaint and a motion for a temporary restraining order on January 8, 2004, seeking, among other things, to prevent the enforcement of the unconstitutional criminal libel statute against him. Verified Complaint; Plaintiff's Motion for Temporary Restraining Order and for a Preliminary Injunction.

12. On January 9, 2004, the Court found that Mink had demonstrated that a temporary restraining order was warranted and ordered the District Attorney not to initiate the prosecution of Mink under the criminal libel statute. January 9, 2004 Order at 1.

13. On January 20, 2004, the District Attorney announced that he would not file a criminal libel charge against Mink based on material published in the first three issues of *THP*. Ex. 8 at 2 (January 20, 2004 Memo from A.M. Dominguez).

14. Based on this "no file" decision, the Court subsequently vacated its temporary restraining order. January 20, 2004 Order at 1.

E. The Real and Credible Threat of Prosecution Against Plaintiffs Remains – Six New Issues of *THP*

15. Plaintiffs have since published and posted six additional issues of *THP*. These issues contain articles that could be construed as violating various aspects of the criminal libel statute, including articles that would "blacken the memory of the dead," or "impeach the honesty, integrity, virtue or reputation" of a living person, or "expose the natural defects" of a living person. Ex. 9 (issues four through nine). For example: "[T]he source of the [Warren and Kenneth] Monfort family fortune that UNC is so enamored of . . . is built on the backs of workers. [A] graduate of the Kenneth W. Monfort School of Business can be expected to follow in Kenny's footsteps and exploit their overworked, underpaid, and undereducated workers for as much quick profit and political clout as possible," (issue four at 2); or new editorial columns by "Rainbow Brite," with an obviously doctored photo of United States Congresswoman Marilyn Musgrave (dressed as a "Teletubbie") (issues eight and nine).

16. Plaintiffs intend to publish future issues of *THP* containing articles that could be construed as violating the statute. Ex. 3 at 2-3, ¶ 7 (July 3, 2004 Mink Declaration).

17. The District Attorney's "no file" decision was limited to the first three issues of *THP* and was further limited to references to Peake. The "no file" decision did not renounce future reliance on the criminal libel statute. Ex. 8 (January 20, 2004 Memo)

18. The District Attorney is term-limited and his successor will not be bound by the analysis and application of law to fact presented in the "no file" decision. Ex. 3 at 3, ¶ 8 (July 3, 2004 Mink Declaration).

19. The Attorney General, charged with defending the constitutionality of Colorado statutes, has announced that the criminal libel statute is constitutional (albeit under limited circumstances) and therefore could be enforced against Mink. Brief of State of Colorado as Amicus Curiae at 24 ("AG's Amicus Brief").

III. ARGUMENT

Summary judgment should be granted if the movant demonstrates that there is no genuine issue of material fact and that judgment is appropriate as a matter of law. *See Anderson v. Liberty Lobby, Inc*. 477 U.S. 242, 248 (1986); *Faustin v. City and County of Denver, Colorado*, 268 F.3d 942, 947 (10th Cir. 2001). To survive summary judgment, the nonmoving party "cannot rest upon his or her pleadings, but must set forth specific facts showing that there is a genuine issue for trial." *Cudjoe v. Independent School District No. 12*, 297 F.3d 1058, 1062 (10th Cir. 2002) (citations omitted). Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (citations omitted). Under these standards, plaintiffs are entitled to partial summary judgment because there is no genuine issue of material facts.

Section 18-13-105 facially violates the Constitution. The Attorney General essentially concedes as much, while nevertheless making a complex argument in an unsuccessful effort to save a limited "part" of the statute addressing purely private criminal libel. However, there is no legitimate way to judicially rewrite the current statute so as to transform it or narrow it into the one advocated by the Attorney General. Even though a narrowing construction is preferred, courts cannot disregard plain language. *Phelps v. Hamilton*, 59 F.3d 1058, 1071 (10th Cir. 1995) ("The federal courts do not have the power to narrow a state law by disregarding plain language in the statute just to preserve it from constitutional attack."); *ACLU v. Johnson*, 194 F.3d 1149, 1159 (10th Cir. 1999) (rejecting defendants' proposed narrowing construction).

On the statute at issue in this case, the Colorado Supreme Court agreed. In *Ryan*, the Supreme Court refused to disregard the plain language of the statute and declined to read in an "actual malice" standard. Instead, it held the statute invalid to the extent that it punishes statements about public officials or public officials on matters of public concern. 806 P.2d at 940.

However, *Ryan* did not go far enough. It was unduly narrow in its statement of the scope of the actual malice requirement, failing to extend it to all statements about matters of public concern. In addition, *Ryan* left truth as an affirmative defense instead of recognizing that the First Amendment requires that falsity be an element of the prosecutor's case for criminal libel. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). In addition, the Supreme Court in *Ryan* declined to reach Section 18-13-105's exclusion of the truth defense for "libels tending to blacken the

memory of the dead and libels tending to expose the natural defects of the living." 806 P.2d at 941 n. 11 (quoting C.R.S. ¶ 18-13-105(2)). The Supreme Court also did not address whether the statute can survive the strict scrutiny that necessarily applies to it as a content-based restriction of speech, nor whether the statute is unconstitutionally vague. Now, however, these issues are squarely before this Court.

A. Mink and THP Have Standing

To invoke the jurisdiction of a federal court, plaintiffs must satisfy the case-or-controversy requirement imposed by Article III of the Constitution. *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003). Under Article III, a plaintiff must show a "personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). To demonstrate standing, a plaintiff must show that (1) he or she has suffered injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Such traditional prerequisites for standing, however, are relaxed in the context of a facial challenge to a statute on First Amendment grounds. *See Sec'y of State v. Munson*, 467 U.S. 947, 956 (1984) ("[W]here there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged."); *Ward*, 321 F.3d at 1266-67 (same). First Amendment plaintiffs may challenge an overbroad statute not

necessarily because their own rights to freedom of expression are violated, but because of the chilling effect on others. "[A] judicial prediction or assumption [exists] that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broderick v. Oklahoma*, 413 U.S. 601, 612 (1973). However, even in light of the more lenient standing requirements, First Amendment plaintiffs must still demonstrate their own injury. *Ward*, 321 F.3d at 1263.

One way to do so is when the plaintiff "alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder." *Id*. (citations omitted). To satisfy this standard, a plaintiff must merely demonstrate (1) an intention to violate the terms of the statute; and (2) a credible threat of prosecution. For the credible threat, a plaintiff need not suffer actual prosecution or be actively threatened with prosecution; rather, a plaintiff must only show that his fear of criminal prosecution under an unconstitutional statute is not "imaginary or wholly speculative." *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987) (citations omitted).

Here, plaintiffs have clearly satisfied this lenient two-part requirement for standing. *First*, plaintiffs have published and intend to continue publishing articles that violate provisions of the Colorado criminal libel statute. Specifically, they have published recent articles that could trigger application of the statute's prohibitions against "blacken[ing] the memory of the dead" or "impeach[ing] the honesty, integrity, virtue or reputation or expos[ing] the natural defects of one who is alive." *See supra* at 7. *Second*, their fear of prosecution is not "imaginary or wholly speculative." *Wilson*,

819 F.2d at 946. Not only have plaintiffs been actively threatened with past prosecution, but the defendants have failed to renounce future prosecutions.[1] *See Ward*, 321 F.3d at 1268 (finding an injury in fact, in part, because the plaintiff had been given "no assurances that he would not be charged" under the statute if he engaged in similar protests in the future); *Chamber of Commerce v. REC*, 69 F.3d 600, 603-04 (D.C. Cir. 1995) (a credible threat of prosecution existed because nothing "would prevent the Commission from enforcing its rule at any time with, perhaps, another change of mind of one of the Commissioners.").

Given the content of the latest editions of *THP*, the past threat of prosecution, and the failure of defendants to provide any assurances to Mink and THP, the threat of prosecution remains real and credible. Thus, plaintiffs have standing to assert their claims against Colorado's unconstitutional criminal libel statute.

B. Section 18-13-105 Violates the First Amendment

In its seminal decision, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court analyzed the nation's history of rejecting punishment for speech, beginning with the Founding Fathers' and the Supreme Court's historical disavowal of the Sedition Act of 1798. *Id.* at 273-74, 276. The Court emphasized that "libel can claim no talismanic immunity from constitutional limitations." *Id.* at 268. Rather, "[i]t

[1] Plaintiffs' standing is unaffected by the District Attorney's "no file" decision. *First*, the decision applied only to the first three editions of *THP*. *Second*, that decision did not include analysis of the statutory prohibitions against statements tending to "blacken the memory of the dead" or "expose the natural defects of one who is alive." *Third*, the District Attorney's memorandum was limited to references to Peake and his role as a "public figure" or "public official." *Fourth*, the District Attorney is term-limited and there has been no assurance from his successor or his office generally that plaintiffs will not be prosecuted for statements that appear in future editions of *THP*.

must be measured by standards that satisfy the First Amendment." *Id.* Like the Supreme Court in *New York Times*, this Court must "consider this case against the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ." *Id.* at 270 (citations omitted).

1. C.R.S. § 18-13-105 Violates the First Amendment Because It Fails to Include An Actual Malice Standard

The constitutional requirement of proof of actual malice in civil and criminal defamation/libel claims has evolved in a series of Supreme Court decisions from the mid-1960s to the mid-1980s.

- In *New York Times*, the Supreme Court held that under the First Amendment, a defamatory false statement about a public official cannot be actionable in a civil action for damages unless it was made with "'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 280.
- In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court held that "the *New York Times* rule also limits state power to impose criminal sanctions for criticism of the official conduct of public officials." *Id.* at 67. "Where criticism of public officials is concerned," the Court saw "no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations." *Id.* (footnote omitted). To the contrary, "[t]he constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy," *id.* at 216, and therefore, the

First Amendment forbids a prosecution for criminal libel based on speech about public officials, unless the state must prove the defendant's actual malice.

- In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court extended the constitutional privilege first recognized in *New York Times* to defamatory criticism of "public figures," or nonpublic persons who "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* at 164 (Warren, C.J., concurring).
- In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court concluded that "in defamation suits by private individuals," the states may "impose liability . . . on a less demanding showing than that required by *New York Times*," *id.* at 348, but nevertheless forbade the States from "impos[ing] liability without fault" even in civil cases involving private victims of defamatory statements. *Id.* at 347; *see also id.* at 376 (confirming "additional burden on the [private individual] plaintiff of proving negligence or other fault" even in civil cases seeking only actual damages) (White, J., dissenting). Because punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence," the Court held that the First Amendment requires proof of actual malice before punitive damages may be awarded in civil cases brought by purely private individuals. *Id.* at 349-50.

- Finally, in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985), a majority of justices concluded, albeit in separate opinions, that the *Gertz* rule, requiring a showing of actual malice to support recovery of punitive damages by private individuals, applies only in cases involving speech on matters of public concern. *Id.* at 758-59 (plurality opinion); *see also id.* at 764 (Burger, C.J., concurring); *id.* at 774 (White, J., concurring). There was no majority decision on this point, however, and the plurality decision did not alter the separate holding in *Gertz* that States may "not impose liability without fault," 418 U.S. at 347, in any civil defamation action brought by a private individual – regardless of the subject matter of the speech. 472 U.S. at 781 ("Nor do the parties question the requirement of *Gertz* that respondent must show fault to obtain a judgment and actual damages.") (Brennan, J., dissenting).

Against this backdrop, it is not surprising that court after court has held criminal libel statutes unconstitutional because they do not include an actual malice requirement for statements defaming public officials or figures, or concerning matters of public concern. *See, e.g., Mangual v. Rotger-Sabat*, 317 F.3d 45, 65-67 (1st Cir. 2003); *Fitts v. Kolb*, 779 F.Supp. 1502, 1514-15 (D.S.C. 1991); *Ivey v. State*, 821 So.2d 937, 941-46 (Ala. 2001); *State v. Powell*, 839 P.2d 139, 143-45 (N.M. 1992); *In re I.M.L. v. State*, 61 P.3d 1038, 1044 (Utah 2002) (citing cases). Like the criminal libel statutes of Utah, Alabama, New Mexico, Puerto Rico, South Carolina, and those of other states, Section 18-13-105 is facially unconstitutional because it does not require the State to

prove actual malice in a prosecution for criminal libel arising out of speech about (a) public officials, (b) public figures, or (c) matters of general public concern. The only state of mind requirement is that the publication or dissemination of the challenged statement must be "knowing[ ]." C.R.S. § 18-13-105(1). But a "knowing[ ]" *publication* falls far short of the constitutionally-mandated requirement that the defendant spoke "with knowledge that [his or her statement] was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280.

Based on the body of United States Supreme Court law summarized above, the Colorado Supreme Court partially invalidated Section 18-13-105 in *Ryan*, holding that, due to the absence of a requirement of proof of actual malice, the statute could not be constitutionally applied to "libelous statements about public officials or public figures involving matters of public concern." 806 P.2d at 940. But the court resolved the issue imperfectly on multiple levels.

First, *Ryan* inaccurately states the scope of the actual malice rule under *New York Times* and its progeny. The language quoted above indicates that the speech must be both "about public officials or public figures" *and* "involving matters of public concern" before the actual malice standard applies.[2] However, as the Attorney General concedes, under *New York Times* and *Curtis*, a civil plaintiff must prove actual malice whenever the speech is about a public official or figure – without any independent

[2] The holding in *Ryan* is ambiguous. It also could be read as applying the actual malice requirement to any speech "about public officials," regardless of whether the speech involves a matter of public concern. Even under that reading, the court erred for the reasons stated in the text.

showing that the matter also relates to a matter of public concern. *See supra* at 14-15; *see also* AG's Amicus Brief at 4 (Section 18-13-105 cannot constitutionally reach "a false libelous statement about public figures relating to matters of private concern"). Similarly, under *Garrison*, the state must prove actual malice whenever the criminal libel prosecution is for speech about a public official, again without independent proof that the specific subject matter of the speech is a matter of public concern. *See supra* at 13-14; *see also* AG's Amicus Brief at 4 (First Amendment requires proof of actual malice in defamation and criminal libel claims based on speech about public figures relating to matters of private concern because "public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods, and little distinction is made between issues of public and private concern.").

Second, the *Ryan* Court stopped too short in its holding. Although the Court recognized that the "lack of an 'actual malice' standard threatens to deter a substantial amount of expression protected by the first amendment," it nevertheless declined to fully invalidate the statute, holding instead that it might be constitutionally applied to purely private defamation, *i.e.*, "where one private person has disparaged the reputation of another private individual." *Id.* at 941. The Court did not recognize, as it should have, that the actual malice standard applies to statements about purely private persons so long as the challenged speech was on a matter of public concern.[3] *See supra* at 14-

[3] The Supreme Court necessarily reached this conclusion in *Gertz* in its analysis of punitive damages. Criminal prosecution is typically even more punitive and deterrent than punitive damages. Thus, to the extent that the First Amendment requires proof of actual malice to award punitive damages in civil defamation cases brought by private persons, the Constitution necessarily would require no less in criminal prosecutions

15; *see also Phelps*, 59 F.3d at 1073 (*New York Times* and *Garrison* require proof of actual malice "in criminal defamation cases involving matters of public concern") (footnote omitted)[4]; *cf.* AG's Amicus Brief at 9 (under Colorado law, actual malice standard applies to "defamatory statements published about a private figure when a matter of public concern is involved"). Nor did the *Ryan* Court acknowledge that in *all* defamation cases there must be proof of fault over and above mere knowing publication**.** *See supra* at 14. Finally, the Court failed to reach any of the independent reasons discussed below as to why Section 18-13-105 fails in its entirety, both under the First Amendment and the Due Process Clause. *See*, *e.g.*, 806 P.2d at 940 n.11 (declining to decide whether the statute's relegation of truth to an affirmative defense, and the unavailability of truth as a defense in certain circumstances, independently dooms the statute under the First Amendment). Plaintiffs' declaratory judgment claim squarely presents those issues for resolution and compels invalidation of the entire statute.

Third, the incomplete invalidation of the statute in *Ryan* has not saved constitutionally-protected speech from the chilling effect of real and threatened

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based on allegedly libelous statements about private persons, but involving matters of public concern. *See Powell*, 839 P.2d at 133 ("[C]riminal penalties certainly pose as much of a threat to First Amendment interests as do punitive damages.").

[4] In *Phelps*, the Tenth Circuit declined to hold the Kansas statute at issue in that case unconstitutional, concluding instead that the Kansas Supreme Court would construe the statute as including an actual malice requirement. *Id.* at 1070-73. Here, by contrast, the Colorado Supreme Court already has considered Section 18-13-105 in *Ryan* and has declined to read into the statute the actual malice element that is essential under *New York Times* and later cases. In other words, the Colorado Supreme Court expressly refused to do precisely what the Tenth Circuit predicted the Kansas Supreme Court would do.

prosecutions in Colorado. After the *Ryan* decision, the General Assembly did not amend Section 18-13-105 to add an actual malice standard. Not surprisingly given the limited scope of the *Ryan* decision, the General Assembly also failed to address the statute's other defects, outlined in this brief. Rather, the statute remains on the books with its original language, as flawed today as it was when the Colorado Supreme Court decided *Ryan*. The unsurprising result is that – as in this case – prosecutors have continued to invoke Section 18-13-105 to prosecute and threaten to prosecute defendants regardless of the absence of actual malice and despite the statute's other constitutional problems. For example, in criminal cases brought against a juvenile in 1997 and 1998 in Larimer County, a student faced criminal libel charges even though he engaged in satirical speech and opinion about public figures and officials, and even though the information included no allegations of actual malice. *See* First Amended and Supplemental Complaint, at ¶ 34; *see also* Addendum to Brief in Support of Motion for Temporary Restraining Order. On information and belief of undersigned counsel, prosecutors in Boulder, Clear Creek County, La Plata County and Larimer County also have relied on the criminal libel statute to investigate and, in some cases, to file criminal charges within the past five years. *See, e.g.*, First Amended and Supplemental Complaint, at ¶¶ 35-36.

2. C.R.S. § 18-13-105 Cannot Survive the Strict Scrutiny That Must Be Applied to It as a Content-Based Regulation of Speech

Beyond the critical absence of an actual malice requirement, Section 18-13-105 suffers from an equally fatal flaw that renders it independently unconstitutional in any factual context – regardless of whether the speech concerns a public official, a public

figure, or a purely private individual, and regardless of whether it relates to matters of public or private concern. Because the statute regulates speech based on its content, it is subject to a strict scrutiny standard of review, which it cannot survive because (a) no compelling state interest justifies its restrictions on protected First Amendment speech, and (b) the threat of criminal prosecution is not the least restrictive means to advance whatever interest the state could articulate for the statute.

In the forty years since the Supreme Court last reviewed the constitutionality of a criminal libel statute, in *Garrison*, the Court has made clear time and again that statutes which impose sanctions – whether criminal, civil, or administrative – on the basis of the content of speech, implicate fundamental First Amendment rights and, therefore, are subject to strict scrutiny: "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (citations omitted); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844, 874-79 (1997); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1156 (10th Cir. 1999). "'Content-based regulations are presumptively invalid,' and the Government bears the burden to rebut that presumption." *Playboy*, 529 U.S. at 817 (citation omitted); *see also Acorn v. Golden*, 744 F.2d 739, 750 (10th Cir. 1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.") (citation omitted).

Just last week the Supreme Court reaffirmed all aspects of the strict scrutiny test in the First Amendment context: "Content-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. To guard against that threat, the Constitution demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality." *Ashcroft v. American Civil Liberties Union*, 542 U.S. __(June 29, 2004), slip op. at 1-2 (citations omitted). The Court explained that the purpose of the second prong of the analysis – whether there are less restrictive alternatives – "is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished." *Id.*, slip op. at 7.

Section 18-13-105 is "content-based restriction," because "enforcement authorities must necessarily examine the content of the message that is conveyed to determine" whether the defendant has violated the statute. *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984); *see also Playboy*, 529 U.S. at 811-12. The criminal libel statute necessarily calls for an examination of the content of the speech, inasmuch as its scope is limited to statements that "tend[ ] to blacken the memory" of the dead, or "impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive." Thus, Section 18-13-105 is presumed invalid unless the government can prove a compelling state interest that justifies its interference with protected speech, and that the statute uses the least restrictive means available to further that interest. Here, defendants cannot demonstrate either of those critical circumstances.

Certainly, the historical rationale for the crime of libel – "to avert the possibility that the utterance would provoke an enraged victim to a breach of peace," *Garrison*, 379 U.S. at 68 – no longer carries weight, as the Supreme Court has recognized:

> Even in [in the early-1800s], however, preference for the civil remedy, which enabled the frustrated victim to trade chivalrous satisfaction for damages, had substantially eroded the breach of the peace justification for criminal libel laws. . . . Changing mores and the virtual disappearance of criminal libel prosecution lend support to the observation that ". . . under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation."

Id. at 69 (citation and footnote omitted); *see also Powell*, 839 P.2d at 143 ("One message of *Garrison* is that criminal libel laws serve very little, if any, purpose."). The Colorado Supreme Court reached a similar conclusion, albeit more obliquely, in *Ryan*. After identifying the "historical rationale for the criminal punishment of libel" as "that libels tended to create breaches of the peace when the libel victim or his friends sought revenge on the libeler," the Court acknowledged that "[w]hile criminal action was used to preserve the peace, civil action was the more popular remedy, as it is today, because it provided compensation for damage to the reputation of the person defamed." 806 P.2d at 938 n.8 (citation omitted); *see also Fitts*, 779 F.Supp. at 1506-08 (summarizing historical background of criminal libel statutes). Nor is there any other compelling justification for criminal libel statutes given the availability of a civil remedy for defamation. *See United States v. Handler*, 383 F.Supp. 1267, 1277-78 (D. Md. 1974) (finding no compelling governmental interest to justify restriction on speech

imposed by 18 U.S.C. § 1718, which court characterized as a "postal criminal libel statute").

Even if the state could articulate a compelling state interest in prohibiting libelous statements, there are far less restrictive alternatives than criminal liability including the risk of imprisonment and fines. In particular, if the governmental interest is to protect individuals from reputational damage, embarrassment or hurt feelings due to defamatory statements, the availability of a civil tort remedy is a far less restrictive, yet effective, alternative. "Above all, limiting aggrieved persons to a civil remedy does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished." *Ashcroft*, slip op. at 9.

Based on the obsolete historical justification for criminal libel laws and the absence of any current compelling justification, as well as the availability of a less restrictive alternative for addressing harm to reputation, defendants cannot meet their burden of showing that the alternative civil remedy is less effective than the antiquated criminal offense. Therefore, the Court should strike down Section 18-13-105 under a strict scrutiny standard of review.

3. C.R.S. § 18-13-105 Violates the First Amendment by Omitting Falsity as an Element Of The Crime of Libel, Thereby Permitting Conviction for the Publication of True Statements

The criminal libel statute suffers yet another constitutional defect. *First*, it permits a criminal conviction without proof that the allegedly libelous statement was false. Truth is relegated to a mere affirmative defense. *Second*, truth is explicitly excluded as an affirmative defense in several categories of criminal libel: Statements

tending to blacken the memory of the dead and statements tending to expose the natural defects of the living. Thus, the statute unconstitutionally permits conviction for true statements because a defendant is not required to put on a defense, and a defendant is not permitted to assert a defense of truth for certain categories of speech. Standing alone, each of these faults would require invalidation of the statute.

The United States Supreme Court has squarely held that defamation laws, to survive constitutional scrutiny, must require proof of the falsity of the defendant's speech. It is not enough to permit truth as a defense. In *Hepps*, the Court invalidated Pennsylvania's rule that permitted liability for libel in the absence of proof of falsity. The defendant's right to prove the truth of his statements as an affirmative defense did not save the statute:

> We believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before receiving damages for defamation from a media defendant. To do otherwise would "only result in a deterrence of speech which the Constitution makes free."

475 U.S. at 777 (citation omitted). The *Hepps* decision flowed from the principal that "the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified." *Id.* In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Court confirmed that the Constitution requires "'that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages'" in a civil defamation action. *Id.* at 16 (quoting *Hepps*); *see also New York Times*, 376 U.S. at 278 ("The state rule of law is not saved by its allowance of the defense of truth.").

The above-quoted decisions considered *civil* defamation laws. Their rationales apply with even greater force in the criminal libel context, *see Garrison*, 379 U.S. at 74, where the liability faced by a defendant is greater than the potential civil liability underlying the *Hepps* decision. *Cf. Reno*, 521 U.S. at 860 (holding that the increased deterrent effect of criminal sanctions – including fines and/or imprisonment for up to two years poses "greater First Amendment concerns than those implicated by . . . civil regulations."). Criminal liability involves the stigmatization and punishment of the accused by the state with its manifold resources. The criminal defendant's stake is "an interest of transcendent value," and the Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact necessary to constitute the crime with which he is charged*." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added); *see also Ashcroft*, slip op. at 12 ("Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech.").

Therefore, under *Hepps* and *Winship*, if the state wishes to impose criminal liability on one who has made an allegedly libelous statement, it must prove the statement's falsity. Because Section 18-13-105 does not place the burden of proving this element on the state, it is unconstitutional.

Adding insult to injury, Section 18-13-105(2) also excludes truth as an affirmative defense for "libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living." This provision directly contravenes

the cases discussed above. *See Hepps*, 475 U.S. 767; *Milokovich*, 497 U.S. at 16; *see also Mangual*, 317 F.3d at 67 (holding unconstitutional Puerto Rico criminal libel statute that recognizes truth as only a qualified defense); *In re I.M.L.*, 61 P.3d at 1044 (same, for Utah criminal libel statute that "provides no immunity for truthful statements").

The Attorney General's proposed narrowing construction does not alter these conclusions. Specifically, the Attorney General argues that Section 18-13-105 is constitutional because the Colorado Supreme Court has held that "truth is an absolute defense" to libel in both civil and criminal cases, citing both *Gomba v. McLaughlin*, 504 P.2d , 337, 338 (Colo. 1973) and *Ryan*, 806 P.2d at 938. The Attorney General concludes that his proposed narrowing construction removes the two "truth exceptions" found in Section 18-13-105(2).[5] *See* AG's Amicus Brief at 17. This argument is contrary to controlling First Amendment law and the explicit terms of the statute which cannot be so lightly removed and rendered meaningless. *See Phelps*, 59 F.3d at 1058 (federal courts "do not have the power to narrow a state law by disregarding plain language in the statute just to preserve it from constitutional attack"); *Wilson*, 819 F.2d at 948 ("When terms of the statute are clear and unambiguous, that language is controlling absent rare and exceptional circumstances."). The Attorney General's proposed construction impermissibly allows a criminal conviction without proof that

[5] The Attorney General concedes, as he must, that *Ryan* declined to address the exclusion of the truth defense found in Section 18-13-105(2). *See* AG's Amicus Brief at 17 n.2.

the allegedly libelous statement is false (relegating truth to a mere defense) and truth is *explicitly excluded* for certain types of libel. As shown above, either defect is fatal.

Thus, the Attorney General's further attempt to salvage Section 18-13-105 is without merit. Based on the statute's failure to include falsity as an element of the government's case and its elimination of the affirmative defense of truth for certain types of libel, it unquestionably violates the First Amendment.

4. C.R.S. § 18-13-105 Permits Prosecution and Conviction for Constitutionally-Protected Statements of Opinion, Satire, and Hyperbole

The criminal libel statute violates the First Amendment for yet another reason: It permits prosecution – again, as in this case – for speech that must be protected because it is opinion, parody or hyperbole.

The Supreme Court has made clear that statements that "could not reasonably have been interpreted as stating actual facts," *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988), enjoy virtually absolute First Amendment protection. In *Milkovich*, the Court confirmed the importance of these decisions, which "provide[ ] assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." 497 U.S. at 20 (citations omitted). "[L]oose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining [whatever proposition he or she was expressing]," *id.* at 21, cannot be the basis for a civil or criminal defamation claim. *See also Falwell*, 485 U.S. at 51-55 (reviewing historical importance of parody and satire in public and political debate).

Moreover, "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich*, 497 U.S. at 20. In other words, if the statement does not "reasonably impl[y] false and defamatory facts," *id.* – if it is the product of the author's imagination or conjecture and not factual – it enjoys unqualified First Amendment protection. *See Rinsley v. Brandt*, 700 F.2d 1304, 1309 (10th Cir. 1983). Perhaps most instructive on this issue is *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983), in which the Tenth Circuit held that the First Amendment protects rhetorical hyperbole and obvious parody regardless of whether the subject is or is not a public figure. *Id.* at 442.

These undeniable constitutional protections led this Court to grant plaintiffs a temporary restraining order, because the statements in the first three issues of *THP* constituted classic satire and opinion. But Section 18-13-105 is not merely unconstitutional as applied in this case. Rather, it is also unconstitutional because, on its face the statute – even as partially invalidated in *Ryan* – permits prosecution for statements that use hyperbole or satire to "to blacken the memory" of the dead, or "impeach the honesty, integrity, virtue or reputation, or expose the natural defects" of the living. For example, on its face Section 18-13-105 would permit a criminal prosecution for the fanciful and incredible statements about Mr. Falwell and his mother, *see Falwell*, 485 U.S. at 48, and for the outlandish statements about Ms. Pring, *see Pring*, 695 F.2d at 443, notwithstanding the indubitably protected status of that hyperbolic speech.

Finally, this defect in the statute exacerbates the separate flaw caused by its relegation of truth to, at the most, a mere affirmative defense. *See supra* at 24-26. With respect to the portion of Section 18-13-105 for which truth *is* an affirmative defense, a defendant loses the benefit of even that constitutionally-insufficient protection when the underlying speech is opinion, satire or hyperbole – which, by definition, cannot be proved true or false. *See Gertz*, 418 U.S. at 339-40 ("Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges or juries but on the competition of other ideas.").

C. Section 18-13-105 Violates the Due Process Clause of the Fourteenth Amendment Because It Is Unconstitutionally Vague

Beyond these First Amendment violations, Section 18-13-105 also violates the Due Process Clause of the Fourteenth Amendment because it is unconstitutionally vague.[6] *See Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (ordinance prohibiting conduct "annoying to persons passing by" is unconstitutionally vague); *Gooding v. Wilson*, 405 U.S. 518 (1972) (statute prohibiting opprobrious words and abusive language tending to cause a breach of the peace is unconstitutionally vague); *Tollet v. United States*, 485 F.2d 1087 (8th Cir. 1973) (federal statute that criminalized "libelous, scurrilous, defamatory and threatening" writings on the outside of a mailed envelope is unconstitutionally vague.).

[6] The Colorado Supreme Court's decision in *Ryan* did not discuss whether Section 18-13-105 is void for vagueness and neither did the Attorney General in his Amicus Brief.

The Supreme Court has made clear that it will not permit the application of a criminal statute so vague "that it 'fails 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). "Criminal statutes must be scrutinized [for vagueness] with particular care." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987) (citation omitted). The Constitution requires that criminal statutes give clear and coherent notice of what conduct is forbidden. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (a court must consider whether the law "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

Moreover, in the context of the First Amendment, the "void for vagueness" doctrine is applied more stringently to avoid chilling constitutional expression. *Smith v. Goguen*, 415 U.S. 566, 573 (1974) ("[W]here 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.") (footnote omitted); *accord Ashton v. Kentucky*, 384 U.S. 195, 200-01 (1966) (in challenge to Kentucky's criminal libel law, explaining that "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer."); *Fitts*, 779 F. Supp. at 1516 ("When a statute touches the area of free expression, the requirements of preciseness are most strictly applied . . . . To avoid chilling the exercise of vital First Amendment rights,

restriction of expression [in criminal libel statute] must be expressed in terms which clearly inform citizens of prohibited conduct and in terms susceptible of objective measurement.").

Thus, in *Reno*, which held that the federal Communications Decency Act was unconstitutionally vague, the Supreme Court took an especially hard look at the statute's prohibition of "indecent" communication on the Internet, for two compelling reasons. *First*, as "a content-based regulation of speech," the Act "raises special First Amendment concerns because of its obvious chilling effect on free speech." 521 U.S. at 871-72. *Second*, the Act is a criminal statute. "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." *Id.* at 872. As the Court explained, this increased deterrent effect in the criminal context, coupled with vague regulations, pose greater First Amendment concerns than those implicated by a civil regulation. *Id*.

Section 18-13-105 cannot survive the especially stringent scrutiny that applies to it as both a criminal statute and one that directly affects First Amendment rights. Under the "void-for-vagueness" doctrine, there is a two-part standard to determine whether a law is unconstitutionally vague. *First*, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted). *Second*, the statute must set forth explicit standards "in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.*; *accord*, *Hill*, 482 U.S. at 466

("'[I]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could rightfully be detained and who should be set at large.'") (citation omitted); *Smith*, 415 U.S. at 574 (the "void-for-vagueness" doctrine requires the "legislature [to] establish minimal guidelines to govern law enforcement."); *Grayned*, 408 U.S. at 108-09 ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.");

Section 18-13-105 satisfies neither criterion for constitutionality. *First*, the statute fails to provide fair notice. Section 18-13-105 criminalizes as a felony any publication "tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the nature defects of one who is alive, and thereby expose him to public hatred, contempt, or ridicule." Due to the elasticity of the terms "public hatred," "public . . . contempt," "public . . . ridicule," "blacken the memory of the dead," and "natural defects," "no standard of conduct is specified at all." *Smith*, 415 U.S. at 578. Here, there is insufficient notice to the person of ordinary intelligence as to what speech the statute prohibits. In addition, the phrases "expose him to public hatred, contempt, or ridicule" and "expose the natural defects of the living" have no established meaning. No reported case has ever construed the latter clause and, accordingly, there is "no settled usage or tradition of interpretation in law"

for it. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1049 (1991). The language in the statute is so amorphous and malleable that it fails to provide any notice as to what is proscribed criminal activity and thus threatens to impermissibly chill constitutionally-protected expression. This uncertainty of meaning requires citizens "at the peril of their . . . liberty . . . to speculate as to the meaning of [a] penal statute . . ." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (citations omitted).

Second, Section 18-13-105 is susceptible to arbitrary enforcement. The prohibitions in Section 18-13-105 appear so broad and standardless that the statute is arguably violated every day in the state.[7] Meanwhile, "policemen, prosecutors, and juries . . . pursue their personal predilection" about whom to hold criminally liable. *Smith*, 415 U.S. at 575. Unquestionably, "[l]egislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Id*.

In sum, the criminal libel statute poses a grave chilling threat to the citizens of Colorado. Section 18-13-105 prohibits the free exercise of fundamental First Amendment rights by restricting expression in a way that fails to inform the ordinary citizen of prohibited conduct and does so in terms that are susceptible to arbitrary

[7] Recent newspaper articles which could be construed as "blackening the memory of the dead" include: Jim Sheeler, "Jefferson's wig—the flip side," *Rocky Mountain News*, July 3, 2004, at 23A (discussing July 4th re-creation of Jefferson's life and how it will, among other things, "knock off halos that often hover over the Founding Fathers" and remember the "fallibility" of Jefferson); Karen Rouse, "Columbus' story getting native voices in curriculum," *Denver Post*, July 5, 2004, A1 (describing teachers who are designing a school curriculum that includes lessons about the rape, pillage and slave trading of indigenous people caused by Columbus and his peers).

enforcement. Such a result is contrary to the demands of the Fourteenth Amendment's Due Process Clause.

D. The Court Should Reject the Attorney General's Proposed Narrowing Construction

Finally, there is the issue of whether any portion of the statute can or should be saved through a "narrowing construction." The Attorney General, in his amicus brief, advocates such an approach. Notably, the amicus brief explaining this construction is 24 pages in length. Actually, labeling it a "construction" is charitable. In reality, the Attorney General proposes a new, extremely limited statute. The Colorado General Assembly did not enact this statute following *Ryan,* and this Court cannot and should not do the General Assembly's job.

> It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be readily susceptible to a narrowing construction that would make it constitutional, it will be upheld. The key to application of this principle is that the statute must be readily susceptible to the limitation; we will not rewrite a state law to conform it to constitutional requirements.

Viriginia v. American Booksellers' Ass'n, 484 U.S. 383, 397 (1988). Here, the Attorney General's "proposed narrowing construction really amounts to a wholesale rewriting of the statute. That [this Court] cannot do." *Johnson,* 194 F.3d at 1159.

In *Ryan,* the Colorado Supreme Court acknowledged that it could not rewrite the statute, but took a different approach and invalidated it in certain instances. Importantly, however, *Ryan* was solely an overbreadth challenge. 806 P.2d at 937 & n.5 (the criminal defendant conceded the statute was constitutional as applied to his "conduct"). Further, the *Ryan* Court limited itself to the lack of an actual malice

requirement, and did not consider that Section 2 disallows the truth defense in certain circumstances. *Id.* at 940-41 n.11.

Nor did the *Ryan* Court consider the various other constitutional flaws identified in this brief, including its inability to withstand strict scrutiny; its omission of falsity as an element of the offense; the statute's application to opinion, hyperbole and satire; and its vagueness. Only a judicially *rewritten* statute can resolve these issues. Rather than do so, this Court should declare the actual statute unconstitutional in its entirety.

IV. CONCLUSION

Based on the constitutional infirmities discussed above, Colorado's criminal libel statute cannot be saved. Even if the statute is construed to apply only to "private libels"--thereby excluding statements about public officials, public figures and matters of public concern--the statute remains unconstitutional. It violates both the First and Fourteenth Amendments. Despite the tortured construction the Attorney General proposes to salvage this statute, there is nothing for this Court to uphold. For these reasons, plaintiffs' request that the Court grant their Motion for Partial Summary Judgment on their First Claim for Relief, seeking a declaratory judgment that C.R.S. § 18-13-105 is facially unconstitutional.

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