

COURT OF APPEALS, STATE OF COLORADO

Court Address: 2 East 14th Avenue, 3rd Floor
Denver, CO 80203

Appeal from the District Court, City and County of Denver,
Colorado, Div. 9
The Honorable Michael A. Martinez, Presiding
Case No. 06CV10876

Appellant: CURIOUS THEATRE COMPANY, a
Colorado non-profit company, PARAGON THEATRE, a
Colorado non-profit corporation, and THEATRE13, INC, a
Colorado non-profit corporation

Appellees: COLORADO DEPARTMENT OF PUBLIC
HEALTH AND ENVIRONMENT, and DENNIS E.
ELLIS, its Executive Director

Attorneys for *Amicus Curiae*:

Name: Bruce E. H. Johnson, (pro hac vice pending)
John Sherman, (pro hac vice pending)
Address: Davis Wright Tremaine LLP
1501 Fourth Avenue
Seattle, Washington 98101
Telephone: (206) 622-3150
Facsimile: (206) 628-7699
E-mail: brucejohnson@dwt.com
johnsherman@dwt.com

Name: Steven D. Zansberg, #26634
Adam Platt, #38046
Address: FAEGRE & BENSON LLP
1700 Lincoln Street
Denver, Colorado 80203
Telephone: (303) 607-3500
Facsimile: (303) 607-3600
E-mail: szansberg@faegre.com
aplatt@faegre.com

FILED IN THE
COURT OF APPEALS
STATE OF COLORADO

APR 17 2007

Clerk, Court of Appeals

▲ COURT USE ONLY ▲

Case Number: 06CA2260

**SECOND AMENDED BRIEF OF *AMICUS CURIAE*
THEATRE COMMUNICATIONS GROUP
IN SUPPORT OF REVERSAL OF THE JUDGMENT BELOW**

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 3

 A. Operative Facts 3

 B. The District Court’s Ruling 3

DISCUSSION 5

 I. THE U.S. CONSTITUTION PROVIDES PROTECTION FOR
 SPEECH, INCLUDING SPEECH MADE IN THE CONTEXT OF
 ARTISTIC EXPRESSION 5

 A. Smoking in the Context of a Play is Protected Expression 6

 B. Theatrical Productions Have Historically Used Smoking as a
 Device to Convey Meaning Through Conduct..... 10

 1. Smoking Provides Insight into Character..... 11

 2. Actors Smoking on Stage Establishes Mood 13

 3. Smoking as a Plot Device..... 15

 4. Smoking on Stage for Political Purposes 16

 II. THE SMOKING BAN ADVERSELY IMPACTS THEATRE
 GROUPS’ ABILITY TO EXPRESS THEIR CHOSEN
 MESSAGES..... 17

 A. The Smoking Ban Suppresses Theatre Groups’ Messages
 Completely in Instances Where it Requires Impermissible
 Changes to Scripts..... 17

 B. The Smoking Ban Prohibits the Use of a Traditional and
 Heavily Relied Upon Theatrical Device..... 21

III.	THE SMOKING BAN IS AN IMPERMISSIBLE INFRINGEMENT OF THE FREEDOM OF SPEECH UNDER THE FIRST AMENDMENT OF THE U.S. CONSTITUTION	23
IV.	THE COLORADO CLEAN INDOOR AIR ACT IMPERMISSIBLY LIMITS EXPRESSION PROTECTED BY THE COLORADO CONSTITUTION, WHICH IS MORE PROTECTIVE OF EXPRESSION THAN THE FEDERAL CONSTITUTION	26
	A. Colorado Courts Have Struck Down Laws Under Article II, §10, Though They Were Permissible Under the First and Fourth Amendments to the U.S. Constitution	28
	B. Applying Comparable State Constitutional Provisions, Other State Supreme Courts Have Struck Down Expression- Restricting Statutes Constitutional Under O’Brien	29
	C. Applying Strict Scrutiny Under Article II, §10 This Court Should Find the Colorado Clean Indoor Air Act Fails to Pass Constitutional Muster	32
V.	CONCLUSION	34

TABLE OF AUTHORITIES

STATE CASES

Bellanca v. New York State Liquor Authority, 429 N.E.2d 765 (N.Y. 1981).....	31
Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991).....	26, 27
Houston v. Manerbino, 185 Colo. 1 (Colo. 1974).....	5
Lewis v. Colorado Rockies Baseball Club, 941 P.2d 266 (Colo. 1997)	27
Mendoza v. Licensing Board of Fall River, 827 N.E.2d 180 (Mass. 2005).....	31
Pap’s A.M. v. City of Erie, 571 A.2d 591 (Pa. 2002)	29
Parrish v. Lamm, 758 P.2d 1356 (Colo. 1988).....	27
People v. Berger, 521 P.2d 1244 (Colo. 1974).....	27
People ex. rel. Tooley v. Ford, 773 P.2d 1059 (Colo. 1989).....	27
People ex. rel. Tooley v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348 (Colo. 1985).....	27
Pierce v. St. Vrain Valley School District RE-1J, 944 P.2d 646 (Colo. 1997)	27
Robertson v. Westminster Mall Co. 43 P.3d 622 (Colo. Ct. App. 2001).....	27
Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044 (Colo. 2002).....	27

FEDERAL CASES

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)	10
City of Erie v. Pap’s A.M., 529 U.S. 277 (2000)	30
Clean Flicks of Colorado v. Soderbergh, 433 F. Supp. 2d 1236 (D. Co. 2006).....	18

Frisby v. Schultz, 487 U.S. 474 (1988)	24
Gilliam v. American Broadcasting Companies, 538 F.2d 14 (2 nd Cir. 1976)	18
Lloyd Corp v. Tanner, 407 U.S. 551 (1972).....	28
Meyer v. Grant, 486 U.S. 414 (1988).....	24
NYC C.L.A.S.H., Inc. v. City of New York, 215 F. Supp.2d 461 (S.D.N.Y. 2004)	6
New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981).....	31
Sable Commc'ns of California, Inc. v. F.C.C., 492 U.S. 115 (1989).....	33
Schacht v. United States, 398 U.S. 58 (1970)	5, 10
Southeastern Promotions, Ltd. v. City of Atlanta, 334 F. Supp. 634 (N.D. Ga. 1971)	7
Southeastern Promotions v. Conrad, 420 U.S. 546 (1975).....	5, 7
Spence v. Washington, 418 U.S. 405 (1974).....	6, 7, 10
Taverns for Tots, Inc. v. City of Toledo, 320 F.Supp.2d 643 (N.D. Ohio 2004)	6
Texas v. Johnson, 491 U.S. 397 (1989).....	3, 4, 6, 10
United States v. O'Brien, 391 U.S. 367 (1968).....	24, 29, 30, 31, 32
Ward v. Rock Against Racism, 491 U.S. 781 (1989).....	24

STATUTES AND REGULATIONS

17 U.S.C. §102(a)(1)-(3).....	17
17 U.S.C. §106(1)-(5).....	18
17 U.S.C. §106A(a)(3)(A)	18
Berkeley Municipal Code §12.70.030	34

Boulder, Co., Revised Code Chap. 6-4-3(a)(6)(A-B) (1999).....33

Cal. Lab. Code § 6404.5(d)(9).....34

Colo. Const. art II, §10.....34

N.Y.C. Admin. Code § 7-503(8)34

N.Y. Const. art. 1, §831

Pa. Const. art. 1, §730

Tempe City Code §22-45.....34

OTHER AUTHORITIES

E. Albee, Who’s Afraid of Virginia Woolf? (1962)..... 12, 19

S. Belber, Match (2004)..... 15

G. Bizet, Carmen (1875)..... 15

Blackley, Fringe Chief’s Herbal Remedy to Beat Smoking Ban on Stage,
LIVING SCOTSMAN (Aug. 29, 2006) 23

Bond, An Inarticulate Hope (Sep. 14, 1999) 14

Brustein, Samuel Beckett: Millennium Poet Laureate, THE
CHRONICLE OF HIGHER EDUCATION (Aug. 4, 2006) 19

Bundra, Anna Suffers from Flaws, COYOTE PRESS (Nov. 11, 2005) 14

Chaplin, Acting is Back in the Fonda Regimen, L.A. TIMES (Sept. 22,
1988)..... 11

D. Cornue, Smoking Bloomberg (2006)..... 16

N. Cruz, Anna in the Tropics (2003) 14

D. Dietz, tempOdyssey (2003) 9, 15

Gardiner, Musical to Parody City’s Smoking Ban, THE SUN (Aug. 22, 2006).....	16
W. Gibson, Golda’s Balcony (1977)	12
H. Holbrook, Mark Twain Tonight! (1954).....	10, 11
F. Ferrante, An Evening with Groucho (1997).....	13
B. Henley, Crimes of the Heart (1978).....	21
M. Kenny, Allegiance (2006)	13
Linsay, Theatre’s Suit Up in Smoke, ROCKY MOUNTAIN NEWS (Oct. 31, 2006).....	22
Mauro, Nilo Cruz (Oct. 10, 2003)	14
Moore, Play Burned by Ban: Next Stage Snuff Musical Set in a Smoky Den, DENVER POST (Nov. 18, 2006).....	15
Murray, Review of Mark Twain Tonight!, TALKIN’ BROADWAY’S BROADWAY REVIEWS, (June 9, 2005).....	13
D. Nimmer, Nimmer on Copyright §25.01 (1992).....	18
J. Osborne, Look Back In Anger (1956).....	14
J. Pielmeier, Agnes of God (1982)	11
G. Puccini, Il Tabarro (1918).....	9
Roberts, Playwright Boycotts Scots Theatres Over Smoking Ban, THE SCOTSMAN (April 1,2006)	20
B. Russell, The Last Smoker in America (2006).....	17
G. Shaw, Heartbreak House (1919).....	21
S. Shepard, True West (1980).....	19
Smolla & Nimmer, §9:17.....	24, 25

Whalen, Directors, Take Note: Samuel Beckett was a Micromanager, Wall
St. J., June 29, 200620

T. Williams, Why Do You Smoke So Much, Lily? (1935).....12

C. Willingham, The Graduate (1967).....8

INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of Theatre Communications Group (“TCG”), a service organization representing nearly every significant non-profit regional theatre company in the United States. The mission of TCG is to strengthen, nurture, and promote the professional not-for-profit American theatre. The organization furthers this mission by awarding grants to theatres and theatre artists and by offering career development programs for artists and theatre leaders, and by guiding advocacy efforts to influence legislative developments affecting non-profit theatres throughout the country. Its membership includes over 444 theatres, six of which are located in Colorado,¹ and 17,000 individual artists nationwide.

The outcome of this case will have a significant impact on TCG and its members. In presenting theatrical productions, the organization’s members rely on both the language of a script and the actors’ expressive conduct to convey meaning. In numerous scripts, this conduct includes smoking as an essential part of a performance. In fact, directors and playwrights specifically include smoking in a script or a performance to better convey a sense of a character to the audience,

¹ Arvada Center for the Arts & Humanities, Creede Repertory Theatre, Curious Theatre Company (one of the three appellants), Denver Center Theatre Company, OpenStage Theatre & Company, and Theatre Aspen.

to establish a mood or state of mind, or to express a message that cannot be articulated in words. Often, the act of smoking provides the audience with insight into a character or a scene that would otherwise be lost without it. While TCG in no way advocates the use of tobacco products, it recognizes the importance of free speech as it pertains to the representation of smoking on stage.

The strong interest of TCG arises from the application of the Colorado Clean Indoor Air Act (“The Smoking Ban”) to theatrical performances. By applying the legislation to such performances, the State of Colorado greatly inhibits theatres’ ability to present productions in the manner in which they choose. Consequently, theatres must decide between self-censorship or incurring sanctions. For these reasons, and those discussed below, TCG respectfully asks the Court to find not only that smoking in theatrical productions constitutes expressive conduct protected by the First Amendment but also that the Colorado Clean Indoor Air Act as applied to theatrical productions infringes upon appellants’ First Amendment freedom of speech.

INTRODUCTION

A. Operative Facts

Amicus hereby adopts and incorporates by reference the Statement of Facts set forth in the Opening Brief of the appellant. The following facts, as supported by the record below, serve as the basis for the argument of *amicus*:

On July 1, 2006, the Colorado Clean Indoor Air Act became effective, thereby making it unlawful to smoke in any enclosed or indoor areas in the state, including theatres. Colorado legislators rejected a proposed amendment that would have created an exception to the smoking ban for theatrical productions. Without the exception, theatres can be fined each time an actor smokes on stage. Consequently, plaintiff-appellants filed a complaint for injunctive relief and declaratory judgment and a motion for preliminary injunction.

B. The District Court's Ruling

After determining that smoking, standing alone, did not constitute expressive conduct protected by the First Amendment, the District Court found that the plaintiff-appellants did not have a reasonable probability of success on the merits, and so denied the plaintiff-appellants' motion for preliminary injunction. In reaching this conclusion, the District Court relied upon *Texas v. Johnson*, in which the United States Supreme Court stated that conduct becomes sufficiently

expressive to warrant First Amendment protection when the conduct conveys a particularized message that the audience will more than likely understand. *Texas v. Johnson*, 491 U.S. 397 (1989). The District Court found that the act of smoking on stage failed to meet this test, because in the court’s opinion, an audience viewing an actor smoke on stage could reach any number of conclusions regarding the message conveyed by the act of smoking. The District Court further noted that smoking is not “inherently expressive conduct” and added that the intent of the “communication or conduct is derived not from the individual making the expression, but rather from the individual who wrote the play.” Because of this, the District Court did not address the constitutionality of the legislation under a test of either intermediate or strict scrutiny.

As demonstrated below, the District Court’s determination that smoking in theatrical productions does not constitute expressive behavior was fundamentally in error, because the court in its analysis focused more on smoking as a separate act rather than as an integral and essential part of certain theatrical performances. The court also erred in failing to analyze the constitutionality of the legislation under the appropriate level of scrutiny.

DISCUSSION

I. The U.S. Constitution Provides Protection for Speech, Including Speech Made in the Context of Artistic Expression

Members of a theatre group have a constitutionally protected right to freedom of speech and symbolic speech. Theatrical productions fall within this protection under the First and Fourteenth Amendments of the Federal Constitution. *Schacht v. United States*, 398 U.S. 58, 63 (1970). As noted by the United States Supreme Court in *Southeastern Promotions v. Conrad*, live dramas receive the same level of First Amendment protection as do other forms of expression. *Southeastern Promotions v. Conrad*, 420 U.S. 546, 557-558 (1975). In his concurring opinion in *Conrad*, Justice Douglas recognized that a “municipal theatre is no less a forum for the expression of ideas than is a public park...[and] is surely no less entitled to the shelter of the First Amendment.” *Conrad*, 420 U.S. at 563. The Supreme Court of Colorado has echoed this sentiment, stating that “the First Amendment and Article II, Section 10 of the Colorado Constitution afford protection to all forms of communications, including moving picture films, which attempt to convey a thought or message to another person.” *Houston v. Manerbino*, 185 Colo. 1, 6 (Colo. 1974).

A. Smoking in the Context of a Play is Protected Expression

The First Amendment protects not only the expression of ideas through printed or spoken words but also symbolic speech – nonverbal activity sufficiently imbued with elements of communication. *Spence v. Washington*, 418 U.S. 405, 409-411 (1974). Conduct becomes expressive when an individual intends to communicate a particular message by his actions and that message will be understood by those who observe it because of the surrounding circumstances. *Id.*; *see also Texas v. Johnson*, 491 U.S. 397 (1989) (finding that conduct warranted First Amendment protection if there was “an intent to convey a particularized message and the likelihood was great that the message would be understood by those who viewed it”).

Two federal district courts have found that mere smoking – outside any theatrical performance – does not constitute an action sufficiently expressive to trigger First Amendment protection. *See NYC C.L.A.S.H., Inc. v. City of New York*, 215 F.Supp.2d 461, 476 (S.D.N.Y. 2004); *Taverns for Tots, Inc. v. City of Toledo*, 341 F.Supp.2d 844, 853 (N.D. Ohio 2004). Whether the First Amendment protects smoking in the context of a theatrical performance, however, presents a different question from the one analyzed by the Ohio and New York courts, because unlike

smoking by itself in bars and restaurants, smoking as performed by cast members in a play is used to convey a message to an audience.

Theatre “frequently mixes speech with live action or conduct.” *Conrad*, 420 U.S. at 557-558. As stated by the District Court for the Northern District of Georgia, stage productions cannot be separated “into “speech” and “non-speech” components as...[t]he nonverbal elements in a theatrical production are the very ones which distinguish this form of art from literature...[A] musical play must be deemed a unitary form of constitutionally protected expression.” *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634, 639 (N.D. Ga. 1971). In many instances, the conduct of an actor can convey as much if not more meaning than the words of the script. Both serve as essential elements to a production, and because of this, a specific action cannot be separated from the language of the play when conducting a First Amendment analysis; however, even if viewed as a separate element of a production, smoking in theatre still passes the tests outlined in *Spence* and *Johnson*.

Smoking in a play is part of an actor’s creative expression of the role. As noted, an individual who smokes in his or her personal life does not engage in constitutionally protected speech; however, smoking in a play is not motivated by any personal desire to consume tobacco products. Many actors or actresses who

smoke on stage do not smoke otherwise. Rather, playwrights, directors, and actors use smoking in plays or movies as a device to tell the audience something about the character, mood, or setting. For example, in the screenplay of *The Graduate*² the character Mrs. Robinson mocks the character Ben for not smoking. Later in the story, after Mrs. Robinson and Ben have started having an affair, the stage directions in various parts of the script specifically call for Ben to smoke.³ The change in Ben's smoking habits alerts the audience to the character's development as Mrs. Robinson exerts greater influence over him.

² Though several of the plays discussed herein were not cited below by either of principal parties, Col. R. Evid. 201 allows the Court to properly take judicial notice of them. The rule, which allows that “judicial notice may be taken at any stage” of a court proceeding, states that judicially noticed facts must not be “subject to reasonable dispute in that [they must be] . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *Id. See Prestige Homes, Inc v. Legouffe*, 658 P.2d 850, 853 (Colo. 1983) (“Appellate courts, as well as trial courts may make use of this rule.”). That these theatrical works incorporate smoking cannot be the matter of reasonable dispute as that fact can be readily determined by resort to the text of the plays, whose stage directions clearly include smoking. Moreover, Colorado appellate courts have taken judicial notice of similarly indisputable, and readily verifiable facts. *Bodelson v. Denver Pub. Co.*, 5 P.3d 373, 379 (Colo. App. 2000) (taking judicial notice of reasons behind creation of memorial); *People v. Archuleta*, 980 P.2d 509, 511 (Colo. 1999) (noting trial court’s taking of judicial notice concerning a particular location being a “notorious location for drug dealing.”); *Thornbury v. Allen*, 39 P.3d 1195, 1198 (Colo. App. 2001) (noting trial court’s taking of judicial notice that “hotels everywhere utilize their own employees to do housekeeping services.”).

³ C. Willingham, *The Graduate* (1967).

In *tempOdyssey*,⁴ the main character, a smoker, learns that he has died only after noticing that no smoke appears when he tries to exhale. The absence of the cigarette smoke serves as the first indication that the character is in fact dead and is essential to the audience's understanding of this development. As noted by Chip Walton, founder of the Curious Theatre Company, "[B]ecause it's actually the absence of smoke the second time that is the important and fundamental device, it's hard to have absence without presence...in other words, if it's not present the first time, it's hard to communicate that it's absent the second time...there's really no acceptable alternative." (Tr. 36)

In the opera *Il tabarro*,⁵ a young wife remarks to her friend that no smoke rises from her husband's pipe. The friend, understanding the sexual implications of the statement, responds that her husband's pipe may be out but his passion is not. Throughout the rest of the opera, rising smoke and the lighting of matches serve as metaphors for the smoldering passions existing between various characters.

Smoking by an actor or actress on stage is thus consistent with other types of expressive conduct that have been entitled to constitutional protection. *See, e.g.,*

⁴ D. Dietz, *tempOdyssey* 22 (2001).

⁵ G. Puccini, *Il Tabarro* (1918).

Schacht v. United States, 398 U.S. 58 (1970) (finding that street actors depicting soldiers during a skit while protesting the Vietnam War were engaged in protected expressive conduct), *Spence v. Washington*, 418 U.S. 405 (1974) (stating that affixing a peace symbol to an American Flag to protest violence at Kent State qualified as protected expressive conduct), *Texas v. Johnson*, 491 U.S. 397 (1989) (finding that flag burning to protest policies of the President constitutes protected expressive conduct). Even in *Barnes v. Glen Theatre, Inc.*, in which the Supreme Court upheld a statute generally banning public nudity, the Court noted that erotic dancing is entitled to First Amendment protection, as the dancers do convey an erotic message. *Barnes v. Glen Theatre, Inc.* 501 U.S. 560, 561 (1991).

As these cases show, expressive behavior can fall under the protection of the First Amendment despite the unpopularity of the conduct, or the message conveyed. Through the act of smoking, actors can communicate sufficient meaning to an audience to qualify smoking on stage as behavior entitled to such protection.

B. Theatrical Productions Have Historically Used Smoking as a Device to Convey Meaning Through Conduct

Playwrights, directors, and actors have used smoking for a variety of reasons in numerous theatrical productions. In some productions, the act of smoking gives

the audience insight into a character's personality. In others, smoking serves as the means to set a mood, evoke an era, or lend greater authenticity to a production.

Directors and actors also use smoking as a device to communicate specific messages between characters or to the audience, and in recent times, smoking on stage has been used to make political statements about smoking itself.

1. Smoking Provides Insight into Character

In developing a character, a playwright will attribute behavioral traits to that character in addition to dialogue to make him or her come alive for the audience.

For example, the script for *Agnes of God* describes the psychiatrist character as an obsessive chain-smoker whose obsession, as the play progresses, moves from smoking to Agnes.⁶ As noted by the *Los Angeles Times* in its review of the film version of the play:

“It is a minor societal footnote that chain-smoking (by Fonda) is the 'Agnes of God's metaphor for the obsessive personality, as it was the play's. The cigarette becomes an offensive weapon as the psychiatrist, bearing her private luggage of anti-Catholicism, invades the cloistered convent. Later the cigarette becomes an item of temporary truce between Fonda and the outspoken mother superior.” Charles Chaplin, *Acting is Back in the Fonda Regimen*, L.A. TIMES, Sept. 22, 1988, at 17.

⁶ J. Pielmeier, *Agnes of God* (1978).

In Edward Albee's *Who's Afraid of Virginia Woolf?*, smoking is essential to the portrayal of the neurotic character Martha, who nervously smokes throughout the play.⁷ Albee specifically noted that he wanted there to be a lot of smoking, as it held symbolic significance. In one part of the play, Martha blows smoke in her husband George's face. In yet another scene illustrating the sexual dynamics and tension between the couple, she asks George to light her cigarette. When he refuses, the other man present, Nick, lights it for her, an important element of the play as it increases the tension between George and Martha, who is pursuing Nick in front of her husband.

Tennessee Williams used smoking to portray the neurosis of a character in *Why Do You Smoke So Much, Lily?*,⁸ a play in which a girl is driven nearly to insanity by her overbearing mother. In *Golda's Balcony*, playwright William Gibson has Israeli prime minister Golda Meir chain smoke during the entire one woman performance, an important action for character development and foreshadowing, as she eventually dies from lung cancer.⁹ Similarly, in Hal Holbrook's long-running one man show, *Mark Twain Tonight!*,¹⁰ Mr. Holbrook

⁷ E. Albee, *Who's Afraid of Virginia Woolf?* 50, 162-163 (1962).

⁸ T. Williams, *Why Do You Smoke So Much, Lily?*

⁹ W. Gibson, *Golda's Balcony* 3 (2002).

¹⁰ H. Holbrook, *Mark Twain Tonight!* 102-104 (1959).

smokes constantly while in character.¹¹ As one reviewer noted, this “puffing away at his cigar...” helps Mr. Holbrook catch “the very essence of his subject.”

Matthew Murray, *Review of 'Mark Twain Tonight!,' Talkin' Broadway's Broadway Reviews*, June 9, 2005. Without the use of smoking, the portrayal of these characters, and numerous others, both fictional and real,¹² would suffer greatly.

2. Actors Smoking on Stage Establishes Mood

In addition to the dialogue and actions of the actors, set designs and props used by theatres greatly aid in establishing the mood, era, and feeling of a production. In certain plays, smoking contributes as well. For example, in

¹¹ In reviewing Mr. Holbrook's performance, reviewer Matthew Murray stated: “If smoke could be taught to dance, only Hal Holbrook could provide the choreography...As Holbrook manipulates the wisps of smoke that swirl around him and then vanish into the fly space, so is the audience nothing but his willing plaything. In the game of theatre, who could ask for more?” Matthew Murray, *Review of 'Mark Twain Tonight!,' Talkin' Broadway's Broadway Reviews*, June 9, 2005.

¹² In playwright Mary Kenny's play, *Allegiance*, Winston Churchill is supposed to be portrayed as smoking a cigar at all times. In the play *Sherlock Holmes*, the famous fictional detective constantly smokes a cigar, as does the actor portraying Groucho Marx in *An Evening with Groucho*. Other famous smokers often portrayed in theatre include Albert Einstein, Fidel Castro, John F. Kennedy, Babe Ruth, and Al Capone, all of whom are regularly played as pipe smokers and cigar aficionados.

reviewing John Osborne's classic *Look Back in Anger*,¹³ a critic stated, "Before the show, the title is projected onto the curtains like a jazz album cover. Between scenes, wreaths of cigarette smoke rise up the curtains. An era is evoked." Paul Bond, *An Inarticulate Hope*, <http://www.wsws.org/articles/1999/sep1999/look-s14.shtml>.

Critics have observed that *Anna in the Tropics*,¹⁴ the Pulitzer Prize-winning play set in a Tampa cigar factory, also benefits from the presence of smoke. As one reviewer noted, "The cigar smoke circling around *Anna in the Tropics* subliminally reminds us to slow down, to strike up a conversation with someone, to indulge in the pleasure of doing nothing...The images that float through our minds have the same quality of the meandering cigar smoke so crucial to the play's ethereal (yet earthy) tone." Lucia Mauro, *Nilo Cruz*, <http://www.performink.com/archives/stagepersonae/2003/CruzNilo.html>. Conversely, critics have given some performances unfavorable reviews when the actors did not incorporate smoking into their performance, noting that a "scene featuring the introduction of a new style of cigar suffered from actors smoking unlit cigars."¹⁵

¹³ J. Osborne, *Look Back in Anger* (1956).

¹⁴ N. Cruz, *Anna in the Tropics* 71-72 (2003).

¹⁵ Matthew Bundra, *Anna Suffers from Flaws*, <http://media.www.coyotepressonline.com/media/storage/paper350/news/2005/11/11/Ae/anna-Suffers.From.Flaws->

Numerous other productions benefit from the presence of actual smoke. For example, as in *Anna in the Tropics*, Georges Bizet's classic opera *Carmen*¹⁶ is set in a cigarette factory. The title character works as a cigarette seller, and so the opera inevitably features cigarettes and smoking. In other productions, the scripts describe various settings as being hazy or smoky or smoke filled,¹⁷ so that the forced absence of such smoke directly attacks the artistic vision of the playwright as outlined in his script. See generally Zachary Pincus- Roth, *No Smoking in the Theater, Especially Onstage*, N.Y. TIMES, Jan. 28, 2007 at 7.

3. Smoking as a Plot Device

In addition to providing insight into character and helping to establish mood, smoking in theatre often serves as an essential plot device. For example, in *Match*¹⁸ by Stephen Belber, the entire direction of the narrative shifts after one character smokes hash, gets high, and reveals his inner thoughts. In *tempOdyssey*,

1058157.shtml?sourcedomain =www.coyotepressonline.com&MIHost=media.collegepublisher.com.

¹⁶ G. Bizet, *Carmen* (1875).

¹⁷ Eugene O'Neil's play *The Iceman Cometh* is set in a smoke-filled bar in 1912. Jez Butterworth set his play *Mojo* in a night club in which many of the characters smoke. *A Man of No Importance* is set in an Irish pub that the authors describe as "a smoky den where working men don't bring their wives." John Moore, *Play Burned by the Ban: Next Stage Snuffs Musical Set in 'a Smoky Den,'* Denver Post, November 18, 2006.

¹⁸ S. Belber, *Match* (2004).

as discussed earlier, a character learns of his own death only after realizing that no smoke leaves his mouth when he tries to exhale. Once this revelation occurs, the focus of the story changes, as the character must then confront his death. In *Look Back in Anger*, the character Cliff lights a cigarette to counteract the waft of smoke emanating from another character's pipe, thereby establishing conflict between the two. Without the presence of actual smoke, however, the act of smoking would not convey that message.

4. Smoking on Stage for Political Purposes

Recently, as the debate over smoking has intensified, cigarettes and smoking have become the topics of various plays. In *Smoking Bloomberg*¹⁹ by David Cornue, a Korean dry cleaner seeks revenge against Mayor Bloomberg for initiating the smoking ban in New York City, as her laundry business suffers a drop in customers when the amount of smoke-scented clothes decreases. The playwright noted that the entire point of the play is to address the constitutionality of a smoking ban. In his words, "It's a platform for a more universal, fundamental, American-based issues about personal freedoms, personal rights, and where do you draw the line." Jill Gardiner, *Musical to Parody City's Smoking Ban*, <http://www.nysun.com/article/38298>.

¹⁹ D. Cornue, *Smoking Bloomberg* (2006).

In a play with a similar message, *The Last Smoker in America*,²⁰ playwright Bill Russell chronicles the problems facing a smoker who cannot quit despite smoking laws that are becoming more and more draconian. The playwrights wrote these plays specifically to address the constitutionality of the anti-smoking laws that may now possibly be used to stifle their creative message. Because smoking is an integral part of conveying the message in these instances and in the numerous other examples previously mentioned, this Court should recognize the act of smoking in the context of theatrical productions as constituting expression protected under the First Amendment.

II. The Smoking Ban Greatly Limits Theatre Groups' Ability to Express their Chosen Messages

A. The Smoking Ban Suppresses Theatre Groups' Messages Completely in Instances Where it Requires Impermissible Changes to Scripts

Because playwrights have the ability to prohibit theatre groups from performing altered versions of their plays, the smoking ban may lead some playwrights to forbid Colorado playhouses from performing their work altogether. Under Title 17 of the United States Code, authors retain a copyright in literary works, musical works, including any words, dramatic works, and any music. 17 U.S.C. §102(a)(1)-(3). This ownership confers upon a copyright holder the

²⁰ B. Russell, *The Last Smoker in America* (2006).

exclusive right to reproduce the work, prepare derivative works, distribute copies of the work, and perform or display the work publicly. 17 U.S.C. §106(1)-(5). It also extends rights of attribution and integrity, which allow a playwright to prevent any intentional distortion of his work. 17 U.S.C. §106A(a)(3)(A). The Second Circuit announced a similar concept in *Gilliam v. American Broadcasting Companies*, in which the Court found that ABC violated the copyright protections of comedy group Monty Python by truncating and editing its performances to allow for commercials. *Gilliam v. American Broad. Co.*, 538 F.2d 14 (2nd Cir. 1976). Courts have also found that any alteration of a movie or video to remove obscene language or sexual content constitutes a violation of a copyright holder's right to create derivative works. *Clean Flicks of Colorado v. Soderbergh*, 433 F. Supp. 2d 1236 (D. Colo. 2006).

Unlike the motion picture business where studios, rather than individual writers, typically own the copyright to a screenplay, most playwrights retain the copyright to their manuscripts. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §25.01 (1992). After completing a script, a playwright will register it with a licensing agency, such as Samuel French, Inc., which will then sell theatrical groups the right to present a play or musical. Without purchasing such performance rights, a theatre company may not present a

playwright's work. Once it obtains the performance rights, the theatre company is bound by the terms of the contract, which typically provides the playwright with the ability to prohibit a performance if it does not follow the language and stage directions of the script. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §25.02 (1992).

Numerous playwrights have canceled performances of their works because of a theatre's failure to adhere to their artistic vision. Edward Albee prohibited an all-male version of *Who's Afraid of Virginia Woolf?*. David Richards, *Edward Albee and the Road Not Taken*, N.Y. Times, June 16, 1991, at sec. 1, pg. 1. Sam Shepherd banned an all-female version of *True West*.²¹ Ernio Hernandez, *Female Production of Sam Shepard's "True West" Shut Down in New York*, PLAYBILL, Mar. 8, 2004 available at <http://web.playbill.com/news/article/84813.html>. Samuel Beckett fought any production that did not strictly adhere to the dialogue and stage directions within his script. See Robert Brustein, *Samuel Beckett: Millennium Poet Laureate*, 48 THE CHRONICLE OF HIGHER EDUCATION 12 (Aug. 4, 2006). Beckett's heirs continue to follow this policy and have closed down performances of his plays for not following stage directions as specific as the number of steps a character must take and the color of the dress an actress must wear. Jeanne

²¹ S. Shepherd, *True West* (1981).

Whalen, *Directors, Take Note: Samuel Beckett was a Micromanager*, Wall St. J., June 29, 2006, at A1.

Playwrights have also begun to prohibit smoke-free versions of their plays. Scottish playwright John Byrne no longer permits Scottish theatres to perform his plays because of a smoking ban that prohibits indoor smoking. Laura Roberts, *Playwright Boycotts Scots Theatres Over Smoking Ban*, The Scotsman, April 1, 2006. Equating the government action to censorship, Mr. Byrne said he would move his plays down to London where smoking on stage is not prohibited.²²

Because playwrights have the ability, either contractually or under federal copyright law, to prohibit adulterated or Bowdlerized versions of their plays from being performed, theatre houses in Colorado must either choose to violate the smoking ban (and face prosecution/fines) or forego performing the work of playwrights who refuse to allow smoke-free performances of their plays. If they choose not to incorporate smoking into their performance but cannot receive the playwright's permission to use fake talcum powder cigarettes or unlit cigars and

²² In response to the ban, Mr. Byrne stated, "It could be the end of my playwriting career. It means that much to me. They don't want us to set a bad example to the audience. That's censorship. What are they going to ban next that they disapprove of?" Laura Roberts, *Playwright Boycotts Scots Theatres Over Smoke Ban*, The Scotsman, Apr. 1, 2006, available at, <http://news.scotsman.com/scotland.cfm?id=501352006&format=print>.

cigarettes, then the playwright's work will go unperformed, depriving the playwright and theater group of their rights to free expression, and Colorado audiences of their right to receive that expression.

B. The Smoking Ban Prohibits the Use of a Traditional and Heavily Relied Upon Theatrical Device

Theatre groups express their chosen messages by incorporating various communicative elements, such as speech, action, music, and dance, in a single theatrical performance. The different elements used in a theatrical performance greatly impact the final message, and so removing any one part drastically changes the message as a whole. A musical without the music will not have the same impact. A duel without swords will seem ludicrous rather than dangerous. Similarly, an audience will not fully understand a scene that calls for smoking without the presence of actual smoke. For example, in George Bernard Shaw's *Heartbreak House*, a boorish man from London goes to visit a country house and while there continually smokes his cigar. At one point, with smoke all around him, he says that he loves to go to the country for the clean air.²³ The line loses all of its humor and meaning without the cloud of smoke hovering around him. In Beth Henley's *Crimes of the Heart*, the character Chick says to Meg: "You know, you shouldn't smoke. It causes cancer. Cancer of the lungs. They say each cigarette is

²³ B. Shaw, *Heartbreak House* 81 (1919).

just a little stick of cancer. A little death stick.” The other character replies: “That’s what I like about it, Chick--taking a drag off of death.” The script then calls for the character to take a “long, deep drag” before saying, “Mmm! Gives me a sense of controlling my own destiny. What power! What exhilaration! Want a drag?” This scene and many others would simply lose their impact without the exhalation and presence of smoke.

The messages conveyed by smoking cannot be communicated without smoke. But because of the extremely broad way in which the Colorado legislature defined tobacco within the Clean Indoor Air Act, theatre groups now have no practical method of portraying a burning cigarette, cigar, or pipe on stage. As numerous theatrical professionals have noted, blowing talcum powder into the air does not provide an adequate or authentic substitute, as it looks fake and is only good for one or two puffs, whereas many productions featuring smoking require the actors to take more than one to two drags.²⁴ Furthermore, other suggested alternatives, such as pretending to smoke an unlit cigarette or cigar, also fail to

²⁴ Sue Linsay, *Theatre’s Suit up in Smoke*, Rocky Mountain News (Oct. 31, 2006); Theatre Record, http://www.theatrerecord.org/issue21_2006/prompt.html; *We Shall Fight Them – in the Assembly Rooms*, THE GUARDIAN, Aug. 8, 2006, <http://www.guardian.co.uk/g2/story/0,,1839421,00.html>.

provide a convincing, authentic option in the minds of directors and reviewers alike.²⁵

Proponents of the ban argue that actors do not use real guns when shooting at one another. Nor do they actually engage in intercourse on stage when the script calls for a sex scene. Smoking differs from these examples, however, in that actors can achieve the illusion of a gun shot or sexual intercourse through simulation. A recorded gunshot blasted through speakers will convince an audience that a gun has been fired. On the other hand, to convincingly portray smoking and its effect on the immediate environ of the smoker, the actors must exhale actual smoke. Because of this, the Clean Indoor Air Act strips theatre groups of a key theatrical device, and in so doing significantly affects their ability to convey their chosen messages to the audience.

III. The Smoking Ban is an Impermissible Infringement of Freedom on Speech Under the First Amendment

When a government entity enacts an ostensibly content-neutral law that incidentally burdens symbolic conduct, that law will be upheld only if: (1) it is

²⁵ Michael Blackley, *Fringe Chief's Herbal Remedy to Beat Smoking Ban on Stage*, LIVING SCOTSMAN, Aug. 29, 2006, <http://living.scotsman.com/topics.cfm?tid=933&id=1274852006>; Bundra, *supra* note 5 (stating that that a “scene featuring the introduction of a new style of cigar suffered from actors smoking unlit cigars”).

within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) the governmental interest is unrelated to the suppression of free expression; (4) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). As noted by commentators, “the fourth prong of *O'Brien* often appears to have an accordion-like quality,” with the Supreme Court sometimes applying a rigid interpretation, and sometimes applying a weak interpretation. See Smolla & Nimmer on Freedom of Speech, § 9:17 (2006). Compare *Frisby v. Schultz*, 487 U.S. 474, 483-484 (1988) (“[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy”) with *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (The requirement of “narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.”) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

Commentators have suggested that the Court applied the soundest interpretation of the fourth prong in *Meyer v. Grant*, 486 U.S. 414 (1988), where the Court considered a Colorado statute that banned the use of paid signature gatherers for referendums. See SMOLLA & NIMMER, § 9:17. Finding the statute

to be content-neutral on its face, the Court struck it down, holding that “[t]he First Amendment protects appellees’ right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.” *Meyer* at 424. In essence, the Court’s holding stands for the proposition “that when a government can employ a more narrowly tailored regulation that would significantly reduce the negative impact on speech without substantially interfering with its legislative goals, the government should be forced to adopt the narrower regulation.” SMOLLA & NIMMER, §9:17. The *Meyer* test is distinguishable from the “least restrictive means” test expressly rejected by the *Ward* Court in that it continues to require that a government narrowly tailor its regulations, but does not require that the “least restrictive means” be employed. Rather, it only requires that the government employ means - though not necessarily the *least* restrictive - that achieve substantially the same results, while significantly reducing the negative impact on speech.

In this case the legislature made *no* effort to narrowly tailor the scope of the Smoking Ban. It enacted an across-the-board regulation, and considered, but ultimately rejected as unnecessary, any exemption for the expressive conduct embodied by smoking in theatrical productions. While the First Amendment does not compel the legislature to adopt the “least restrictive” manner of reducing

second-hand smoke – as including an exemption for *any* smoking purported by the smoker to be expressive would be – it was required to adopt a means that would reduce the direct negative impact on speech while achieving substantially the same result. By adopting an exemption allowing smoking in the context of a theatrical performance (on the condition that theatres warn patrons orally and by posting signage) or even requiring the installation of adequate ventilation systems, the legislature could have achieved substantially the same result, while reducing the negative impact on speech. Furthermore, though many theatres, directors, and actors have begun to address smoking-related health concerns on their own by using herbal cigarettes rather than tobacco; however, the Smoking Ban prohibits even this healthier option. Because such alternatives were readily available, and yet were not adopted – nor apparently even considered – this Court should find the Smoking Ban to be not sufficiently narrowly tailored under *Meyer v. Grant*, and should thus strike it down as an unconstitutional restriction on free speech.

IV. The Smoking Ban Impermissibly Limits Expression Protected By The Colorado Constitution, Which Is More Protective Of Expression Than The Federal Constitution

The Colorado Supreme Court repeatedly has held that this state's constitution ensures its citizens even greater freedom than does the United States Constitution. *See e.g. Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo.

1991).²⁶ In *Bock*, the Colorado Supreme Court summed up the longstanding tradition: “For more than a century, this Court has held that Article II, Section 10 provides greater protection of free speech than does the First Amendment.” *Id.* Nowhere is the spirit of this proposition more evident than in the very words of Article II, Section 10, which, unlike the federal constitution, imbues each citizen with an affirmative right to express herself: “No law shall be passed impairing the freedom of speech; *every person shall be free to speak, write or publish whatever he will on any subject . . .*” Colo. Const. art. II, § 10 (emphasis added). Furthermore, the Court has expressly found that Colorado’s Constitution provides broader protections for “expressive rights” than does the federal constitution. *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 (Col. 2002) (“With respect to expressive freedoms, this court has recognized that the Colorado Constitution provides broader free speech protections than the Federal Constitution.”); *see also People ex rel Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Col. 1985).

²⁶ *See also Lewis v. Colorado Rockies Baseball Club*, 941 P.2d 266, 271 (Colo. 1997); *Pierce v. St. Vrain Valley School District RE-1J*, 944 P.2d 646, 649 (Colo. 1997); *People ex rel. Tooley v. Ford*, 773 P.2d 1059, 1066 (Colo. 1989); *Parrish v. Lamm*, 758 P.2d 1356, 1365 (Colo. 1988); *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 356 (Colo. 1985); *People v. Berger*, 521 P.2d 1244, 1246 (1974); *Robertson v. Westminster Mall Co.*, 43 P.3d 622 (Colo. App. 2001).

A. Colorado Courts Have Struck Down Laws Under Art. II, § 10, Though They Were Permissible Under The First and Fourth Amendments To The United States Constitution

The Colorado Supreme Court's frequent statements regarding the state constitution's broad speech protections represent more than effete theory. The Court has repeatedly taken a strong view regarding rights of free expression. Thus, although in *Lloyd Corp v. Tanner*, 407 U.S. 551 (1972), the United States Supreme Court expressly found that there is no federal first amendment right to distribute literature on the premises of a privately-owned shopping center, in both *Bock*, and the Colorado Court of Appeals' *Robertson v. Westminster Mall Co.*, this state's courts held that there is such a right under Colorado's Art. II, § 10. *See Bock* 819 P.2d 55 at 62-63; *Robertson*, 43 P.3d 622, 625 (Colo. Ct. App. 2001).

Furthermore, in *Tattered Cover*, finding "the protections afforded to fundamental expressive rights under the [federal constitution] to be inadequate" to protect this state's citizens, the Colorado Supreme Court found that the Colorado Constitution "requires a more substantial justification" to support a search warrant executed against a bookstore. *Tattered Cover*, 44 P.3d at 1056. Compared to a more deferential Fourth Amendment analysis, our Supreme Court held that the Constitution requires that when the government seeks to conduct a search that implicates the "expressive rights" of a party, or the public, the subject of the

materials searched shall have the right to challenge the warrant before it is executed and the government must satisfy a version of strict scrutiny. *Id.* at 1057-1058. Specifically, the Court found that the government “must demonstrate that it has a compelling need for the information sought,” that there are no “reasonable alternative means of satisfying the asserted need,” and that the warrant is not “overly broad.” *Id.* at 1059. Lastly, Colorado courts must balance the law enforcement need for such records against the harm to constitutional interests. *Id.* Just as the Court has found that the Federal Constitution’s Fourth Amendment is insufficiently protective of Coloradoans’ rights of expression, this Court should find that the First Amendment’s *O’Brien* test is similarly deficient, and apply a more stringent, Article II, § 10 based standard.

B. Applying Comparable State Constitutional Provisions, Other State Supreme Courts Have Struck Down Expression-Restricting Statutes Found Constitutional Under *O’Brien*

While the Colorado Supreme Court has not yet had occasion to decide whether the *O’Brien* test adequately protects Coloradoans’ expressive rights, other states – with constitutional provisions substantially similar to Colorado’s – have, and have found *O’Brien* insufficiently protective. In *Pap’s A.M. v. City of Erie*, 571 A.2d 591 (Pa. 2002), the Pennsylvania Supreme Court struck down on state constitutional grounds a city ordinance that made it a crime to appear naked in any

public place because the ordinance infringed on the rights of Pennsylvanians to employ nudity as a form of expressive conduct. Notably, the United States Supreme Court had upheld the ordinance under *O'Brien*. See *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). Noting that “[f]reedom of expression has a robust constitutional history and place in Pennsylvania,” the state supreme court examined the language of its constitutional speech provisions, recognizing that its text, like Colorado’s, provides an **affirmative** grant of expressive rights rather than merely limiting state action, as does the federal constitution. *Pap's A.M.* 571 A.2d at 603. “The freedom of thoughts and opinions is one of the invaluable rights of man, and *every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.*” Pa. Const. art. 1, §7 (emphasis added).²⁷ The court noted that the federal law under *O'Brien* is “in a state of flux,” and added that the Supreme Court Justices were in obvious disagreement over when *O'Brien* should apply, and how to apply it if it did. *Pap's A.M.* 571 A.2d at 607, 611. Because of this, Pennsylvania’s Supreme court refused to allow its state citizens’ fundamental rights to be “rendered uncertain, unknowable, or changeable, while the U.S. Supreme Court struggles to articulate a standard to govern a similar

²⁷ Pennsylvania’s constitution served as a model for “numerous other state constitutions, including Colorado’s.” *Fullerton v. County Court*, 124 P.3d 866, 869 (Colo. App. 2005).

federal question.” *Id.* Consequently, the Pennsylvania Court cast away as inappropriate *O’Brien’s* uncertain intermediate scrutiny test for expressive conduct cases and instead applied strict scrutiny, finding that the city’s ordinance in banning *all* nude dancing was not narrowly tailored inasmuch as it, like the Colorado statute at issue here, made illegal all expression involving the conduct.

Similarly, in *Bellanca v. New York State Liquor Authority*, 429 N.E.2d 765 (N.Y. 1981), New York’s highest court invalidated under its state constitution a statute prohibiting a state liquor licensee from permitting female nudity on the premises, though the United States Supreme Court had already expressly upheld it under the federal constitution. *See New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981). The New York court found the statute was “prohibited by the guarantee of freedom of expression declared in section 8 of article I [of the New York Constitution],” *Id.* at 236, which, like Colorado’s Constitution, provides that “every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain the liberty of speech or the press.” N.Y. Const. art. 1, §8.

In *Mendoza v. Licensing Bd. of Fall River*, 827 N.E.2d 180 (Mass. 2005), the Massachusetts Supreme Judicial Court considered a challenge to a public indecency ordinance banning all public nudity brought by a businessman who had

been denied a license to operate an establishment presenting nude dancing. Though it appeared to acknowledge that the ordinance would be deemed constitutional under *O'Brien*, the court found it lacking under the state's more protective constitutional provision. "Although the analysis under [Mass. Const.] art. 16 is generally the same as under the First Amendment . . . [i]n our weighing the ordinance in this case and the Supreme Court's reasoning in upholding a similar ordinance, we conclude that the Federal rule does not adequately protect the rights of the citizens of Massachusetts under art. 16." *Mendoza*, 827 N.E.2d at 201.

Just as these other states' courts that have struck down statutes that burden expressive conduct in violation of state constitutional guarantees, this Court should find the *O'Brien* test is insufficiently protective of Coloradoans' speech rights under Article II, §10's affirmative grant of rights to citizens

C. Applying Strict Scrutiny Under Article 2, § 10 This Court Should Find the Smoking Ban Fails to Pass Constitutional Muster

The Smoking Ban purports to prohibit *all* smoking as part of a theatrical performance, thus eliminating a particularly effective, and absolutely irreplaceable means of communicating mood, style, and theme. Inasmuch as *O'Brien's* convoluted and inconsistently-applied intermediate scrutiny test insufficiently

promotes the policies championed by Article II, § 10, this Court should apply “strict scrutiny” and strike down this overbroad statute.

For a statute to survive strict scrutiny, it must be the “least restrictive means” of furthering a “compelling” governmental interest. *See Sable Commc’ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Even assuming *arguendo* that the government has a “compelling” interest in reducing exposure to second-hand smoke, it has surely not employed the “least restrictive means” of achieving its goal. Exposure to second-hand smoke could be minimized without infringing on expressive rights simply by putting in place an exception for theatrical performances that also requires theatres to provide adequate ventilation, and to post ample signage warning theatre-goers that there will be smoking in a particular performance.²⁸

²⁸ Indeed several municipalities, including Boulder, have indoor smoking ordinances with exceptions that, while permitting smoking on stage, also safeguard theatre-goers:

“(a) No person shall smoke within any building except in one of the following locations: . . . (6) By a performer as part of a theatrical production so long as the following additional conditions are met: (A) A sign...is posted conspicuously at each public entrance...informing the audience that performers will be smoking; and (B) The producer...has used reasonable efforts to inform the potential audience for the performance...of the fact that performers will be smoking...”

Given that the state legislature could have preserved the expressive rights of playwrights, actors, directors, and theatre-goers while still achieving its goal of protecting against the detrimental effects of second-hand smoke, it did not use the “least restrictive means” to achieve its goals. Accordingly, the law should be held unconstitutional as a violation of Article II, §10’s affirmative grant of expressive rights.

V. CONCLUSION

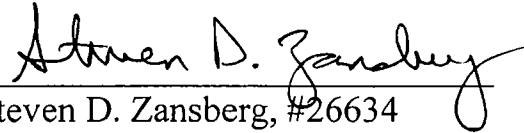
For the foregoing reasons, *amicus curiae* respectfully asks the Court to reverse the judgment below and to remand with directions to the District Court to find that smoking in the context of *bona fide* theatrical productions constitutes expression protected by the First Amendment of the U.S. Constitution (and Article II §10 of the Colorado Constitution) and that consequently, the Colorado Clean Indoor Air Act violates the appellant theatre groups’ freedom of speech as protected by the U.S. and Colorado constitutions.

Boulder, Co., Revised Code Chap. 6-4-3(a)(6)(A-B) (1999). *See also* Cal. Lab. Code § 6404.5(d)(9) (providing an exemption for smoking on “theatrical production sites, if smoking is an integral part of the story in the theatrical production); N.Y.C. Admin. Code § 7-503(8) (providing an exemption for smoking when “part of a theatrical production”); Tempe City Code §22-45 (providing that smoking is not subject to restrictions on-stage as part of a “stage production, ballet or similar exhibition); Berkeley Municipal Code §12.70.030 (providing that “smoking is permitted on stage when such smoking is part of a stage production”).

Dated April 17, 2007

Respectfully submitted,

FAEGRE & BENSON LLP

A handwritten signature in black ink that reads "Steven D. Zansberg". The signature is written in a cursive style and is positioned above a horizontal line.

Steven D. Zansberg, #26634

Adam Platt, #38046

DAVIS WRIGHT TREMAINE LLP

Bruce E. H. Johnson, WSBA # 7667

John Sherman, WSBA #38393

Attorneys for *Amicus Curiae*

Theatre Communications Group

CERTIFICATE OF MAILING

I hereby certify that on April 17, 2007 I placed a true and correct copy of the foregoing **SECOND AMENDED BRIEF OF *AMICUS CURIAE* THEATRE COMMUNICATIONS GROUP IN SUPPORT OF REVERSAL OF THE JUDGMENT BELOW** in the United States mail, first-class postage prepaid, properly addressed to the following:

Robert C. Douglas, Jr.
Lisa Brenner Freimann
Colorado Attorney General's Office
1525 Sherman Street, 2nd Floor
Denver, CO 80203

A. Bruce Jones
Daniel R. Pabon
Holland & Hart
P.O. Box 8749
Denver, CO 80201