Word Count: 4,728

SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue Denver, Colorado 80203	
Appeal from the Court of Appeals, State of Colorado, Div. 2 Court of Appeals No.: 06CV19876 Honorable Steven L. Bernard, Judge City and County of Denver District Court No.: 6CV10876 Honorable Michael A. Martinez, Judge	
Petitioners: CURIOUS THEATRE COMPANY, a Colorado non-profit company; PARAGON THEATRE, a Colorado non-profit company; and THEATRE13, INC., a Colorado non-profit company, **Respondents: COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT; and DENNIS E. ELLIS, Executive Director**	▲ COURT USE ONLY ▲ **CASE NO.: 08SC351**
Attorneys for Amicus Curiae: Steven D. Zansberg, #26634 Adam M. Platt, #38046 Levine Sullivan Koch & Schulz, L.L.P. 1888 Sherman Street, Suite 370 Denver, Colorado 80203 Telephone: (303) 376-2409 Facsimile: (303) 376-2401 szansberg@lskslaw.com; aplatt@lskslaw.com Bruce E. H. Johnson, *admitted pro hac vice* Noelle H. Kvasnosky, *pro hac vice pending* Davis Wright Tremaine LLP 1201 Third Avenue, Suite 2200 Seattle, Washington 98101-3045 Telephone: (206) 622-3150 Facsimile: (206) 757-7700 brucejohnson@dwt.com; noellekvasnosky@dwt.com	

BRIEF OF AMICUS CURIAE THEATRE COMMUNICATIONS GROUP IN SUPPORT OF PETITIONERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

Amicus Curiae Theatre Communications Group (hereinafter "TCG") submits this brief in support of Petitioners' appeal from the decision of the Colorado Court of Appeals finding the Colorado Clean Indoor Air Act is constitutional as applied to smoking in theatrical productions under both Article II, Section 10 of the Colorado Constitution, and the First Amendment of the United States Constitution.

SUMMARY OF ARGUMENT

Members of theatre groups have a constitutionally-protected right to freedom of speech and expressive conduct. This Court has previously determined that Article II, section 10 provides *greater* protection to expressive conduct than the First Amendment. *E.g.*, *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991). The Court of Appeals applied the test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968), in determining the Smoking Ban is constitutional as applied to theatres under both the United States Constitution and the Colorado Constitution — a test the highest courts of three other states with constitutional provisions for freedom of expression nearly identical to Colorado's have determined inadequate to protect speech interests under each of their state constitution's affirmative grant of freedom of expression.

The Court of Appeals inadequately weighted the theatres' free speech interests and failed to consider the extent of the incidental restrictions of the Smoking Ban on petitioners' expressive rights. TCG seeks to inform this Court of the extent of the negative effects of the Smoking Ban on theatres' freedom of expression, and the inadequacy of the alternative avenues available to theatres to convey their chosen message in lieu of smoking.

DISCUSSION

I. THE SMOKING BAN AS ENACTED IMPERMISSIBLY INFRINGES FREEDOM OF SPEECH UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

Playwrights, actors, directors and theatre groups have a constitutionally-protected right to freedom of speech and symbolic speech. Theatrical productions fall within this purview under the First and Fourteenth Amendments of the Federal Constitution. *See Schacht v. United States*, 398 U.S. 58, 63 (1970). As noted by the United States Supreme Court in *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975), live dramas receive the same level of First Amendment protection as do other forms of expression. *Id.* at 557-58. 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] surely no less entitled to the shelter of the First Amendment." *Id.* at 563 (Douglas, J., concurring). This Court

has echoed this sentiment: "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. The Court of Appeals Inadequately Weighted the Smoking Ban's Significant Incidental Restrictions on Expressive Conduct in Its Analysis Under *O'Brien*.

This Court reviews *de novo* questions of law and "constitutional facts" when First Amendment rights are at stake. *See NBC Subsidiary (KCNC-TV), Inc. v. The Living Will Center*, 879 P.2d 6, 9-11 (Colo. 1994) (citations omitted). The Court of Appeals found petitioners met their initial burden of showing smoking in theatrical productions is constitutionally-protected expressive conduct. *Curious Theatre Co. v. Col. Dept. of Health*, --- P.3d ---, 2008 WL 732113, at *8 (Colo. App. March 20, 2008). Whether a content-neutral law that incidentally burdens expressive conduct will be upheld as constitutional under the First Amendment is determined under the four factors of *United States v. O'Brien*, 391 U.S. 367 (1968), namely: whether (1) the statute is within the constitutional power of the government; (2) the statute 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. *Id.* at 377. The Court of Appeals held the Smoking Ban constitutional under *O'Brien*, including finding the Smoking Ban to be narrowly tailored. *Curious Theatre*, 2008 WL 732113, at *11.

B. The Smoking Ban is Substantially Broader than Necessary to Achieve the Government's Interests.

The Smoking Ban's blanket prohibition incidentally restricts constitutionally-protected theatrical smoking to a greater degree than is essential to further the legislature's interest in protecting nonsmokers from involuntary exposure to environmental tobacco smoke in most indoor areas open to the public. § 25-14-202, C.R.S. 2007. Scholars have noted the fourth prong of *O'Brien* "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, 485 (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 narrow tailoring requirement is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation") (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

Commentators suggest the United States Supreme Court interpreted *O'Brien*'s fourth prong most soundly in *Meyer v. Grant*, 486 U.S. 414 (1988), where the Court considered the constitutionality of a Colorado statute banning the use of paid signature gatherers for referendums. *See* Smolla & Nimmer, § 9:17. In striking down the content-neutral legislation, the Court held "[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*, 486 U.S. at 424. At its essence, *Meyer*'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 . . . 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 the former dictates that where the government can substantially achieve its legitimate goals in a manner that less heavily burdens speech by more precisely tailoring its regulation it must do so, whereas the latter requires that the least restrictive means always be adopted. Otherwise stated, where the least restrictive means test always requires that a government regulation go not a step further than absolutely necessary, the *Meyer*

test allows the government greater flexibility to achieve its goals in the manner it believes most appropriate. The *Meyer* test does not, however, permit the government to disregard less restrictive means.

In this case, were the General Assembly to adopt an exemption to accommodate 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 as a prerequisite to permitting smoking on stage, it would achieve substantially the same result while greatly reducing the Smoking Ban's incidental 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, 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 is not sufficiently narrowly tailored under *Meyer v. Grant*, and should thus strike it down as an unconstitutional restriction on free speech.

Notably, the General Assembly made *no* effort to narrowly tailor the scope of the Smoking Ban. Rather, the legislature enacted an across-the-board regulation whose wide swath completely forecloses the array of expression theatrical smoking

portends. The legislature considered an exemption for the expressive conduct embodied by smoking in theatrical productions, but unlike other jurisdictions that provided an exemption to accommodate free speech interests while curtailing the adverse effects of second-hand smoke with *de minimus* effects on the legislation's impact,[1] the General Assembly rejected such an exemption as unnecessary. 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 does require consideration of whether a statute could obtain substantially similar results with less negative restrictions on speech. *O'Brien*, 391 U.S. at 376 (1968).

1. Alternative avenues of expression available under the Smoking Ban as applied to theatres are inadequate to replace the messages expressed through theatrical smoking.

The Court of Appeals cursorily concluded the Smoking Ban was narrowly tailored because the statute focuses directly on one form of conduct – smoking – and allowed other channels of expression within indoor theaters. The alternative avenues to smoking in plays that the Court of Appeals suggests are woefully inadequate to express the myriad messages conveyed by theatrical smoking.

---

[1] *See supra* n. 4.

Theatrical productions have historically used smoking as expressive conduct. In some productions, the smoking provides the audience with insight into the characters. In Edward Albee's *Who's Afraid of Virginia Woolf?* (1962), smoking is an integral behavior of the character Martha, whose persistent nervous smoking conveys her neurosis to the audience. *Id.* at 50, 162-63. Smoking can likewise be imperative to portraying historical figures in plays, such as Hal Holbrook's cigar-puffing portrayal of Mark Twain in the long-running one-man show *Mark Twain Tonight!* (1954). One reviewer noted the incessant "puffing away at his cigar" caught "the very essence" of Mark Twain's persona. M. Murray, *Review of 'Mark Twain Tonight!'*, Talkin' Broadway's Broadway Reviews, June 9, 2005. Were the characters of Martha or Mark Twain to pretend to "smoke" a talcum powder cigarette this behavioral attribute would be contrived, with the audience perhaps even perceiving the activity as parodic or humorous rather than character-developing.

Smoking is often employed in plays to establish the mood, the era, and the overall feel of the play. A critic stated John Osborne's classic play *Look Back in Anger* (1956) evokes an era through "wreaths of cigarette smoke ris[ing] up the curtains." P. Bond, *An Inarticulate Hope*, (Sept. 14, 1999), www.wsws.org.

Critics have observed of Nilo Cruz's Pulitzer Prize-winning play *Anna in the Tropics* (2003):

> 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.

L. Mauro, *Nilo Cruz*, Oct. 10, 2003, www.performink.com. The ethos of the play's locale, a Tampa cigar factory in the 1920s, is bereft without the visual elements that smoking imbues to a darkened stage. Unfavorable reviews followed when productions of *Anna in the Tropics* did not incorporate smoking. *See* J. Moore, *Play Burned by the Ban: Next Stage Snuffs Musical Set in 'a Smoky Den'*, Denver Post, Nov. 18, 2006; Z. Pincus-Roth, *No Smoking in the Theater; Especially Onstage*, N.Y. Times, Jan. 28, 2007.

Smoking can be an integral plot device, without which a play's meaning may not be realized. For instance, in Dan Dietz's *tempOdyssey* (2003), the main character's inhalation and exhalation of smoke throughout the play confirms the character's existence. Only after taking a drag on a cigarette, and realizing no smoke exits his mouth when he exhales, does the character learn of his death. In such an instance, pretending to smoke could not convey the authors' and directors' intended messages: indeed, directors armed only with inadequate alternatives such

as talcum powder or prop cigarettes would fail to convey *tempOdyssey*'s message. Without actual onstage smoking this theatrical work cannot be performed.

Equally concerning, the Smoking Ban's prohibition of theatrical smoking effectively forecloses Colorado theatres from performing certain works. A theatre company is not authorized to present a playwright's work without first securing performance rights. Theatres are typically contractually obligated to allow the playwright to prohibit a performance if it does not follow the script's language and stage directions. Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §25.02 (1992). A typical performance rights license includes language similar to the following: "There shall be no additions, omissions, or alterations of any kind or nature except as indicated in the published edition of the Work." Numerous playwrights have canceled performances where a theatre failed to adhere to their artistic vision and contractual obligations. For instance, Samuel Beckett fought any altered production and his heirs continue to follow this policy. *E.g.*, R. Brustein, *Samuel Beckett: Millennium Poet Laureate*, 48 The Chronicle Of Higher Educ. 12 (Aug. 4, 2006), J. Whalen, *Directors, Take Note: Samuel Beckett was a Micromanager*, Wall St. J., June 29, 2006 at A1.

In at least one instance, a playwright explicitly prohibited smoke-free versions of his plays. Playwright John Byrne no longer permits Scottish theatres to

perform his plays because a Scottish law prohibits indoor smoking. L. Roberts, *Playwright Boycotts Scots Theatres Over Smoking Ban*, The Scotsman, April 1, 2006, http://news.scotsman.com/scotland. Equating the law with censorship, Mr. Byrne stated he would move his plays to London where smoking on stage is not prohibited. *Id.*

If a Colorado theatre cannot receive the playwright's permission to use alternatives that comply with the Smoking Ban, the playwright's work could go unperformed. One alternative playwrights are likely to find acceptable would be to have actors in character smoke herbal cigarettes, rather than tobacco cigarettes; however, the Smoking Ban's stringent restrictions foreclose even this option. Absent the playwright consenting to a non-smoking production of his work, theatres may have to forgo presenting the production, depriving theatres, actors, directors, and playwrights their right to free expression, and Colorado audiences of their right to receive that expression.

II. THE SMOKING BAN IMPERMISSIBLY RESTRICTS EXPRESSION PROTECTED BY ARTICLE II, SECTION 10 OF THE COLORADO CONSTITUTION, WHICH IS MORE PROTECTIVE OF EXPRESSION THAN THE FEDERAL CONSTITUTION.

Over the course of the last century this Court has repeatedly held that "Article II, Section 10 provides greater protection of free speech than does the First

Amendment." *Bock*, 819 P.2d at 59.[2] Nowhere is the spirit of this proposition more evident than in the text of Article II, Section 10 itself, which, unlike the federal constitution's negative check on governmental power, imbues each citizen with an *affirmative* right of expression: "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 its counterpart in the First Amendment of the federal constitution. *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 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 (Colo. 1985). Indeed, the Court of Appeals acknowledged that this Court has consistently interpreted Article II, Section 10, as affording *greater* protection for free speech than the First

---

[2] *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).

Amendment in certain situations. *Curious Theatre*, 2008 WL 732113, at *12. This Court's unbroken chain of precedents interpreting Article II, section 10 more broadly than the First Amendment is well founded in the text, history and philosophy that animate Colorado's constitution. *See, e.g.*, Robert K. Fitzpatrick, Note, *Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. Rev. 1833, 1835-41 (2004).

A. Colorado Courts Have Struck Down Laws Under Article II, Section 10, Otherwise Permissible Under the First and Fourteenth Amendments to the United States Constitution.

As noted by New York's highest court, "[i]t has long been recognized that matters of free expression in . . . the arts generally, are particularly suited to resolution as a matter of state common law and state constitutional law, the Supreme Court under the Federal Constitution fixing only the minimum standards applicable throughout the Nation." *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 248 (N.Y. 1991). The Colorado Supreme Court has likewise repeatedly taken a strong view regarding rights of free expression, including frequent statements regarding the state constitution's broad speech protections representing more than effete theory. Thus, while the United States Supreme Court found no First Amendment right to distribute literature on the premises of a privately-owned shopping center in *Lloyd Corp v. Tanner*, 407 U.S. 551 (1972), this state's courts

have held that there is such a right under Colorado's Article II, Section 10, in both *Bock*, 819 P.2d at 62-63, and *Robertson v. Westminster Mall Co.*, 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, this Court held 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, this Court held the Colorado 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 1057-58. Specifically, this Court found 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's need for such records against the harm to constitutional interests. *Id.* Just as this Court has previously found the Fourth Amendment insufficiently protects Coloradoans' rights of expression, this Court

should find the First Amendment's *O'Brien* test is similarly deficient, and instead apply a more stringent, Article II, Section 10-based standard.

B. The Governmental Interest Supporting Legislation That Incidentally Burdens Speech Cannot Alter the Constitutional Standard Applied to Determine Whether a Statute Unconstitutionally Infringes Speech.

The standard to apply in determining whether content-neutral legislation that incidentally burdens expression is unduly restrictive does not change based upon the nature or weight of the government's interest in the legislation. Rather, such considerations determine only whether or not the appropriate constitutional standard is *satisfied*. The Court of Appeals erred in factoring into its analysis of which test to apply that previous Colorado cases extending greater protection to speech under Article II, Section 10 did not involve a public health interest. Whatever the weight of the state's interest may be, be it in crime enforcement, as in *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002), or in avoiding public disruption in effectively public spaces, as in *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991), the test imposed to determine whether speech is unconstitutionally burdened remains the same. Public health concerns are no more valid than any other important state interest in determining the standard to apply. Nevertheless, the Court of Appeals "decline[d] to interpret the Colorado Constitution article II, section 10 more expansively than the First Amendment *in*

this context," seemingly for the illogical reason that the Smoking Ban "involve[s] a state interest connected with public health." *Curious Theatre*, 2008 WL 732113, at * 12-13 (emphasis added).

As such, the Court of Appeals' conclusion that the petitioning theatres "did not demonstrate the use of substitutes [to smoking] is so inadequate as to outweigh the state's strong interests in protecting the health of its citizens" is inchoate. *Id.* at 11. The Court of Appeals cites to *Clark v. Community For Creative Non Violence*, 468 U.S. 288, 293 (1984) and *Denver Publishing Co. v. City of Aurora*, 896 P.2d 306, 316-318 (Colo. 1995) in support of its summary conclusion. However, neither *Clark* nor *Denver Publishing* supports such a proposition. Rather, both *Clark* and *Denver Publishing* recognize that the legislation in the respective cases furthers an important government interest, but then go on to analyze whether the constitutional standard for content-neutral legislation that implicates free speech interests was met within each statute's unique context. Indeed, this Court stated in *Denver Publishing*, that "courts must consider the [content-neutral] restriction in context," belying any contention that the existence of a valid and important government interest alone may suffice for legislation to incidentally restrict speech. *Denver Publishing*, 896 P.2d at 312-13 (citing *Ward*, 491 U.S. at 802). TCG recognizes the State has a valid interest in protecting public health, however a

statute's valid public health purpose is not sufficient in and of itself to surmount the *O'Brien* test and be deemed constitutional. Moreover, the Court of Appeals' decision ignores the fact that the government's legitimate police power was similarly at stake in the obscenity, mall leafleting and drug enforcement contexts, but this Court did not conclude that these interests warranted a diminution in the Constitutional test arising under Article II, Section 10.

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

While this 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*, 812 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 in question on federal constitutional grounds under *O'Brien*. *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). Noting "[f]reedom of expression has a robust constitutional history and place in

Pennsylvania," the Pennsylvania Supreme Court examined the language of its constitutional speech provisions, recognizing that its text, just 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.*, 812 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).[3] The court noted that the federal law under *O'Brien* is "in a state of flux," and added the Supreme Court Justices were in obvious disagreement over when *O'Brien* should apply, and how to apply it when applicable. *Pap's A.M.*, 812 A.2d at 607, 611. Because of this, the Pennsylvania Supreme Court refused to allow its state's 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 federal question." *Id.* at 611. Accordingly, the Pennsylvania Court cast away *O'Brien*'s uncertain intermediate scrutiny test for expressive conduct cases and instead applied strict scrutiny, necessitating a finding that the city's ordinance in

[3] 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).

banning *all* nude dancing was not narrowly tailored inasmuch as it, like Colorado's Smoking Ban, 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 New York's state constitution a statute prohibiting a state liquor licensee from permitting female nudity on the premises, though the United States Supreme Court had upheld that very statute under the federal constitution. *See New York State Liquor Auth. 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]," 429 N.E. at 769, which, like Colorado's Constitution, provides that "[e]very citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." N.Y. Const. art. 1, § 8.

Most recently, 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." *Id.* at 201 (internal citations omitted).

Just as these other states' highest courts have struck down content-neutral statutes that burden expressive conduct in violation of state constitutional guarantees, this Court should find the *O'Brien* test insufficient to protect Coloradoans' speech rights under Article II, Section 10's affirmative grant of rights.

D. Applying Strict Scrutiny Under Article II, Section 10, This Court Should Find the Smoking Ban Unconstitutional.

The Smoking Ban purports to prohibit *all* smoking as part of a theatrical performance, thus eliminating a unique, effective, and irreplaceable means of communicating mood, style, and theme. Because *O'Brien*'s inconsistently-applied intermediate scrutiny test inadequately champions the rights granted by Article II, Section 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). Assuming *arguendo* that the government has a "compelling" interest in reducing involuntary exposure to second-hand smoke, it has not employed the "least restrictive means" of achieving its goal. Exposure of cast members or the audience to second-hand smoke could be minimized without infringing expressive rights by requiring theatres to adequately ventilate and to post ample signs warning theatre-goers there will be smoking in a particular performance.[4]

---

[4] 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 Smoking Ban should be held unconstitutional as a violation of Article II, Section 10's affirmative grant of expressive rights.

III. THIS COURT'S DECISION HAS FAR-REACHING IMPLICATIONS FOR THE FREE-SPEECH RIGHTS OF THEATRES, PLAYWRIGHTS, DIRECTORS, AND ACTORS.

As noted by the Court of Appeals, more than half the states and the District of Columbia have some form of smoking ban. *Curious Theatre,* 2008 WL 732113, at *3. At least half of the states with smoking bans provide an exception for theatrical smoking, with other jurisdictions granting exemptions on an ad hoc basis. *Id.* This Court's decision will be the first on this issue in any jurisdiction, and as such may affect theatres, playwrights, actors and theatre patrons in every

---

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").

state with, or considering, indoor smoking laws that do not allow smoking in theatrical productions. This Court's resolution of the Smoking Ban's constitutionality under Colorado's state constitution is especially salient for those states with constitutions akin to Colorado's in their affirmative grant of freedom of expression. *See* discussion *supra* Part II.C.

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 the Colorado Clean Indoor Air Act violates the appellant theatre groups' freedom of speech as protected by the U.S. and Colorado constitutions.

DATED this 26th day of January, 2009.

Respectfully submitted,

By _____

Steven D. Zansberg, #26634
Adam M. Platt, #38046
Levine Sullivan Koch & Schulz, L.L.P.
1888 Sherman Street, Suite 370
Denver, CO 80203
Telephone: (303) 376-2409
Facsimile: (303) 376-2401
Email: szansberg@lskslaw.com
aplatt@lskslaw.com

Bruce E. H. Johnson, *admitted pro hac vice*
Noelle H. Kvasnosky, *pro hac vice pending*
Davis Wright Tremaine LLP
Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
Telephone: (206) 622-3150
Fax: (206) 757-7700
E-mail: brucejohnson@dwt.com
noellekvasnosky@dwt.com

Attorneys for Amicus Curiae
Theatre Communications Group

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify this Brief of Amicus Curiae Theatre Communications Group contains 4,728 words, as counted by Microsoft Word's word-processing system, including headers, footnotes, and quotations.

By _____

Steven D. Zansberg, #26634
Adam M. Platt, #38046
Levine Sullivan Koch & Schulz, L.L.P.
1888 Sherman Street, Suite 370
Denver, CO 80203
Telephone: (303) 376-2409
Facsimile: (303) 376-2401
Email: szansberg@lskslaw.com
aplatt@lskslaw.com

Bruce E. H. Johnson, *admitted pro hac vice*
Noelle H. Kvasnosky, *pro hac vice pending*
Davis Wright Tremaine LLP
Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
Telephone: (206) 622-3150
Fax: (206) 757-7700
E-mail: brucejohnson@dwt.com
noellekvasnosky@dwt.com

Attorneys for Amicus Curiae
Theatre Communications Group

CERTIFICATE OF SERVICE

I certify that on January 26, 2009, I served a copy of the foregoing **BRIEF OF AMICUS CURIAE THEATRE COMMUNICATIONS GROUP IN SUPPORT OF PETITIONERS** to the following by

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Fax

Clerk, Colorado Court of Appeals
Colorado State Judicial Building
2 East 14th Avenue, 3rd Floor
Denver, CO 80203

John W. Suthers
Robert C. Douglas
Lisa Brenner Freimman
Josh Urquhart
1525 Sherman Street, 5th Floor
Denver, CO 80203

A. Bruce Jones, No. 11370
Stephen G. Masciocchi, No. 19873
Daniel R. Pabon, No. 36646
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Mailing Address:
Post Office Box 8749
Denver, Colorado 80201-8749

Cindy Henning