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Colorado Court of Appeals, Opinion by Judge Bernard, Rothenberg and Carparelli, JJ. concurring Court of Appeals Case No. 06CA2260 District Court, City and County of Denver, Colorado Judge Michael A. Martinez, Presiding District Court Case No. 06CV10876	
Petitioners: CURIOUS THEATER COMPANY, a Colorado non-profit corporation; PARAGON THEATRE, a Colorado non-profit corporation; and THEATRE13, INC., a Colorado non-profit corporation v. **Respondents**: COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT and DENNIS E. ELLIS, its executive director	**▲COURT USE ONLY▲**
Attorneys for *Amici Curiae*: Edward T. Ramey, #6748 Isaacson Rosenbaum P.C. 633 17th Street, Suite 2200 Denver, Colorado 80202 Phone Number: (303) 256-3978 Fax Number: (720) 974-7932 E-mail: eramey@ir-law.com	Case No. 2008SC351

BRIEF OF THE DRAMATISTS GUILD OF AMERICA AND THE NATIONAL COALITION AGAINST CENSORSHIP AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

I. INTEREST OF THE *AMICI CURIAE*

The Dramatists Guild of America (the "Guild") is the national professional association of playwrights, librettists, lyricists, and composers writing for the stage. Since its inception in 1912, the Guild has worked to advance the rights of dramatists, from beginning writers to the most prominent authors represented on Broadway, off-Broadway, and in regional theaters across the country. The Guild has over 6,000 members worldwide, and its governing council has included some of the nation's most prominent theatrical writers.

The National Coalition Against Censorship ("NCAC"), founded in 1974, is an alliance of 51 national non-profit organizations, including religious, educational, professional, artistic, labor, and civil rights groups united in the conviction that freedom of thought, inquiry, and expression are indispensable to a healthy democracy. NCAC educates the public and policymakers about threats to free expression and works to create a more hospitable environment for laws, decisions, and policies protective of free speech and democratic values.[1]

Both the Guild and NCAC are vitally concerned with the issues posed in this case due to their impact upon theatrical expression. To these *amici's* knowledge, the analysis and decision of this Court in this case will be the first by a senior state

[1] The positions advocated by the NCAC in this brief do not necessarily reflect the positions of each of its participating organizations.

or federal appellate court to address the application of indoor smoking restrictions to on-stage theatrical performances, and to seek to balance the legislative objectives of the former with the constitutional protections afforded the latter. It is perhaps most appropriate that the issue comes at this time to this Court, as the application of these regulations in Colorado in the theatrical context is among the most sweeping and restrictive in the country.

II. STATEMENT OF ISSUE ADDRESSED BY THESE *AMICI CURIAE*

Did the court of appeals apply an incorrect legal standard in holding that Colorado's indoor smoking ban was constitutional as applied to on-stage theatrical smoking under the First Amendment to the United States Constitution?[2]

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[2] Also before this Court is the issue of whether the court of appeals erred in concluding that the Colorado Constitution, article II, section 10, provides no greater protection to free speech (at least "in this context") than the United States Constitution. It is troubling that the broader protections afforded by the affirmative declaration of Colo. Const. art. II, §10 were dismissed – and that this Court's reasoning in Tattered Cover, Inc., v. City of Thornton, 44 P.3d 1044, 1054 (Colo. 2002), and Bock v. Westminster Mall, 819 P.2d 55, 59-62 (Colo. 1991), was perfunctorily distinguished – solely upon the contextual basis that "none of these cases involved a state interest connected with public health" (Ct. of App. Op. at 32) (as apparently distinguishable in constitutional weight from the interests in police investigations of criminal activity and private property rights discussed in Tattered Cover and Bock). Nevertheless, as the ruling of the court of appeals is unsupportable on First Amendment grounds, it is surely at least as unsupportable under Colo. Const. art. II, §10. These *amici* will leave a more detailed discussion of the latter to the Petitioners and other *amici*.

III. STATEMENT OF THE CASE

These *amici* adopt the Petitioners' statement of the case.

IV. SUMMARY OF THE ARGUMENT

The court of appeals correctly concluded that the Colorado Clean Indoor Air Act, §25-14-201, *et seq.*, C.R.S. (2008), as applied to prohibit all smoking on stage in theatrical productions, burdens expressive conduct protected by the First Amendment. Nevertheless, the court then misconstrued and misapplied the essential requirement that such a restriction be narrowly tailored to address a legitimate governmental interest. Particularly, the court:

1. conducted its analysis and reached its conclusion upon a record wholly devoid of *any* evidence of tailoring to, or even furtherance of, the proffered governmental interest in public health;

2. reached its conclusion in the face of a record limited to evidence directly contradicting its conclusion; and

3. confused the requirement of narrow tailoring with the caveat that a tailored restriction need not be the least restrictive or intrusive means of accomplishing a legitimate governmental end.

V. ARGUMENT

A. Standard of Review

These *amici* seek to address only questions of law, which this Court reviews *de novo*. "Whether a trial court or the court of appeals has applied the correct legal standard to the case under review is a matter of law." Freedom Colorado Information, Inc. v. El Paso County Sheriff's Dept., 196 P.3d 892, 897-98 (Colo. 2008).

B. The First Amendment Values at Issue

The court of appeals correctly concluded that theatrical performances constitute expressive conduct entitled to the full protections of the First Amendment. Ct. of App. Op. at 15. In view of the extensive precedent according First Amendment protections to a wide range of conduct intended to communicate particularized messages or points of view – some of which is recited by the court of appeals at pp. 17-19 of its opinion – and in view of the nature of live theater, it would be surprising if this point were contested.

With regard to on-stage smoking as an element of theatrical expression, however, the Respondents appear to have taken a contrary position – one that was accepted by the district court. The court of appeals properly disapproved this argument, noting that "smoking may be used to give insight into a character's

personality, set the mood, or evoke an era. A play might use smoking to communicate specific plot twists, such as a character being diagnosed with cancer after a lifetime of smoking. Smoking could be used to make political statements about smoking itself." Ct. of App. Op. at 19. The Petitioners and the court of appeals have provided numerous examples of classic and well-known theatrical works in which smoking is integral to the message the playwright and actors seek to communicate to the audience – from Albee to Osborne to O'Neill to Pielmeier to the 1960s classic THE GRADUATE. Ct. of App. Op. at 20. Indeed, even minimal deference to the creative ambit of authors, playwrights, directors, and actors in our society would accord them the respect of an initial presumption that they would not have incorporated smoking into a theatrical presentation had they not intended it to be artistically communicative and expressive in some fashion and to some degree.[3]

According First Amendment protection to smoking on stage as part of a theatrical production – as the court of appeals properly did – does not, of course, mean that it is altogether immune from limitation. But any limitation may only be imposed consistent with the jurisprudential standards that have been developed by

[3] As noted by the court of appeals at p. 20 of its opinion, the insistence of some playwrights that their works be presented exactly as written – to include smoking when smoking is called for – may result in the effective exclusion of such works from the reach of Colorado audiences. Even short of such preclusion, tinkering with a creative work indisputably changes it – a step that should not be taken lightly.

this and other courts when conduct within the protection of the First Amendment is at issue.

C. Standard for Evaluating a Governmental Restriction on Smoking as Part of Theatrical Expression

Taking the legislative declaration of §25-14-202, C.R.S. (2008) at face value, the intent of the Colorado Clean Indoor Air Act may be accepted to be "to protect nonsmokers from involuntary exposure to environmental tobacco smoke" – a content neutral objective. Thus, the applicable standard for evaluating governmental restrictions would be that espoused in United States v. O'Brien, 391 U.S. 367, 377 (1968), that it is "within the constitutional power of the Government; if it furthers an important or substantial interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." It is with the fourth criterion – and perhaps the second – that the problem arises here.

The fourth criterion is a tailoring requirement – "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests . . . ." Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989); *accord*, Denver Publishing Co. v. City of Aurora, 896 P.2d 306, 314 (Colo. 1995). This does not mean that the regulation

must be "the least restrictive or least intrusive means" of serving the governmental interests "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Ward, 491 U.S. at 798-99. However, the regulation may not "burden substantially more speech than is necessary to further the government's legitimate interests." Id. at 799. "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Id. *Accord*, Turner Broadcasting System, Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 662 (1994).

As with regulations directed at the content of speech – *see, e.g.*, United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 816 (2000) – "the burden of proving a content-neutral statute is constitutional rests with the government." Denver Publishing Co, *supra*, 896 P.2d at 319; *accord*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 416, n. 12 (1993), quoting Bd. of Trustees v. Fox, 492 U.S. 469, 480 (1989). "When the government restricts speech, the government bears the burden of proving the constitutionality of its actions." Essence, Inc. v. City of Federal Heights, 285 F.3d 1272, 1283-84 (10th Cir. 2002), quoting Z.J. Gifts D-2, L.L.C v. City of Aurora, 136 F.3d 683, 688 (10th

Cir. 1998). This includes each of the elements of the O'Brien test. Essence, Inc., *supra*, 285 F.3d at 1283.

Thus, it is incumbent upon the Respondents in this case to prove that their regulation of indoor smoking under the Colorado Clean Indoor Air Act, as applied to on-stage theatrical expression protected by the First Amendment, furthers their espoused governmental interest and does so in a manner that does not burden substantially more speech than is necessary to accomplish their legitimate purpose. This the Respondents have been unable to do – indeed, they have been wholly relieved by the court of appeals of both the opportunity and necessity of even trying.

D. The Misapplication of the O'Brien Standard by the court of appeals

1. The absence of any record to support the court of appeals' application of the O'Brien criteria.

As noted on p. 2 of the court of appeals' opinion, the district court denied the Petitioners' request for a preliminary injunction and declaratory judgment after the Petitioners had set forth their evidence "but before the Health Department presented *any* evidence" (emphasis added). This ruling was based upon the district court's conclusion that "smoking . . . including in the theatrical context" did not amount to "expressive conduct" entitled to First Amendment protection. Ct. of App. Op. at 2-3. The court of appeals reversed this conclusion. In lieu of a

remand, however, the court of appeals proceeded – on the basis of no evidence whatsoever from the Respondents – to reach its own conclusion that the fact-specific O'Brien test had been met.

As a result, the Respondents have not even been required to establish (*i.e.*, meet or even address their constitutional burden of proof) that the application of the indoor smoking ban to theatrical productions furthers the governmental interests recited in §25-14-202, C.R.S. (2008), let alone that this application reflects a narrow tailoring to those interests. The second O'Brien factor – furtherance of an important or substantial governmental interest – at a minimum begs for *some* evidentiary support in this context that the presence of a single lighted herbal (or even tobacco) cigarette on the stage of a ventilated theater poses a credible threat of harmful "exposure to environmental tobacco smoke" that would threaten the "health, comfort, and environment" of voluntary theatergoers. This is not to question the recited legislative purpose; this is to question the nexus between that purpose and the application at issue in this case. *Cf.*, Essence, Inc., *supra*, 285 F.3d at 1287-89 (questioning whether an age restriction upon patrons of nude dancing furthers a city's interest in addressing the secondary effects of increased crime).

More glaringly, there is absolutely no evidence in the record of tailoring – the fourth O'Brien criterion. There is no explanation of the need to expand the smoking restriction to "cloves and any other plant matter" – §25-14-203(17), C.R.S. (2008) – in furtherance of the recited " health, comfort, and environment" threats of exposure to tobacco smoke.[4] There is no explanation for the blanket application of these restrictions to voluntary and adequately notified theatergoers in the interest of avoiding "*in*voluntary exposure to environmental tobacco smoke." There is no evidence of consideration of waivers or exceptions when a theater is

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[4] Sheldon Harnick, the Tony Award winning lyricist for FIORELLO (1960) and FIDDLER ON THE ROOF (1965), has noted the regrettable impact of such an expansive ban upon his translation of the popular opera CARMEN. In Act I, as soldiers from a nearby barracks watch, young women working in a cigarette factory appear on stage, smoking "cigarettes," with smoke floating in the air above them, and the soldiers and women sing:

Soldiers:

Here they come,
Their eyes bold as brass,
Brazen coquettes
From whose ripe and impudent lips
Hang cigarettes!

Chorus of Cigarette Girls:

See the smoke gently rising
Like a vagrant like a vagrant,
Up to the sky,
Taking flight so light and fragrant!
Every puff brings a measure
Of soothing pleasure . . . .

With at least a provision allowing harmless herbal substitutes, this entrancing scene could be salvaged.

large enough or adequately ventilated so as not to create secondary exposure to patrons from on-stage smoking. There is no evidence of consideration of a procedure for the granting of limited waivers or modifications of the otherwise absolute restrictions (with perhaps appropriate notice to theatergoers) when smoking is determined to be critical to the artistic and expressive presentation of a theatrical scene. There is no evidence of consideration of a procedure for the granting of even limited waivers or modifications when an entire production may otherwise be barred by contractual limitations or the wishes of the playwright. There is simply *no evidence of anything* to support the Respondents' constitutionally imposed burden of proof.

Having relieved the Respondents of their constitutional burden of demonstrating the nexus to purpose and narrow tailoring of their restrictions, the court of appeals supports this wholesale suspension of the O'Brien criteria by its own finding that "the Smoking Ban allows other channels of expression." Ct. of App. Op. at 28. Recited examples include "outdoor theatrical performances" (in winter?) and "fake and prop cigarettes" (which the appellate court finds the Petitioners not to have proven to be "so inadequate" as to outweigh the "state's strong interest in protecting the health of its citizens" despite the absence of any proof by the Respondents of a nexus with or tailoring of its restrictions to that

interest). This concludes with a call from the bench for the "willing suspension of disbelief" in the context of the theatrical art form – over the considered objections of the artists themselves – comparable to the understanding that real bullets are not being used on stage. Ct. of App. Op. at 28-30. Respectfully, this approach turns the government's burden to prove narrow tailoring on its head. It substitutes an inquiry into the viability of alternatives not properly addressed unless and until narrow tailoring has itself already been established. *See, e.g.*, American Civil Liberties Union v. City and County of Denver, 569 F.Supp.2d 1142, 1163-64 (D.Colo. 2008).[5]

2. The recitation of evidence directly contradicting the conclusion regarding tailoring.

In the process of reaching its conclusion that the indoor smoking ban "is narrowly tailored to achieve a legitimate state interest" – Ct. of App. Op. at 31 – the court recited ample evidence that the restriction at issue could *not* have been narrowly tailored, citing thirteen jurisdictions where indoor smoking restrictions of this nature had been crafted, in a variety of ways, precisely to accommodate

[5] It must also be respectfully noted that the consideration afforded by the court of appeals to the judgment of theatrical artists regarding the efficacy of the suggested alternatives in the face of the blanket application of the indoor smoking ban pales beside the rigor of the analysis afforded protestors in the face of concerns about public safety and terrorism. *Cf.* Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212, 1225-26 (10th Cir. 2007); American Civil Liberties Union, *supra*, 569 F.Supp.2d at 1180-84.

expressive conduct in the context of theatrical productions. Ct. of App. Op. at 7-9. Particularly illustrative is New York, where the statewide indoor smoking ban applies only to tobacco – N.Y. Pub. Health Law §1399-n (2008) – and leaves room for waivers in circumstances of financial hardship or "other factors which would render compliance unreasonable" – N.Y. Pub. Health Law §1399-u (2008). New York City's restrictions contain a specific proviso that "smoking may be a part of a theatrical production." N.Y.C. Admin. Code §17-503(a)(8).

The point is not, as the court of appeals correctly noted at p. 30 of its opinion, that the availability of less burdensome alternatives necessarily belies narrow tailoring. In this case, however, those alternatives are the only evidence pertinent to tailoring in the record – a product of the Respondents not having been required to meet their constitutionally imposed burden of proof before the district court.

3. The confusion of the requirement of narrow tailoring with the caveat that a tailored restriction need not be the least restrictive or intrusive means of accomplishing a legitimate governmental end.

As noted in Ward, *supra*, narrow tailoring does not require a time, place, and manner regulation of speech or expressive conduct to "be the least restrictive or least intrusive means" of serving a legitimate governmental interest. 491 U.S. at 798. This caveat, however, does not altogether suspend the tailoring requirement.

As explained in Ward, "*So long as the means chosen are not substantially broader than necessary to achieve the government's interest*, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." 491 U.S. at 800 (emphasis added).

Here, rejecting Petitioners' arguments that the blanket application of the state's indoor smoking ban to theatrical expression did not evidence narrow tailoring, the court of appeals opined: "We need only conclude that it was reasonable for the legislature to have determined that preventing involuntary exposure to tobacco smoke is achieved most effectively by banning all smoking in indoor locations, including theaters." Ct. of App. Op. at 31. Wholly absent from this conclusion is the prerequisite that the ban be narrowly tailored – or that it be tailored at all. One may as readily note that security and public safety may be achieved most effectively by banning all forms of public protest and expressions of discontent. This is directly contrary to the O'Brien criteria. The court of appeals has allowed the caveat to swallow the rule.

VI. CONCLUSION

For the reasons set forth above, these *amici* support the position of the Petitioners in this case.

Respectfully submitted this 26th day of January, 2009.

ISAACSON ROSENBAUM P.C.

By: _____
Edward T. Ramey

ATTORNEYS FOR *AMICI CURIAE*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of January, 2009, a true and correct copy of the foregoing **BRIEF OF THE DRAMATISTS GUILD OF AMERICA AND THE NATIONAL COALITION AGAINST CENSORSHIP AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS** was placed in the United States mail, postage prepaid, to the following addressees:

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