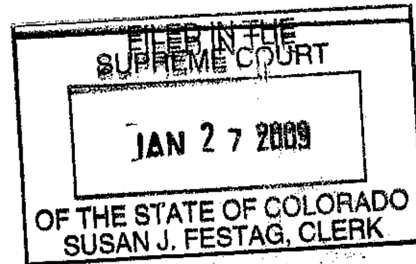
SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue Denver, CO 80203	
Colorado Court of Appeals, Opinion by Judge Bernard, Rothenberg, and Carparelli, JJ. concurring Court of Appeals No. 06CA2260 District Court, City and County of Denver, Colorado Judge Michael A. Martinez, Presiding District Court No. 06Cv10876	
Petitioners: CURIOUS THEATRE COMPANY, a Colorado non-profit corporation, PARAGON THEATRE, a Colorado non-profit corporation, and THEATRE13, INC., a Colorado non-profit corporation **Respondents:** COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, and DENNIS E. ELLIS, its executive director	▲ **COURT USE ONLY** ▲ Case Number: 2008SC351
Attorneys for Petitioners: Name: A. Bruce Jones, No. 11370 Stephen G. Masciocchi, No. 19873 Daniel R. Pabon, No. 36646 HOLLAND & HART LLP Address: 555 Seventeenth Street, Suite 3200 Post Office Box 8749 Denver, Colorado 80201-8749 Phone Number: (303) 295-8000 Fax Number: (303) 295-8261 E-mail: bjones@hollandhart.com smasciocchi@hollandhart.com drpabon@hollandhart.com	

PETITIONERS' OPENING BRIEF

TABLE OF CONTENTS

INTRODUCTION 1

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

A. Nature Of The Case 2

B. Course Of Proceedings And Disposition Below 3

STATEMENT OF FACTS 6

SUMMARY OF ARGUMENT 11

ARGUMENT 13

I. THE STANDARD OF REVIEW IS DE NOVO. 13

II. THE COURT OF APPEALS ERRED IN APPLYING *O'BRIEN* 14

A. The Court of Appeals Erred By Failing To Compel The State To Justify Its Complete Ban On Indoor Theatrical Smoking, And By Inappropriately Broadening The Smoking Ban's Purpose Beyond Preventing Involuntary Exposure. 15

B. The Two Alternative Means of Communication Postulated By The Court Of Appeals Are Inadequate And Unrealistic. 18

III. THE SMOKING BAN, AS APPLIED TO THEATRICAL SMOKING, VIOLATES COLORADO CONSTITUTION ARTICLE II, § 10. 20

REMEDY 25

CONCLUSION 26

TABLE OF AUTHORITIES

State Cases

Bellanca v. N.Y. State Liquor Auth., 429 N.E. 2d 765 (N.Y. 1981) 22

Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991) 20, 23

Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991)..24

Cooper v. People, 13 Colo. 373, 22 P. 790 (Colo. 1889) 24

Denver Publishing Co. v. City of Aurora,
896 P.2d 306 (Colo. 1995) 15

Fullerton v. County Court, 124 P.3d 866 (Colo. App. 2005).......................................23

Holliday v. RTD, 43 P.3d 676 (Colo. App. 2001) 13

Lewis v. Colo. Rockies Baseball Club, 941 P.2d 266 (Colo. 1997)........................13, 19

Marco Lounge, Inc. v. City of Federal Heights,
625 P.2d 982 (Colo. 1981) 21, 23, 26

Mendoza v. Licensing Bd. of Fall River, 827 N.E.2d 180 (Mass. 2005)..................22, 23

Pap's A.M. v. City of Erie, 812 A.2d 591 (Pa. 2002) 22, 23

Pierce v. St. Vrain Valley School Dist., 981 P.2d 600 (Colo. 1999) 21, 22

Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982)..25

State v. Ball, 796 A.2d 542 (Conn. 2002)...16

Tattered Cover, Inc. v. City of Thorton, 44 P.3d 1044 (Colo. 2002)......................21, 22

Federal Cases

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 16

City of Ladue v. Gilleo, 512 U.S. 43 (1994) 18

Community Communications Co. v. City of Boulder,
660 F.2d 1370 (10th Cir. 1981) 25

Elrod v. Burns, 427 U.S. 347 (1976)..26

Frisby v. Schultz, 487 U.S. 474 (1988) 18

Hughes v. Oklahoma, 441 U.S. 322 (1979) 17

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) 15

Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) 19

Schneider v. State, 308 U.S. 147 (1939) 18, 19

Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 19

Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180 (1997) 15

Turner Broadcasting, Inc. v. FCC, 512 U.S. 622 (1994) 16

United States v. O'Brien, 391 U.S. 367 (1968) 11, 14, 15, 22

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 17

Statutes

C.R.S. § 25-1-112 2

C.R.S. § 25-14-203(16) 2

C.R.S. § 25-14-204(1)(w)-(y) 2

C.R.S. §§ 25-14-201 to 209 1

C.R.S. §25-14-203(17) 1

Mont. Code Ann. §50-40-103(8) (2005) 5

N. J. Rev. Stat. §26: 3(D)-57 (2006) 5

Wash. Rev. Code Ann. §70.160.020 (2006) 6

INTRODUCTION

On July 1, 2006, the Colorado Clean Indoor Air Act (the "Smoking Ban" or "Ban") went into effect. C.R.S. §§ 25-14-201 to 209 (Attachment 1). The Smoking Ban prohibits smoking in virtually all indoor areas open to the public, and reaches beyond traditional tobacco to include "cloves and any other plant material or product[.]" *Id.* §25-14-203(17). The Ban's purpose, as stated in its legislative declaration, is "to protect nonsmokers from involuntary exposure to environmental tobacco smoke[.]" *Id.* §25-14-202. The Legislature expressly rejected an amendment that would have excepted smoking which is integral to a theatrical production ("theatrical smoking"). (Attachment 2). In this appeal, Petitioners – three Colorado theater companies (the "Theatres") – challenge the Smoking Ban as violative of free expression under the federal and state constitutions.

ISSUES PRESENTED FOR REVIEW

1. Whether the court of appeals erred in holding that Colorado's smoking ban was constitutional as-applied to theatrical smoking under the First Amendment of the United States Constitution.

2. Whether the court of appeals erred in concluding that the Colorado Constitution, article II, section 10 provided no greater protection to free speech than the United States Constitution.

STATEMENT OF THE CASE

A. Nature Of The Case

This case concerns whether state and federal constitutional provisions protecting freedom of expression preclude the government from completely banning all kinds of smoking as part of theatrical productions. Petitioners are one Boulder (Theatre13) and two Denver (Curious Theatre and Paragon Theatre) theater companies. Respondents – the Colorado Department of Public Health and Environment and its Executive Director[1] (collectively the "State") – are statutorily charged with enforcement of Colorado's public health laws, including the Smoking Ban. *See* C.R.S. § 25-1-112.

The Smoking Ban states, "smoking shall not be permitted and no person shall smoke in any indoor area, including, but not limited to . . . auditoria, theater(s) or museums . . . ." § 25-14-204(1)(w)-(y). The Ban defines "Smoking" as the "burning of any lighted cigarette, cigar, pipe, or any other matter or substance that contains tobacco." C.R.S. § 25-14-203(16). Theatrical smoking

often uses tea leaves, cloves, or non-traditional "tobacco." But the statute reaches theatrical smoking by broadly defining "tobacco" to include these alternatives:

> "Tobacco" means cigarettes, cigars, cheroots, stogies, and periques; granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco; snuff and snuff flour; Cavendish; plug and twist tobacco; fine-cut and other chewing tobacco; shorts, refuse scraps, clippings, cuttings, and sweepings of tobacco; and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or for smoking in a cigarette, pipe, or otherwise, or both for chewing and smoking. ***"Tobacco" also includes cloves and any other plant matter or product that is packaged for smoking.***

C.R.S. §25-14-203(17) (emphasis added). Thus, theatrical smoking is not allowed in Colorado's indoor theaters.

B. Course Of Proceedings And Disposition Below

On October 13, 2006, the Theatres sued for a declaratory judgment and a preliminary injunction against enforcement of the Smoking Ban as applied to theatrical smoking. (Vol. 1:1-13; 17-37).[2] A preliminary injunction hearing was held before the district court on October 30, 2006. During the hearing, the Theatres demonstrated that many notable plays, such as *Who's Afraid of Virginia*

---

[1] Respondent Ellis is no longer the Executive Director. On remand, Petitioners will move to substitute the current Director for Mr. Ellis.

[2] The record consists of pleadings (Volume 1), a transcript of the preliminary injunction hearing (Volume 2, cited "Tr."), and two binders of exhibits.

Woolf?, by Edward Albee, and *A Moon for the Misbegotten*, by Eugene O'Neill, could not be presented because of the Ban's prohibition. But at the close of the Theatres' case, the court denied injunctive relief after concluding that theatrical smoking is not "inherently" expressive. As a result, the State was not required to present evidence to justify application of the Ban to theatrical smoking.

The Theatres appealed and asserted that smoking during a theatrical production constitutes expression warranting constitutional protection. In an opinion issued on March 20, 2008, the court of appeals agreed. The court noted that theatrical smoking could "be used to give insight into a character's personality, set the mood, or evoke an era." Slip Op. at 19. The court added that theatrical smoking was used to communicate "specific plot twists, such as a character being diagnosed with cancer after a lifetime of smoking. Smoking could [also] be used to make political statements about smoking itself." *Id.*

Nevertheless, the court of appeals concluded the Smoking Ban was a content neutral statute that only incidentally burdened this expression. *Id.* at 22. Applying the four-part test in *United States v. O'Brien,* 391 U.S. 367 (1968), the court ruled that Colorado had a strong governmental interest in protecting its citizens' health and well-being by prohibiting their exposure to indoor smoke. *Id.* at 24-25. The court further held that the statute was narrowly tailored to effectuate its purpose,

even though the State had provided no proof of any such tailoring. *Id.* 25-28. It added that adequate alternative means of expression existed because plays could be presented outdoors and prop cigarettes could be used. *Id.* at 28-30. Finally, the court held that the state constitution extended no further protection to content neutral statutes concerning public health than did the First Amendment. *Id.* at 33.

The court of appeals noted that more than half the states have "some form" of smoking ban, and it indicated that 19 states had rejected specific exceptions for theatrical smoking in their bans.[3] *Id.* at 9. But only three states – Washington, Montana, New Jersey – have a combination like Colorado that broadly prohibits all types of smoking (including cloves, tea leaves, and other tobacco substitutes) while also rejecting a statutory exception for theatrical smoking. These three states broadly define "smoking" such that theatrical smoking is also encompassed by their bans. *See, e.g.*, N. J. Rev. Stat. §26: 3(D)-57 (2006) ("'Smoking' means the burning of, inhaling from, exhaling the smoke from, or the possession of a lighted cigar, cigarette, pipe or any other matter or substance which contains tobacco or any other matter that can be smoked."); Mont. Code Ann. §50-40-103(8) (2005)

[3] Petitioners are unaware of any state other than Colorado specifically rejecting a statutory exception for theatrical smoking. Presumably, the court of appeals was referring to the fact that the other states have not expressly excluded theatrical smoking.

("'Smoking' or 'to smoke' includes the act of lighting, smoking, or carrying a lighted cigar, cigarette, pipe or any smokable product."); Wash. Rev. Code Ann. §70.160.020 (2006) ("'Smoke or 'smoking' means the carrying or smoking of any kind of lighted pipe, cigar, cigarette, or any other lighted smoking equipment.").

Courts in other states have yet to decide whether a smoking ban can survive a constitutional challenge when applied to expressive theatrical smoking. Thus, the court of appeals' decision is the first and only appellate decision in the nation on this issue. The Theatres ask this Court to reverse the court of appeals' decision and hold that the Ban is unconstitutional as applied to theatrical smoking.

STATEMENT OF FACTS

In support of their request for an injunction, the Theatres presented the testimony of four witnesses with combined professional theatrical experience in excess of sixty years. Mr. Richard Devin, holder of a Master of Fine Arts from the Yale School of Drama, had recently retired after seventeen years as the Artistic Director of the Colorado Shakespeare Festival. (Tr. 96:2-16). Chip Walton founded Curious Theatre Company in 1997, and was named Denver's Theater Person of the Year: 2005. (Tr. 26:4-9; Ex. 1). Michael Stricker of Paragon Theatre, and Judson Webb of Theatre13, were co-founders of their respective theatre companies, with experience and training as producers, directors, and actors.

(Tr. 56:5-57:3, 81:6-20). All four witnesses were emphatic that smoking is, and has been, part of the theatrical expression of numerous plays.

Mr. Devin testified that:

> [T]here are plays where the playwright has made a decision, written it into the script, and it's vital to the conveyance of the characters – of a specific character in the play or group of characters – . . . that smoking is a part of their lives or a part of the specific situation.

(Tr. 100:21-101:1). "[T]here are times when it's so important to the action of the play, and the audience's understanding of the characters in the play, that we would not really have any choice to eliminate it and still do the play." (Tr. 103:10-14). "We make the decision [about smoking] through talking it through with our staff, our director, our production manager, the artistic director of the theatre, to arrive at a group opinion as to how important the smoking would be to the audience's understanding of this play." (Tr. 104:17-21). When asked if he considered the playwright's intent in that calculation, Mr. Devin responded: "Absolutely. That's the prime decision-maker." (*Id.* at 22-24).

Mr. Walton testified about his company's upcoming production of *tempOdyssey*, in which a character initially smokes, then realizes he has died because he can no longer smoke. "[Smoking] expresses – it expresses both something about that character while he is still alive and smoking, as well as

expresses . . . a fundamental, dramatic plot point when he is dead." (Tr. 35:23-36:1).

> [I]n this particular case, because it's actually the absence of smoke the second time that is the important fundamental device, it's hard to have absence without presence, you know. So, in other words, if it's not present the first time, it's hard to communicate that it's absent the second time, and through those conversations with [the playwright] and through conversations internally with the production team, we've concluded that there's really no acceptable alternative [to smoking].

(Tr. 36:10-18). "[Smoking] goes to who this character is when he is alive, and it's a trait that he mentions several times in the play. It's something that is in the playwright's opinion . . . it's very much a part of who this character is." (Tr. 42:8-13).

Likewise, Mr. Stricker, when asked whether it is important to maintain the artistic integrity of a play by using cigarettes, stated as follows: "Absolutely. And I would, in addition to that, say oftentimes because we're doing older pieces or classic theatre, these playwrights are dead and gone, so we don't have the advantage of getting to talk to them. All we know about their intentions is what is in the script." (Tr. 61:18-22). When asked if it was simply a matter of artistic integrity, Mr. Stricker testified, "It goes beyond that. It's at the very, very core of character development, of story telling. [I]t's as necessary as if a character is a

soldier and is supposed to have a gun in their hand. It's that necessary." (Tr. 61:25-62:3). Mr. Stricker went on to state that smoking was integral to numerous plays, both planned and already presented by his company, including *Who's Afraid of Virginia Woolf?*, by Edward Albee; *Mojo*, by Jez Butterworth; *Look Back in Anger*, by John Osborne; *Buicks*, by Julianne Shepherd; *Sailor Song*, by John Patrick Shanley; *Vieux Carre*, by Tennessee Williams; *A Moon for the Misbegotten*, by Eugene O'Neill; and *The Caretaker*, by Harold Pinter. (Tr. 62:4-65:24, 68:3-70:15).

Mr. Webb testified about a play – *Match* – that his company had just presented and where, despite the Ban, actors had smoked. When asked whether the smoking was part of what was intended by the playwright, he responded: "Oh, absolutely, without question." (Tr. 87:9-11). He added that not smoking would have limited the expression that the playwright wanted in the play. (Tr. 88:6-8).

The witnesses also testified to the chilling impact that the Smoking Ban would have on future presentations in Colorado. Mr. Devin testified, "My biggest concern is the chilling effect of our freedom to express and include a lot of great literature that will be enhanced with smoking . . . ." (Tr. 107:4-8).

> We would have to choose not to do certain plays and/or we would have to make a decision to do a play which we feel requires smoking with lesser effectiveness of that presentation, which most often would make us just

> decide not to do it because we don't want to do anything halfway in terms of the effectiveness for the audience.

(*Id.* at 16-21).

Mr. Walton spoke of theater as a "dialogue with the public," (Tr. 29:5-7), and testified, "I certainly would hate to not be able to consider plays on their artistic merit simply because there was smoking in them so that would be a shame because in this case, for example, I would never have had the opportunity to produce *tempOdyssey*." (Tr. 44:11-15). Mr. Stricker was even more direct. "If the playwright's intent is to have smoking in the play, that's what we will do, and if the ban does not allow us to do that, then that forces us not to pick that playwright's material." (Tr. 66:24-67:2).

The three theatre company representatives also testified that their respective companies provided advance notice to their audiences if smoking was to occur on stage. (Tr. 43:2-12, 59:10-17, 84:1-12). They also stated that actors were informed about the need for smoking during auditions, and that no actor or crew member was forced to be near any smoking. (Tr. 38:2-39:5, 67:3-25, 88:9-22).

For Curious Theatre's planned presentation of *tempOdyssey*, only one partial non-traditional tobacco cigarette was to be smoked. (Tr. 35:2-20). Likewise in *Match*, only one non-traditional cigarette was used. (Tr. 85:4-86:23). The

maximum amount of smoking that was described for any play was 15-20 minutes "spread out over two hours." (Tr. 70:24-71:3).

Finally, all four witnesses insisted that so-called prop or fake cigarettes were inadequate substitutes for real smoking. (Tr. 40:12-41:20, 60:22-61:9, 89:19-91:10, 106:13-107:3). One of these fake cigarettes was demonstrated. (Tr. 89:19-90:6). Fake cigarettes contain talcum, which an actor blows through to emit a puff of "smoke." (*Id.*). Although the trial court thought the fake was "fairly realistic," (Tr. 134:18-21), Mr. Webb testified that it was not an adequate substitute, especially if the scene required the actor to "draw" on a cigarette. (Tr. 91:4-10). All the other witnesses agreed. (Tr. 40:12-41:20, 60:22-61:9, 106:13-107:3). Indeed, Mr. Stricker testified to his experience of an audience laughing at a fake cigarette during a drama when laughter was not the play's intent. (Tr. 60:22-61:9).

SUMMARY OF ARGUMENT

The court of appeals erred in upholding the state's complete ban on theatrical smoking in indoor theaters. The court correctly held that theatrical smoking constituted protected speech, but it mistakenly concluded that a complete ban somehow satisfied "narrow tailoring" under *O'Brien*.

The court's analysis of narrow tailoring was flawed in two key respects. First, the court did not hold the State to its burden of justifying its restriction of

free expression. The court sanctioned a complete ban on indoor theatrical smoking without any factual justification. It compounded this error by insisting that the Ban was necessary to protect the public against any exposure to second-hand smoke, when the stated legislative purpose is to protect against ***involuntary*** exposure.

Second, the court erred in postulating that fake cigarettes and outdoor performances constituted adequate alternatives. Alternative means of expression are constitutionally adequate only if they are functionally equivalent to the banned communication. Here, every witness confirmed that fake cigarettes, which use talc and allow an actor to blow a single puff of smoke, are not adequate alternatives, particularly if a script requires an actor to draw on a cigarette. Indeed, one witness testified that the use of this prop elicited laughter in a dramatic moment. Likewise, outdoor performances are not an adequate alternative. The Theatres have indoor facilities, and in any event, a ban on speech in one location cannot be justified because the speech is permitted in another location.

The court also erred in concluding that Colorado Constitution Article II, section 10 provided no greater protection than the First Amendment. This Court has recognized that the First Amendment establishes only the constitutional floor, and that Article II, section 10 provides greater protection. The court of appeals noted that this court has not applied the Colorado Constitution's broader protection

in the context of public health regulations, but it did not explain why health regulations in general or the Smoking Ban in particular warrant different treatment. Courts in other states having similar constitutional provisions—provisions that provide an affirmative guarantee of freedom of expression—have invalidated laws that totally banned protected expression. Applying the analogous language of the Colorado Constitution, the Court should hold that the Smoking Ban is unconstitutional as applied to theatrical smoking.

ARGUMENT

I. THE STANDARD OF REVIEW IS DE NOVO.

"*De novo* review is . . . appropriate when the issues raised touch on First Amendment concerns. In such cases, an appellate court must make an independent review of the whole record to ensure that the judgment rendered does not intrude on the right of free speech." *Holliday v. RTD*, 43 P.3d 676, 681 (Colo. App. 2001) (citing *Lewis v. Colo. Rockies Baseball Club*, 941 P.2d 266 (Colo. 1997)).

Here, if left unchanged, the court of appeals' decision will have a continued chilling effect and thereby preclude numerous theatrical productions in our state. The smoking alternatives suggested by the court are impractical and likely to convey an entirely different message than intended by the playwright or director, such that theaters will forego presenting certain plays rather than alter the play's

intended message. Because of these implications for free speech, all aspects of the court of appeals' decision must be reviewed de novo.

II. THE COURT OF APPEALS ERRED IN APPLYING *O'BRIEN*.

In rejecting the challenge to the Smoking Ban, the court of appeals interpreted and applied *United States v. O'Brien,* 391 U.S. 367 (1968). Slip Op. at 23-31. Under *O'Brien*, a government regulation survives a first amendment challenge if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* at 377. For purposes of this appeal, the Theatres do not contend that the Smoking Ban violates the first three prongs of the *O'Brien* test. However, the court of appeals erred in applying the critical fourth – or "narrow tailoring" – part of the test. Slip Op. at 26-31.

The *O'Brien* standard is generally referred to as "intermediate" scrutiny of legislation.[4] Slip Op. at 13. But the court of appeals' conception of "narrow tailoring" renders it a virtually meaningless inhibition on the government. Under

[4] Amicus Curiae the Thomas Jefferson Center for the Protection of Free Expression asserts that *O'Brien* is not the appropriate standard. Under a more exacting test, the Ban would be plainly unconstitutional as applied to theatrical smoking.

the court's view of *O'Brien*, any statute would pass muster no matter how much, or what type of, speech was affected, provided the government could identify hypothetical examples of the speech otherwise being allowed.

The court's holding is erroneous for two inter-related reasons. First, the court's approach relieves the State of its burden to justify the scope of the restriction on free expression, in contravention of this Court's holding in *Denver Publishing Co. v. City of Aurora*, 896 P.2d 306, 319 & n.20 (Colo. 1995) ("[T]he burden of proving a content-neutral statute is constitutional rests with the government. . . . [T]he evidentiary standard is necessarily included within the applicable constitutional test.") Second, the court postulated alternative means of expression unsupported by any evidentiary record.

A. The Court of Appeals Erred By Failing To Compel The State To Justify Its Complete Ban On Indoor Theatrical Smoking, And By Inappropriately Broadening The Smoking Ban's Purpose Beyond Preventing Involuntary Exposure.

The United States Supreme Court requires factual justifications for legislation to satisfy intermediate scrutiny under the First Amendment. *See, e.g., Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391-93 (2000); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 187 (1997) ("*Turner II*") (district court relied on 18 months of factual development on remand, "yielding a record of tens of thousands of pages" of evidence, comprised of materials acquired during

Congress' preenactment hearings, as well as additional expert submissions, sworn declarations and testimony, and industry documents in order to determine governmental interest); *Turner Broadcasting, Inc. v. FCC*, 512 U.S. 622, 645-46 (1994) ("*Turner I*"). "[These] cases . . . make plain . . . that application of an intermediate scrutiny test to a government's asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 311 (2000) (Souter, J., concurring in part and dissenting in part). Here, the district court denied relief at the close of the Theatres' case and did not receive any evidence from the State. Thus, the record before the court of appeals lacked any factual justification for the Smoking Ban as applied to theatrical smoking.

The court of appeals also erred in concluding that the "Smoking Ban is narrowly tailored, because it focuses on the one form of conduct, smoking, upon which the state's announced interest in protecting public health depends." Slip Op. at 28 (citing *State v. Ball*, 796 A.2d 542, 554 (Conn. 2002)). In this regard, the court overlooked the plain language of the legislative declaration contained in the statute. The legislative declaration states a more limited goal than protecting each and every member of the public from the dangers of second-hand smoke:

> The general assembly hereby finds and determines that it is in the best interest of the people of this state to protect

> nonsmokers from ***involuntary exposure to environmental tobacco smoke*** in most indoor areas open to the public, public meetings, food service establishments, and places of employment. The General Assembly further finds and determines that ***a balance should be struck between the health concerns of nonconsumers of tobacco products and the need to minimize unwarranted governmental intrusion into, and regulation of, private spheres of conduct and choice*** with respect to the use or non-use of tobacco products in certain designated public areas and in private places.

C.R.S. §25-14-202 (emphasis added).

As revealed by this declaration, the Legislature's focus was ***involuntary exposure*** to second-hand smoke. In broadening this stated interest to include any and all exposure to second-hand smoke, the court of appeals discounted simple alternatives suggested by the Theatres – such as providing notice in advance so no audience member would be "involuntarily exposed" to smoke, as well as notice to actors and crew at the outset of a play's production. In broadening the State's interest beyond the Legislature's intent, the court erroneously relieved the State of its burden to demonstrate that the statute was narrowly tailored. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 338 (1979) (holding that a broad public interest will not relieve a state of its burden to demonstrate a statute's narrow tailoring); *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989) ("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."); *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil.").

In expanding the statutory intent beyond the scope of the legislative declaration, the court of appeals disregarded Supreme Court precedent on how to derive the government's legislative purpose. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 47 (1994) (analyzing statute's stated purpose to determine governmental interest); *Schneider v. State,* 308 U.S. 147, 162 (1939) (analyzing the language of an ordinance to determine its purpose and governmental interest). The court of appeals therefore failed to hold the government's feet to the constitutional fire and free expression has been extinguished in Colorado theaters as a result.

B. The Two Alternative Means of Communication Postulated By The Court Of Appeals Are Inadequate And Unrealistic.

The court of appeals compounded its error on narrow tailoring by making its own unsupported fact findings. Specifically, the court posited that adequate alternative means of expression existed because plays could be presented outdoors or prop cigarettes could be used. Slip Op. at 28-30.

In making its finding regarding outdoor presentations, the court effectively acknowledged that the Smoking Ban precludes the Theatres from presenting many plays indoors. The court referenced plays that "require smoking as a critical

element of their performance" and acknowledged that certain playwrights demand their plays "be performed exactly as written," thus precluding the Theatres from presenting these plays indoors. Slip Op. at 20. The court's proposed alternative – presenting the plays outdoors – ignored the fact that Petitioners have only indoor facilities.[5] The court also never explained how outdoor performances are practical in cold weather. In any event, this finding is irrelevant as a matter of constitutional law: '"[One] is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."' *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 77-78 (1981) (quoting *Schneider*, 308 U.S. at 163); *see also Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (overturning city's refusal to allow use of a municipal theater to present the musical "Hair," and stating, "[w]hether petitioner might have used some other, privately owned theater in the city for the production is of no consequence").

Similarly, the finding that fake cigarettes sufficed as an alternative for expressing a playwright's intent misapplied the legal standard and directly contradicted the evidentiary record. *See Lewis,* 941 P.2d at 277 (the alternative channel of communication must be "functionally equivalent" to that being banned).

---

[5] Two of the theater companies present their plays in theater buildings, while the third uses an indoor theater facility at the Boulder Museum of Contemporary Art.

Here, the testimony revealed that the use of a fake cigarette had elicited laughter in a serious moment of a performance. (Tr. 60:22-61:9). In fact, the evidence demonstrated that a fake or prop cigarette was not close to the functional equivalent of either traditional or non-traditional tobacco cigarettes, such as those consisting of rolled-up tea leaves. While live theater involves, as the court noted, the "willing suspension of disbelief," the evidence showed that audiences are unwilling to suspend their disbelief when it comes to fake cigarettes. By finding to the contrary, the court of appeals joined the district court in substituting its judgment on the authenticity of fake cigarettes for that of the witnesses, who had extensive experience in theatrical productions and had actually observed audience reactions to these phony props. *See supra* at 11.

In sum, the court of appeals erred in concluding that the Smoking Ban was narrowly tailored and that outdoor performances and fake cigarette sufficed as constitutionally-adequate alternatives. This Court should therefore hold the Smoking Ban to be unconstitutional as applied to theatrical smoking.

III. THE SMOKING BAN, AS APPLIED TO THEATRICAL SMOKING, VIOLATES COLORADO CONSTITUTION ARTICLE II, § 10.

Under this Court's precedents, the First Amendment represents a "floor" above which Colorado citizens' "freedom of speech . . . is further guaranteed" by our state constitution, Article II, §10. *Bock v. Westminster Mall Co.*, 819 P.2d 55,

59 (Colo. 1991). "With respect to expressive freedom, this court has recognized that the Colorado Constitution provides broader free speech protection than the Federal Constitution." *Tattered Cover, Inc. v. City of Thorton*, 44 P.3d 1044, 1054 (Colo. 2002).

Invoking both the state and federal constitutions, this Court has specifically acknowledged that theatrical entertainment constitutes protected speech. *Marco Lounge, Inc. v. City of Federal Heights*, 625 P.2d 982, 983 n.1, 986 (Colo. 1981). In *Marco*, the Court found that a regulation which had the effect of completely eliminating a type of protected speech, *i.e.,* nude dancing, violated both the First Amendment and the Colorado Constitution. *Id.* at 988. As in *Marco*, the smoking ban completely prohibits a certain type of protected speech – smoking as a means and part of theatrical expression.

The court of appeals, however, concluded that this Court has recognized "the broader scope of the Colorado Constitution" in only a few instances, and that none of them involved a state interest "connected with public health." Slip Op. at 32. But the court did not explain why this distinction should yield a different outcome or different interpretation of Art. II, §10. The court cited only one case – *Pierce v. St. Vrain Valley School Dist.*, 981 P.2d 600, 606 n.8 (Colo. 1999) – to support its assertion that "speech protections may sometimes yield to greater policy interests."

Slip Op. at 33. As a general proposition, this statement is unexceptional. But *Pierce* does not explain under what circumstances other policy interests trump free speech, nor does it state that public health concerns presumptively override the right to free expression under the state constitution. Indeed, at issue in *Pierce* was the confidentiality of a settlement agreement, not a health regulation. 981 P.2d at 601. And there was no reference to narrow tailoring in *Pierce*.

In sharp contrast, other state supreme courts, faced with the difficulties inherent in interpreting and applying *O'Brien*, have not hesitated to invoke their state constitutions to invalidate laws that banned free expression. *See, e.g.*, *Mendoza v. Licensing Bd. of Fall River*, 827 N.E.2d 180, 190 (Mass. 2005); *Pap's A.M. v. City of Erie*, 812 A.2d 591, 613 (Pa. 2002); *Bellanca v. N.Y. State Liquor Auth.*, 429 N.E. 2d 765, 768 (N.Y. 1981).

Like Colorado's Constitution, the constitutions of these states do more than limit the government in enacting laws abridging free expression. Instead, they affirmatively guarantee free expression, as does Art. II, § 10: "every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty . . . ." *See Tattered Cover,* 44 P.3d at 1054 (Art. II, § 10 provides broader free speech protection than the First Amendment). This emphasis on personal freedoms is also embedded in the structure of our state

constitution, unlike its federal counterpart. Our Bill of Rights – Art. II – is at the forefront of our constitution, preceded only by Art. I, which establishes the state boundaries. The Court has been cognizant of this tradition of liberty in interpreting Art. II, §10. *See Bock*, 819 P.2d at 59. Indeed, even the Legislature acknowledged in the Smoking Ban "the need to minimize unwarranted governmental intrusion into, and regulation of, private spheres of conduct[.]" C.R.S. §25-14-202.

In contrast to the opinion below, the Massachusetts Supreme Court in *Mendoza* reached a conclusion that is consistent with *Marco*. The court recognized the government's "public health" interest in banning public nudity, but nonetheless found that interest inadequate to justify a ***complete*** ban on nude dancing. 827 N.E.2d at 198-99. Invoking the state constitution, the court found that "a complete ban is not 'narrowly tailored,' and is unconstitutional on that ground." *Id.* at 199.

Also instructive is the approach of the Pennsylvania Supreme Court, particularly since Pennsylvania's constitution was the model for many other state constitutions, including Colorado's. *Fullerton v. County Court*, 124 P.3d 866, 869 (Colo. App. 2005). Like the Massachusetts court, the Pennsylvania Supreme Court applied its own state constitution to address the constitutionality of restrictions on nude dancing. *Pap's A.M.*, 812 A.2d at 613. In doing so, the court invoked those

factors important to construing its own constitution, as previously set forth in *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991):

> 1) [T]ext of the Pennsylvania constitutional provision;
>
> 2) history of the provision, including Pennsylvania case-law;
>
> 3) related case law from other states;
>
> 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

These factors all point to providing more protection under the Colorado Constitution as applied here. First, as already noted, the text of the Colorado Constitution contains an affirmative statement of the right of free expression, as does the Pennsylvania constitution. Second, this Court has traced its recognition of the breadth of this right to free expression in Colorado to a decision in 1889. *See Cooper v. People,* 13 Colo. 373, 22 P. 790 (Colo. 1889). Thus, Colorado has a lengthy history supporting application of the state constitution. Third, while there is no case-law from other states addressing a smoking ban's impact on free expression, the previously cited cases concerning nude dancing are informative. Finally, with respect to policy considerations, the record in this case demonstrates the dramatic impact on freedom of expression, where numerous classic plays

cannot be presented to the citizens of Colorado if the Smoking Ban remains in force with respect to theatrical smoking.

In sum, a complete ban on indoor theatrical smoking violates the affirmative right to freedom of expression under Art. II, §10. The Smoking Ban precludes the presentation of admittedly protected artistic speech, and the ban is not tailored at all, much less narrowly tailored. Under either the state or federal constitution, the decision of the court of appeals should be reversed.

REMEDY

The district court's and court of appeals' rulings came in the context of the denial of preliminary injunctive relief. But this Court granted certiorari only to consider the constitutionality of the Smoking Ban, *i.e.,* whether the Theatres have a reasonable probability of success on their constitutional claims. The Court did not grant certiorari to consider the other elements of a preliminary injunction. *See Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982).

While the Court, in other legal and factual contexts, might remand for reconsideration of the remaining preliminary injunction factors, that added step should not be necessary here. Where First Amendment interests are threatened, irreparable injury sufficient to justify the entry of an injunction is ***presumed.*** *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th

Cir. 1981); *see also Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)("The loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury."). If the Court reverses on the merits, it will thereby resolve not only that the Theatres will likely succeed on their First Amendment and/or Article II, §10 claims, but also that the Theatres will have satisfied the core element needed for injunctive relief—irreparable injury.

For this reason, and for the additional reason that this case has been pending in this posture for over two years, the Court should order the district court to issue a preliminary injunction in favor of the Theatres, *see Marco*, 625 P.2d at 989, and remand for further proceedings on the Theatres' claims for declaratory relief and a permanent injunction.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court of appeals, order entry of a preliminary injunction, and remand for proceedings on the Theatres' claims for declaratory relief and a permanent injunction.

Dated: January 26, 2009.

Respectfully submitted,

A. Bruce Jones No. 11370
Stephen G. Masciocchi, No. 19873
Daniel R. Pabon, No. 36646
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
P. O. Box 8749
Denver, CO 80201-8749

Attorneys for Petitioners Curious Theatre, Paragon Theatre, and Theatre13

CERTIFICATE OF SERVICE

I certify that on January 26, 2009, I served a copy of the foregoing **PETITIONERS' OPENING BRIEF** to the following by

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

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

Bruce E. H. Johnson
Davis Wright Tremain, LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045

James W. Hubbell
Kelly Garnsey Hubbell & Lass LLC
1441 Eighteenth Street, Suite 300
Denver, CO 80202-1255

Edward T. Ramey
Isaacson Rosenbaum, P.C.
633 17th Street, Suite 2200
Denver, CO 80202

Robert M. O'Neil
J. Joshua Wheeler
400 Worrell Drive
Charlottesville, VA 22911

Stephen D. Zansberg
Levine Sullivan Koch & Schultz, LLP
1888 Sherman Street, Suite 370
Denver, CO 80203

Denise Crale
____

4403814_2.DOC

Appendix 1

C
West's Colorado Revised Statutes Annotated Currentness
Title 25. Health
Environmental Control
Article 14. Control of Smoking
Part 2. Colorado Clean Indoor Air Act
→ **§ 25-14-201. Short title**

This part 2 shall be known and may be cited as the "Colorado Clean Indoor Air Act".

CREDIT(S)

Added by Laws 2006, Ch. 22, § 1, eff. July 1, 2006.

Current through the Second Regular Session of the Sixty-Sixth General Assembly (2008)

(C) 2008 Thomson Reuters/ West

END OF DOCUMENT

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

C
West's Colorado Revised Statutes Annotated Currentness
Title 25. Health
Environmental Control
Article 14. Control of Smoking
Part 2. Colorado Clean Indoor Air Act
→ **§ 25-14-202. Legislative declaration**

The general assembly hereby finds and determines that it is in the best interest of the people of this state to protect nonsmokers from involuntary exposure to environmental tobacco smoke in most indoor areas open to the public, public meetings, food service establishments, and places of employment. The general assembly further finds and determines that a balance should be struck between the health concerns of nonconsumers of tobacco products and the need to minimize unwarranted governmental intrusion into, and regulation of, private spheres of conduct and choice with respect to the use or nonuse of tobacco products in certain designated public areas and in private places. Therefore, the general assembly hereby declares that the purpose of this part 2 is to preserve and improve the health, comfort, and environment of the people of this state by limiting exposure to tobacco smoke.

CREDIT(S)

Added by Laws 2006, Ch. 22, § 1, eff. July 1, 2006.

Current through the Second Regular Session of the Sixty-Sixth General Assembly (2008)

(C) 2008 Thomson Reuters/ West

END OF DOCUMENT

C
West's Colorado Revised Statutes Annotated Currentness
Title 25. Health
Environmental Control
Article 14. Control of Smoking
Part 2. Colorado Clean Indoor Air Act
→ **§ 25-14-203. Definitions**

As used in this part 2, unless the context otherwise requires:

(1) "Airport smoking concession" means a bar or restaurant, or both, in a public airport with regularly scheduled domestic and international commercial passenger flights, in which bar or restaurant smoking is allowed in a fully enclosed and independently ventilated area by the terms of the concession.

(2) "Auditorium" means the part of a public building where an audience gathers to attend a performance, and includes any corridors, hallways, or lobbies adjacent thereto.

(3) "Bar" means any indoor area that is operated and licensed under article 47 of title 12, C.R.S., primarily for the sale and service of alcohol beverages for on-premises consumption and where the service of food is secondary to the consumption of such beverages.

(4) "Cigar-tobacco bar" means a bar that, in the calendar year ending December 31, 2005, generated at least five percent or more of its total annual gross income or fifty thousand dollars in annual sales from the on-site sale of tobacco products and the rental of on-site humidors, not including any sales from vending machines. In any calendar year after December 31, 2005, a bar that fails to generate at least five percent of its total annual gross income or fifty thousand dollars in annual sales from the on-site sale of tobacco products and the rental of on-site humidors shall not be defined as a "cigar-tobacco bar" and shall not thereafter be included in the definition regardless of sales figures.

(5)(a) "Employee" means any person who:

(I) Performs any type of work for benefit of another in consideration of direct or indirect wages or profit; or

(II) Provides uncompensated work or services to a business or nonprofit entity.

(b) "Employee" includes every person described in paragraph (a) of this subsection (5), regardless of whether such person is referred to as an employee, contractor, independent contractor, or volunteer or by any other designation or title.

(6) "Employer" means any person, partnership, association, corporation, or nonprofit entity that employs one or more persons. "Employer" includes, without limitation, the legislative, executive, and judicial branches of state government; any county, city and county, city, or town, or instrumentality thereof, or any other political subdivision of the state, special district, authority, commission, or agency; or any other separate corporate instrumentality or unit of state or local government.

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

(7) "Entryway" means the outside of the front or main doorway leading into a building or facility that is not exempted from this part 2 under section 25-14-205. "Entryway" also includes the area of public or private property within a specified radius outside of the doorway. The specified radius shall be determined by the local authority or, if the local authority has not acted, the specified radius shall be fifteen feet.

(8) "Environmental tobacco smoke", " ETS", or "secondhand smoke" means the complex mixture formed from the escaping smoke of a burning tobacco product, also known as "sidestream smoke", and smoke exhaled by the smoker.

(9) "Food service establishment" means any indoor area or portion thereof in which the principal business is the sale of food for on-premises consumption. The term includes, without limitation, restaurants, cafeterias, coffee shops, diners, sandwich shops, and short- order cafes.

(10) "Indoor area" means any enclosed area or portion thereof. The opening of windows or doors, or the temporary removal of wall panels, does not convert an indoor area into an outdoor area.

(11) "Local authority" means a county, city and county, city, or town.

(12) "Place of employment" means any indoor area or portion thereof under the control of an employer in which employees of the employer perform services for, or on behalf of, the employer.

(13) "Public building" means any building owned or operated by:

(a) The state, including the legislative, executive, and judicial branches of state government;

(b) Any county, city and county, city, or town, or instrumentality thereof, or any other political subdivision of the state, a special district, an authority, a commission, or an agency; or

(c) Any other separate corporate instrumentality or unit of state or local government.

(14) "Public meeting" means any meeting open to the public pursuant to part 4 of article 6 of title 24, C.R.S., or any other law of this state.

(15) "Smoke--free work area" means an indoor area in a place of employment where smoking is prohibited under this part 2.

(16) "Smoking" means the burning of a lighted cigarette, cigar, pipe, or any other matter or substance that contains tobacco.

(17) "Tobacco" means cigarettes, cigars, cheroots, stogies, and periques; granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco; snuff and snuff flour; cavendish; plug and twist tobacco; fine-cut and other chewing tobacco; shorts, refuse scraps, clippings, cuttings, and sweepings of tobacco; and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or for smoking in a cigarette, pipe, or otherwise, or both for chewing and smoking. "Tobacco" also includes cloves and any other plant matter or product that is packaged for smoking.

(18) "Tobacco business" means a sole proprietorship, corporation, partnership, or other enterprise engaged primarily in the sale, manufacture, or promotion of tobacco, tobacco products, or smoking devices or accessories, either at

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

wholesale or retail, and in which the sale, manufacture, or promotion of other products is merely incidental.

(19) "Work area" means an area in a place of employment where one or more employees are routinely assigned and perform services for or on behalf of their employer.

CREDIT(S)

Added by Laws 2006, Ch. 22, § 1, eff. July 1, 2006.

Current through the Second Regular Session of the Sixty-Sixth General Assembly (2008)

(C) 2008 Thomson Reuters/ West

END OF DOCUMENT

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

C
West's Colorado Revised Statutes Annotated Currentness
Title 25. Health
Environmental Control
Article 14. Control of Smoking
Part 2. Colorado Clean Indoor Air Act
→ **§ 25-14-204. General smoking restrictions**

(1) Except as provided in section 25-14-205, and in order to reduce the levels of exposure to environmental tobacco smoke, smoking shall not be permitted and no person shall smoke in any indoor area, including, but not limited to:

(a) Public meeting places;

(b) Elevators;

(c) Government-owned or -operated means of mass transportation, including, but not limited to, buses, vans, and trains;

(d) Taxicabs and limousines;

(e) Grocery stores;

(f) Gymnasiums;

(g) Jury waiting and deliberation rooms;

(h) Courtrooms;

(i) Child day care facilities;

(j) Health care facilities including hospitals, health care clinics, doctor's offices, and other health care related facilities;

(k)(I) Any place of employment that is not exempted.

(II) In the case of employers who own facilities otherwise exempted from this part 2, each such employer shall provide a smoke-free work area for each employee requesting not to have to breathe environmental tobacco smoke. Every employee shall have a right to work in an area free of environmental tobacco smoke.

(l) Food service establishments;

(m) Bars;

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

(n) Limited gaming facilities and any other facilities in which any gaming or gambling activity is conducted;

(o) Indoor sports arenas;

(p) Restrooms, lobbies, hallways, and other common areas in public and private buildings, condominiums, and other multiple-unit residential facilities;

(q) Restrooms, lobbies, hallways, and other common areas in hotels and motels, and in at least seventy-five percent of the sleeping quarters within a hotel or motel that are rented to guests;

(r) Bowling alleys;

(s) Billiard or pool halls;

(t) Facilities in which games of chance are conducted;

(u)(I) The common areas of retirement facilities, publicly owned housing facilities, and, except as specified in section 25-14-205(1)(k), nursing homes, but not including any resident's private residential quarters or areas of assisted living facilities specified in section 25-14-205(1)(k).

(II) Nothing in this part 2 affects the validity or enforceability of a contract, whether entered into before, on, or after July 1, 2006, that specifies that a part or all of a facility or home specified in this paragraph (u) is a smoke-free area.

(v) Public buildings;

(w) Auditoria;

(x) Theaters;

(y) Museums;

(z) Libraries;

(aa) To the extent not otherwise provided in section 25-14-103.5, public and nonpublic schools;

(bb) Other educational and vocational institutions; and

(cc) The entryways of all buildings and facilities listed in paragraphs (a) to (bb) of this subsection (1).

(2) A cigar-tobacco bar shall not expand its size or change its location from the size and location in which it existed as of December 31, 2005. A cigar-tobacco bar shall display signage in at least one conspicuous place and at least four inches by six inches in size stating: "Smoking allowed. Children under eighteen years of age must be accompanied by a parent or guardian."

CREDIT(S)

Added by Laws 2006, Ch. 22, § 1, eff. July 1, 2006. Amended by Laws 2007, Ch. 103, § 1, eff. Aug. 3, 2007.

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Current through the Second Regular Session of the Sixty-Sixth General Assembly (2008)

(C) 2008 Thomson Reuters/ West

END OF DOCUMENT

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

C
West's Colorado Revised Statutes Annotated Currentness
Title 25. Health
Environmental Control
Article 14. Control of Smoking
Part 2. Colorado Clean Indoor Air Act
→ **§ 25-14-205. Exceptions to smoking restrictions**

(1) This part 2 shall not apply to:

(a) Private homes, private residences, and private automobiles; except that this part 2 shall apply if any such home, residence, or vehicle is being used for child care or day care or if a private vehicle is being used for the public transportation of children or as part of health care or day care transportation;

(b) Limousines under private hire;

(c) A hotel or motel room rented to one or more guests if the total percentage of such hotel or motel rooms in such hotel or motel does not exceed twenty-five percent;

(d) Any retail tobacco business;

(e) A cigar-tobacco bar;

(f) An airport smoking concession;

(g) The outdoor area of any business;

(h) A place of employment that is not open to the public and that is under the control of an employer that employs three or fewer employees;

(i) A private, nonresidential building on a farm or ranch, as defined in section 39-1-102, C.R.S., that has annual gross income of less than five hundred thousand dollars; or

(j) Repealed by Laws 2007, Ch. 391, § 1, eff. Jan. 1, 2008.

(k)(I) The areas of assisted living facilities:

(A) That are designated for smoking for residents;

(B) That are fully enclosed and ventilated; and

(C) To which access is restricted to the residents or their guests.

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

(II) As used in this paragraph (k), "assisted living facility" means a nursing facility, as that term is defined in section 25.5-4-103, C.R.S., and an assisted living residence, as that term is defined in section 25-27-102.

CREDIT(S)

Added by Laws 2006, Ch. 22, § 1, eff. July 1, 2006. Amended by Laws 2007, Ch. 103, § 2, eff. Aug. 3, 2007; Laws 2007, Ch. 391, § 1, eff. Jan. 1, 2008.

Current through the Second Regular Session of the Sixty-Sixth General Assembly (2008)

(C) 2008 Thomson Reuters/ West

END OF DOCUMENT

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

C
West's Colorado Revised Statutes Annotated Currentness
Title 25. Health
Environmental Control
Article 14. Control of Smoking
Part 2. Colorado Clean Indoor Air Act
→ **§ 25-14-206. Optional prohibitions**

(1) The owner or manager of any place not specifically listed in section 25-14-204, including a place otherwise exempted under section 25-14-205, may post signs prohibiting smoking or providing smoking and nonsmoking areas. Such posting shall have the effect of including such place, or the designated nonsmoking portion thereof, in the places where smoking is prohibited or restricted pursuant to this part 2.

(2) If the owner or manager of a place not specifically listed in section 25-14-204, including a place otherwise exempted under section 25-14-205, is an employer and receives a request from an employee to create a smoke-free work area as contemplated by section 25-14-204 (1) (k) (II), the owner or manager shall post a sign or signs in the smoke-free work area as provided in subsection (1) of this section.

CREDIT(S)

Added by Laws 2006, Ch. 22, § 1, eff. July 1, 2006.

Current through the Second Regular Session of the Sixty-Sixth General Assembly (2008)

(C) 2008 Thomson Reuters/ West

END OF DOCUMENT

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

West's Colorado Revised Statutes Annotated Currentness
Title 25. Health
Environmental Control
Article 14. Control of Smoking
Part 2. Colorado Clean Indoor Air Act
→ **§ 25-14-207. Other applicable regulations of smoking-local counterpart regulations authorized**

(1) This part 2 shall not be interpreted or construed to permit smoking where it is otherwise restricted by any other applicable law.

(2)(a) A local authority may, pursuant to article 16 of title 31, C.R.S., a municipal home rule charter, or article 15 of title 30, C.R.S., enact, adopt, and enforce smoking regulations that cover the same subject matter as the various provisions of this part 2. No local authority may adopt any local regulation of smoking that is less stringent than the provisions of this part 2; except that a local authority may specify a radius of less than fifteen feet for the area included within an entryway.

(b) The municipal courts or their equivalent in any city, city and county, or town have jurisdiction over violations of smoking regulations enacted by any city, city and county, or town under this section.

CREDIT(S)

Added by Laws 2006, Ch. 22, § 1, eff. July 1, 2006.

Current through the Second Regular Session of the Sixty-Sixth General Assembly (2008)

(C) 2008 Thomson Reuters/ West

END OF DOCUMENT

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

C
West's Colorado Revised Statutes Annotated Currentness
Title 25. Health
Environmental Control
Article 14. Control of Smoking
Part 2. Colorado Clean Indoor Air Act
→ **§ 25-14-208. Unlawful acts-penalty-disposition of fines and surcharges**

(1) It is unlawful for a person who owns, manages, operates, or otherwise controls the use of a premises subject to this part 2 to violate any provision of this part 2.

(2) It is unlawful for a person to smoke in an area where smoking is prohibited pursuant to this part 2.

(3) A person who violates this part 2 is guilty of a class 2 petty offense and, upon conviction thereof, shall be punished by a fine not to exceed two hundred dollars for a first violation within a calendar year, a fine not to exceed three hundred dollars for a second violation within a calendar year, and a fine not to exceed five hundred dollars for each additional violation within a calendar year. Each day of a continuing violation shall be deemed a separate violation.

(4) All judges, clerks of a court of record, or other officers imposing or receiving fines collected pursuant to or as a result of a conviction of any persons for a violation of any provision of this part 2 shall transmit all such moneys so collected in the following manner:

(a) Seventy--five percent of any such fine for a violation occurring within the corporate limits of a city, town, or city and county shall be transmitted to the treasurer or chief financial officer of said city, town, or city and county, and the remaining twenty-five percent shall be transmitted to the state treasurer, who shall credit the same to the general fund.

(b) Seventy--five percent of any fine for a violation occurring outside the corporate limits of a city or town shall be transmitted to the treasurer of the county in which the city or town is located, and the remaining twenty-five percent shall be transmitted to the state treasurer, who shall credit the same to the general fund.

CREDIT(S)

Added by Laws 2006, Ch. 22, § 1, eff. July 1, 2006.

Current through the Second Regular Session of the Sixty-Sixth General Assembly (2008)

(C) 2008 Thomson Reuters/ West

END OF DOCUMENT

© 2009 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

C
West's Colorado Revised Statutes Annotated Currentness
Title 25. Health
Environmental Control
Article 14. Control of Smoking
Part 2. Colorado Clean Indoor Air Act
→ **§ 25-14-209. Severability**

If any provision of this part 2 or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this part 2 that can be given effect without the invalid provision or application, and to this end the provisions of this part 2 are declared to be severable.

CREDIT(S)

Added by Laws 2006, Ch. 22, § 1, eff. July 1, 2006.

Current through the Second Regular Session of the Sixty-Sixth General Assembly (2008)

(C) 2008 Thomson Reuters/ West

END OF DOCUMENT

Appendix 2

HB1175_L.030

HOUSE

FLOOR AMENDMENT

Second Reading HB06-1175

BY REPRESENTATIVE Weissmann

Amendment No. ___________

1 Amend the corrected Health and Human Services Committee Report,
2 dated January 30, 2006, page 2, line 6, strike "CASINO."." and substitute
3 "CASINO.";

4 after line 6, insert the following:

5 "(2) THIS PART 2 SHALL NOT APPLY TO THE USE OF TOBACCO ON
6 STAGE BY A PERFORMER IN A THEATRICAL PERFORMANCE IF BOTH OF THE
7 FOLLOWING CONDITIONS ARE MET:

8 (a) A SIGN WITH LETTERS NO LESS THAN ONE INCH HIGH IS POSTED
9 CONSPICUOUSLY AT EACH PUBLIC ENTRANCE TO THE PLACE OF
10 PERFORMANCE, INFORMING THE AUDIENCE THAT PERFORMERS WILL BE
11 SMOKING AS PART OF THE PERFORMANCE; AND

12 (b) THE PRODUCER OF THE PERFORMANCE HAS USED REASONABLE
13 EFFORTS TO INFORM THE POTENTIAL AUDIENCE FOR THE PERFORMANCE, IN
14 ADVANCE OF THEIR ARRIVAL AT THE PLACE OF PERFORMANCE, OF THE
15 FACT THAT PERFORMERS WILL BE SMOKING AS PART OF THE
16 PERFORMANCE. THIS SHALL BE ACCOMPLISHED BY GIVING THE
17 INFORMATION AT THE TIME ADVANCE RESERVATIONS ARE MADE OR
18 ADVANCE TICKETS ARE SOLD, OR WHEN SEATS ARE CONFIRMED, OR BY
19 INCLUDING IN ALL ADVERTISING AND PUBLICITY SPECIFIC TO THE
20 PERFORMANCE OVER WHOSE CONTENT THE PRODUCER HAS CONTROL THE
21 INFORMATION THAT ACTORS WILL BE SMOKING AS PART OF THE
22 PERFORMANCE, OR BY ANY OTHER MEANS REASONABLY LIKELY TO
23 CONVEY THE INFORMATION IN A TIMELY MANNER."."

** *** ** *** **