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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT MAR - 9 2009 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK ▲ COURT USE ONLY ▲
Appeal from the Court of Appeals State of Colorado, Division 2 Court of Appeals No.: 2006CA2260 Opinion by Judge Bernard; Rothenberg and Carapelli, JJ., concurring. City and County of Denver District Court Case No.: 2006cv10876 Honorable Michael A. Martinez, Judge	Case No.: 2008 SC 351
CURIOUS THEATRE COMPANY, a Colorado non-profit company; PARAGON THEATRE, a Colorado non-profit company; and THEATRE13, INC., a Colorado non-profit company, Petitioners, v. COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT; and JAMES MARTIN, EXECUTIVE DIRECTOR, Respondents.	
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Respondents Colorado Department of Public Health and Environment and James Martin, its current Executive Director[1] (collectively, the "CDPHE"), by and through their attorneys, hereby submit this Answer Brief.

INTRODUCTION

Petitioners Curious Theatre Company, Paragon Theatre and Theatre13, Inc. (collectively, the "Theaters") filed this lawsuit on October 13, 2006, arguing that the Colorado Clean Indoor Air Act (the "Indoor Smoking Ban") unconstitutionally interfered with their purported free speech rights under the federal and state constitutions. They were unsuccessful before the trial court and the Court of Appeals. This Court granted *certiorari* on December 2, 2008 on two issues: Whether the Indoor Smoking Ban as applied in the theatrical context violates the First Amendment of the U.S. Constitution, and whether Article II, Section 10 ("Section 10") of the Colorado Constitution provides more speech protection for onstage smoking than its federal equivalent.

ISSUES PRESENTED FOR REVIEW

The CDPHE does not object to the Theaters' formulation of the first issue presented for review. A clarification is necessary with respect to the second issue.

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[1] Dennis Ellis, the Executive Director when the action was commenced, has been replaced by Mr. Martin and thus is automatically substituted as a party under C.A.R. 43(c)(1).

The lower court did not hold that the scope of the free speech protection afforded under Section 10 generally is identical to that of the First Amendment; its holding was limited to the context of theatrical smoking. Thus, the second issue properly before this Court is formulated as follows: Whether the Court of Appeals erred in concluding that the Colorado Constitution provides no greater protection to the conduct at issue ***in this case*** than does the U.S. Constitution.

STATEMENT OF THE CASE

The CDPHE has one principle objection to the Theaters' formulation of the "Nature of the Case" – it is possible to interpret it as substantially overstating the scope of the Indoor Smoking Ban. The Theaters broadly describe the regulation as "completely banning all kinds of smoking as part of theatrical productions." (Op. Br. at p. 2.) They further state that "theatrical smoking is not allowed in Colorado's indoor theaters." (*Id.* at p. 3.) The first statement is incorrect. Most forms of smoking are allowed as part of ***outdoor*** theatrical productions and are not "completely banned."

Furthermore, both statements are true with respect to indoor performances only insofar as "all kinds of smoking" and "theatrical smoking" are defined narrowly to exclude the use of fake or prop cigarettes to portray smoking. Just as

"theatrical violence" generally refers to the simulation of violent conduct onstage and not actual combat, *see* Fiona Kirk, "Theatrical Violence: From the woods of Maine to the desert of Las Vegas, stage combat workshops offer intensive training for fight directors and actors," STAGE DIRECTION, October 2002 ed. (available at http://www.stage-directions.com/backissues/oct02/combat.shtml), so too should the term "theatrical smoking" encompass any onstage portrayal of smoking, including the use of fake or prop cigarettes to simulate the act.

With respect to the "Course of Proceedings and Disposition Below," the CDPHE accepts the Theaters' formulation subject to the following objections. First, the Theaters only ***purported*** to demonstrate that certain plays could not be presented because of the Indoor Smoking Ban – the CDPHE countered that the use of fake or prop cigarettes would sufficiently portray scripted smoking, and the trial judge made the factual finding that such alternatives were realistic enough to accomplish the requisite expressive purposes. (Tr. 134:13-135:2.) Second, the trial court's denial of the request for a preliminary injunction was based on a full review of the factors set forth in *Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982), and not just the conclusion that smoking is not "inherently expressive."

Third, the Theaters' discussion of the various smoking regulations in other states (Op. Br. at p. 5) is inappropriate to include in their summary of the "Course of Proceedings and Disposition Below." This is pure legal argument, and the CDPHE does not concede that this description of other states' regulations is correct or relevant. Furthermore, the Theaters apparently use the term "theatrical smoking" throughout this section of their brief in a manner that excludes the use of fake or prop cigarettes to portray smoking. As noted above, this narrow usage is inconsistent with commonly-accepted definitions of similar terms such as "theatrical violence."

STATEMENT OF FACTS

The Theaters' "Statement of Facts" consists of a summary of the testimony offered by four witnesses during the preliminary injunction hearing before the trial court. The description suffers from two major flaws. First, they give an incomplete view of the case by omitting the history surrounding the Indoor Smoking Ban. Second, with respect to the trial court proceedings, the Theaters gloss over certain aspects that were essential to the ultimate ruling. A comprehensive summary of the facts is set forth below.

Then-Governor Owens signed the Indoor Smoking Ban into law on March 27, 2006, and it became effective on July 1, 2006. *See* H.B. 1175, 65th Leg., Reg. Sess., 2006 Colo. Sess. Laws, Ch. 22, pp. 53-63. The Indoor Smoking Ban, *see* §§ 25-14-201 to 209, C.R.S. (2006), broadly prohibits smoking in most indoor areas. The legislative declaration set forth in the law states 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" and the law's purpose is "to preserve and improve the health, comfort, and environment of the people of this state by limiting exposure to tobacco smoke." C.R.S. § 25-14-202.

The Theaters filed a Verified Complaint in Denver District Court on October 11, 2006 asserting that the Indoor Smoking Ban violates their right of artistic expression under the First Amendment because it prohibits onstage smoking in theaters. (*See* Record at pp. 1-13.) They filed a motion for preliminary injunction and a supporting memorandum on the same day. (*Id.* at 17-37.)

The CDPHE filed its brief in opposition to the motion for preliminary injunction on October 26, 2006. (*Id.* at 73-115.) On October 30, 2006, the trial court held an evidentiary hearing regarding the Theaters' preliminary injunction motion. (*Id.* at 47-48 and Transcript.) The Theaters describe certain testimony taken at this hearing in their Opening Brief, but neglect a number of crucial facts.

Most notably, they paint a scenario in which they introduced extensive testimony concerning the expressive nature of theatrical smoking and the inadequacy of fake or prop cigarettes to convey the desired message (Op. Br. at pp. 6-11), yet the trial judge wholly disregarded this evidence to rule in the CDPHE's favor. The Theaters gloss over the key fact that the judge did not ignore their witnesses' testimony – he just did not weigh it as heavily as hoped against more persuasive conflicting evidence.

The Theaters elicited the testimony of Judson Webb during the evidentiary hearing before the trial court, during which time he demonstrated the use of a fake or prop cigarette. (Tr. 89:19-90:6.) The judge relied heavily on this demonstration:

> Now, I've never seen any demonstration like that before, but I can tell you – and I am a fan of the theatre. I can tell you that what I saw the witness – I believe it was Mr. Webb on the fake cigarette, as Mr. Douglas has termed them, it seemed to be very real. It was fairly realistic. I was a distance of about, I don't know, four or five feet maybe, but I definitely saw smoke go out of the cigarette, and his efforts at reviving it. I don't know if they're a one-shot deal or what, but it certainly seemed like it was an alternative that could be utilized

(Tr. 134:16-135:1.) The foregoing is clear that the judge did not ***disregard*** the testimony concerning the inadequacy of fake or prop cigarettes – he just ***disagreed*** with it based on this other firsthand evidence.

Nor is this the only shortcoming of the Theaters' description of the evidence. For example, they describe Richard Devin's testimony concerning the expressive nature of onstage smoking in some detail (Op. Br. at pp. 6-7) but neglect to recount his subsequent admission that certain events portrayed onstage cannot actually occur and must be simulated (*e.g.*, fire, gunshot wounds, etc.). (Tr. 109:8-113:6.) Mr. Devin conceded that it was the duty of a theater company to realistically simulate these events despite any limitations in doing so. (Tr. 113:3-113:6.)

Michael Stricker similarly admitted during his testimony that a variety of acts portrayed onstage are "faked" with various degrees of realism due to various physical or legal restrictions. (Tr. 71:25-78:18.) He described using a fake gun during a production of *Hedda Gabler*, mimicking the effects of alcohol consumption in *Who's Afraid of Virginia Wolf*, and "pretending" that a state of absolute darkness existed despite an illuminated exit sign in *Wait Until Dark*. (*Id.*)

The district court concluded that Theaters failed to establish their right to injunctive relief under the *Rathke* factors and denied their request for injunctive relief. (Tr. 117:7-121:1.) This decision was upheld by the Court of Appeals, which agreed that smoking onstage is expressive conduct but nonetheless concluded that application of the Indoor Smoking Ban to theatrical smoking satisfied the test set forth by the U.S. Supreme Court in *United States v. O'Brien*,

391 U.S. 367 (1968) governing the constitutionality of content-neutral laws incidentally affecting speech. The court also refused to expand the state free speech protection under Section 10 to encompass expressive conduct affected by content-neutral public health laws. (Slip Op. at pp. 22-33.) This Court granted *certiorari* on the two issues identified in the Opening Brief and above.

SUMMARY OF THE ARGUMENT

The Indoor Smoking Ban is designed to protect the public health by preventing secondhand smoke exposure though a prohibition of most forms of indoor smoking in public. The Theaters essentially ask this Court to carve out a judicially-crafted exception to the law for onstage smoking in the theater context, which they argue is afforded free speech protection by the federal and state constitutions. Neither the First Amendment nor Section 10 require any such thing.

The Indoor Smoking Ban targets virtually all forms of indoor smoking, the overwhelming majority of which will have no free speech implications. The parties accordingly agree that the analytical framework set forth in *O'Brien* must be used to determine whether any incidental effect of the content-neutral ban on the free speech at issue in the case – the onstage portrayal of smoking – is permissible under the First Amendment. The Theaters concentrate on two main

arguments – the idea that the Indoor Smoking Ban is not narrowly tailored to further the governmental interest behind it, and the notion that there is not an adequate alternative that can be used to convey the same message as actual smoking in the theater context.

Neither assertion is persuasive. The Theaters assert a narrow view of the governmental interest behind the Indoor Smoking Ban, but the act's legislative declaration of intent and substantive provisions demonstrate that Colorado's interest extends far beyond the scope that they claim. Additionally, although the Theaters suggest alternatives that they claim will advance the governmental interest at stake in a less restrictive manner, courts are virtually unanimous in rejecting this sort of "least restrictive means" test. Finally, with respect to the question of whether there is an adequate alternative that will accomplish the same purpose as onstage smoking, the parties' dispute on this issue is a factual one, which was answered unequivocally by the trial court finding that the use of fake or prop cigarettes is sufficiently realistic for the expressive purposes at issue here.

The Theaters' second main argument is that the Colorado Constitution should be interpreted to provide more free speech protection to their efforts to smoke onstage, but they fail to offer a convincing reason explaining why this

would be appropriate, especially when there is no dispute that the challenged law is designed to protect the public health. Furthermore, Colorado cases involving analogous – though far from identical – fact patterns show that this Court has always applied the same analysis under Section 10 as is required by the First Amendment in the context of a content-neutral law incidentally affecting onstage expressive conduct.

ARGUMENT

I. The Standard of Review Generally Is *De Novo*, but the Trial Court Should Be Given Deference with Respect to Issues of Disputed Physical Fact.

The issue of whether the Indoor Smoking Ban violates the First Amendment to the U.S. Constitution and/or Section 10 of the Colorado Constitution generally must be reviewed *de novo*. *See Lewis v. Colo. Rockies Baseball Club*, 941 P.2d 266, 271 (Colo. 1997). However, this Court should give deference to the trial court's resolution of disputed factual issues and only disturb them in cases of clear error, though the legal conclusions reached from those facts remain subject to a *de novo* review. *See, e.g., City and Cnty. of Denver v. Crandall*, 161 P.3d 627, 633 (Colo. 2007); *Valdez v. People*, 966 P.2d 587, 598 (Colo. 1998); *cf. Lewis*, 941 P.2d at 271 ("In this case, ***the physical facts are not disputed*** although the legal

conclusions to be drawn from those facts are very much contested" (emphasis added).). Finally, this Court's analysis must presume the Indoor Smoking Ban is constitutional, and it is the Theaters' burden to prove otherwise. *See Denver Publ. Co. v. City of Aurora*, 896 P.2d 306, 318 (Colo. 1995).

II. The U.S. Constitution Does Not Require the Creation of an Exception to the Indoor Smoking Ban for Theater Productions.

A. The Indoor Smoking Ban Is Content-Neutral, and Thus, Intermediate Scrutiny Is Warranted.

The intermediate scrutiny analysis set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) will be appropriate to apply to the Indoor Smoking Ban in this context if it is a content-neutral law. *See Denver Publ.*, 896 P.2d at 313 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). This prerequisite is met where a law is "justified without reference to the content of the regulated speech." *Id.* The primary inquiry is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791.

The Theaters and the CDPHE agree that it was appropriate to analyze the Indoor Smoking Ban under the *O'Brien* test in the first place, although they disagree as to whether the Court of Appeals did so correctly. Despite this

consensus, the Thomas Jefferson Center for the Protection of Free Expression (the "TJCPFE") argues in its *amicus* brief that onstage smoking is "purely expressive" with no clear nonspeech element, and thus the Indoor Smoking Ban is not content-neutral and stricter scrutiny is warranted under *Tinker v. Des Moines Ind. Comm. Sch. Distr.*, 393 U.S. 503 (1969).

This must be rejected for a number of reasons. First, the test used to determine whether a law is content-neutral is not whether it incidentally affects some sort of "purely expressive" conduct – it is whether that effect is independent from and/or unrelated to the content of the speech.[2] There is no suggestion that Colorado enacted the Indoor Smoking Ban because it disagreed with any message conveyed by onstage smoking in the theater context. *See Hill v. Colo.*, 530 U.S. 703, 719 (2000) (holding that abortion protest restrictions were content-neutral because they did not discriminate against viewpoint); *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 649 (4th Cir. 1995) (same). To the contrary, it did so because the legislature believed that exposure to secondhand smoke in any indoor environment presented a public health risk. The vast majority of the law's impact

[2] Indeed, this unworkable legal theory would eviscerate the *O'Brien* analysis. If a party challenging any purportedly content-neutral law on First Amendment grounds could ignore its nonspeech impact and focus solely on the affected expressive conduct, then it is hard to imagine that any law would be sufficiently content-neutral to warrant application of *O'Brien*.

(*i.e.*, banning smoking in bars, restaurants and workplaces) has no effect whatsoever on expressive conduct. *See NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461, 476 (S.D.N.Y. 2004) (holding that smoking is not expressive conduct); *Taverns for Tots, Inc. v. City of Toledo*, 341 F. Supp. 2d 844, 853 (N.D. Ohio 2004) (same).

The TJCPFE argument also must be rejected on its own terms. It is not enough when deciding whether to apply *O'Brien* to say that an activity generally is expressive and thus may not be regulated; a court instead must closely examine the conduct to determine whether particular regulated components are central or irrelevant to the desired expression. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (holding that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms"); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 453-54 (2nd Cir. 2001) ("The Appellants' argument fails to recognize that the target of the [law at issue] has both a nonspeech and a speech component, and that the [law], as applied to the Appellants,... target[s] only the nonspeech component."); *see also O'Brien*, 391 U.S. 376-77.

This principle shows that theatrical smoking is anything but "purely expressive." An actor tasked with portraying smoking onstage must make a myriad of choices unrelated to the message being expressed on how to go about portraying the conduct. Should the actor use real tobacco or some other material? What brand of cigarette? What nontobacco substance? Should the actor inhale? And of course, ***should he or she use a real cigarette or a fake one***? It is hard to dispute that many or most of these choices will be made for reasons of convenience or personal taste that are independent of the expressive purpose of the conduct – the portrayal of a character smoking.

This observation highlights a misconception contained in most of the briefing that the expressive conduct at issue is the act of physically smoking onstage. It is not. Drama theorists and critics as early as Aristotle have observed that the goal of theater is the ***imitation*** of action and/or nature, and not the exact repetition of it. *See* Aristotle, *Aristotle's Poetics*, pt. V, trans. S.H. Butcher (2007) (available at http://ebooks.adelaide.edu.au/a/aristotle/poetics/). Commentators over the past several centuries have flatly rejected the notion that action onstage somehow is or should be mistaken for reality – to the contrary, audiences know they are observing fictitious events onstage, and it is the job of the theater company

to make them willingly suspend their disbelief. *See* Samuel Johnson, *Preface to Shakespeare*, vol. VII (1765) (available at http://ebooks.adelaide.edu.au/j/johnson/samuel/preface/preface.html); Samuel Taylor Coleridge, *Biographia Literaria*, ch. XIV (1817) (available at http://ssad.bowdoin.edu:8668/space/Biographia+Literaria+XIV+-+Coleridge+on+Wordsworth).

Actors and directors normally strive for realism, but physical limitations frequently prevent the exact reproduction of the acts depicted. It is difficult, after all, to recreate the forest setting of *A Midsummer Night's Dream* indoors. In the same vein, content-neutral legal restrictions limit how various types of conduct can be portrayed onstage, usually out of concern for the safety of the actors or the audience. Scripted violence must be simulated, for example, and having an actual bonfire onstage is prohibited. A theater's goal is to present a dramatic work such that it overcomes the inherent limitations and the audience believes that the fictitious events that it is witnessing are real, even though they are not. (Tr. 113:3-113:6.)

The expressive conduct in a theatrical production must be viewed in this light. It is the ***portrayal*** of scripted conduct that is protected expressive conduct – not the actual event being portrayed. If the latter was the case, it would result in an

absurd world where virtually any action could be afforded First Amendment protection merely by being written into a play. Yet it is clear that the stabbing to death of the actor playing Julius Caesar is not protected speech (though portraying his assassination is).

This is the main reason why intermediate scrutiny is warranted here. If Colorado were trying to ban or restrict the onstage ***portrayal*** of smoking, then that content-based law very well might be subject to stricter review. But the Indoor Smoking Ban does not do that. It merely governs the technical mechanics of how smoking is portrayed onstage. The law may have an indirect effect – perhaps even an impermissible one – on expressive speech. But it is not the content-based suppression of speech.

B. The Indoor Smoking Ban Satisfies the *O'Brien* Test.

The fact that the Indoor Smoking Ban does not directly regulate the substantive message being conveyed by theatrical smoking, but instead incidentally affects the technical aspects of how it is portrayed, makes the law precisely the sort of content-neutral "time, place and manner" restriction that the *O'Brien* test was meant to address. A law will pass this intermediate scrutiny if: (a) it is within the constitutional power of the governmental body enacting it; (b) it

furthers an important or substantial government interest; (c) the government's interest is unrelated to the suppression of free expression; and (d) the incidental restriction on the alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. *See Barnes*, 501 U.S. at 567 (citing *O'Brien*, 391 U.S. at 376-77).

Neither the Theaters nor the *amici* seriously dispute that the first three factors of the *O'Brien* analysis have been satisfied.[3] (Op. Br. at p. 14.) Thus, the only issue before this Court is whether the Indoor Smoking Ban complies with the fourth *O'Brien* requirement – in other words, whether the incidental restriction on the expressive aspects of theatrical smoking imposed by the state's general smoking prohibition is no greater than is essential to Colorado's interest in protecting the public health from the dangers of secondhand smoke exposure.

This fourth *O'Brien* factor itself has been refined into two separate subparts by subsequent authorities. First, the content-neutral law must be narrowly tailored

[3] The *amicus* brief of the Dramatists Guild of America halfheartedly suggests that "perhaps" the second *O'Brien* factor has not been met because the existence of a substantial government interest "begs for some evidentiary support." (Dram. Guild Am. Br. at p. 9.) There are two problems with this. First, when viewed as a whole, the Indoor Smoking Ban clearly is intended to prevent the public health risks associated with exposure to secondhand smoke. *See* C.R.S. § 25-14-202. Second, the CDPHE introduced evidence for the record during the trial court proceedings involving these dangers. (*See* ROA, Resp. Exhs. C-F.)

to further the substantial governmental interest being addressed, and second, it must leave open ample alternative channels for communication. *See, e.g., City of Erie v. Pap's AM*, 529 U.S. 277, 301 (2000); *Denver Publ.*, 896 P.2d at 316-17; *St. John's Church in Wilderness v. Scott*, 194 P.3d 475, 482 (Colo. App. 2008); *see also Ward*, 491 U.S. at 798-99.

The Theaters argue that neither requirement has been met for three separate reasons. First, they contend that Colorado's interest served by the Indoor Smoking Ban is the prevention of the ***involuntary*** public exposure to secondhand smoke. (Op. Br. at pp. 15-18.) The ban does not further this legislative purpose under this theory because onstage smoking is prohibited even where audience members are prospectively advised that a particular play will contain actual smoking yet "voluntarily" choose to attend despite that warning. Second, the Theaters assert that even if the governmental interest at issue here is furthered by the law, the Indoor Smoking Ban is not sufficiently narrowly tailored because there are alternative measures that might achieve the same purpose in a less restrictive manner. Finally, they argue that there are not acceptable alternatives to onstage smoking, and the trial court erred when it concluded otherwise. All three arguments should be rejected for the reasons set forth below.

1. The Theaters' Interpretation of the Governmental Interest Furthered by the Indoor Smoking Ban Is Improperly Narrow.

The Theaters' first argument that the "narrowly tailored" subpart of the fourth *O'Brien* factor has not been met is that there is not a sufficient relationship between the Indoor Smoking Ban as applied in the theater context and the legitimate state interest at issue. As an initial matter, it is important to note that there is no allegation that the governmental interest at stake is not substantial or that the law is being interpreted and applied improperly by the CDPHE. To the contrary, the only reason why the governmental interest or legislative purpose behind the Indoor Smoking Ban is even remotely relevant is that the Theaters assert that the application of the law in the theatrical context is inconsistent with their narrow view of the legislative intent underlying it, and thus, this *O'Brien* requirement has not been met. This Court must answer two questions in order to resolve this disputed issue: What is the governmental interest at stake, and does the Indoor Smoking Ban further it?

The Theaters cite a portion of the legislative declaration of the act to argue that the law's purpose (and by extension the governmental interest at issue) is to protect nonsmokers only from "involuntary" exposure to secondhand smoke. (Op.

Br. at pp. 15-18 (quoting C.R.S. § 25-14-202).) They interpret this language to mean that the governmental interest does not extend to situations where nonsmokers are aware that smoke is going to be present in a particular environment but still choose to risk exposure. Therefore, the Theaters contend, any application of the Indoor Smoking Ban to prohibit theatrical smoking where the audience could be notified beforehand that they would be exposed to smoke does not further the government interest being addressed by the law.

The first problem with this narrow view of the legislative intent behind the Indoor Smoking Ban is that the Theaters' quotation of the preface of the act is incomplete – they leave out the most important part of the legislative declaration. In addition to the selective portion quoted in the Theaters' opening brief, the preface continues: "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." *Id* (emphasis added).

This express declaration of the legislative purpose of the Indoor Smoking Ban clearly is not limited to the "involuntary" exposure to tobacco smoke – to the contrary, it expresses a purpose to limit ***all*** types of exposure. It also highlights the

disingenuousness of the Theaters' argument. They fault the Court of Appeals for "disregard[ing] Supreme Court precedent on how to derive the government's ***legislative purpose***" (Op. Br. at p. 18 (emphasis added)), but proceed themselves to ignore the portion of the statute ***that explicitly identifies this purpose.*** And, of course, such express declarations of legislative purpose usually are the best guide to legislative intent. *See, e.g., Hernandez v. People*, 176 P.3d 746, 753 (Colo. 2008); *Stamp v. Vail Corp.*, 172 P.3d 437, 443 (Colo. 2007).

The Theaters' narrow interpretation of the governmental interest furthered by the Indoor Smoking Ban and its legislative purpose also turns the commonly-accepted intent of the law on its head. It is commonly understood that the ban primarily was enacted to prevent restaurants, bars and workplaces from permitting smoking, even where patrons or employees are notified that smoking is permitted on premises or the establishment is divided into smoking and nonsmoking sections. *See, e.g., Coalition for Equal Rights, Inc. v. Owens*, 458 F. Supp. 2d 1251, 1256-57 (D. Colo. 2006) (describing the scope of the Indoor Smoking Ban). If the Theaters are right, however, the law's accepted purpose would be inconsistent with Colorado's interest being served by it – if it merely was intended to prohibit smoke exposure without advance warning, why would smoking be precluded altogether in

bars or restaurants or workplaces, when those establishments could do something as simple as post a sign advising that smoking would occur on premises?

The better interpretation of the preface's use of the term "involuntary" exposure is that it is meant to cover situations in which patrons or employees of an establishment are forced to subject themselves to secondhand smoke if they want to enjoy the services offered by the business or maintain employment. Colorado's interest in sparing its nonsmoking citizens from being forced to choose between smoke exposure or staying home is the only construction of legislative purpose that would be consistent with the substantive provisions of the Indoor Smoking Ban (as well as its express declaration of legislative purpose).

Finally, even if audience members who have been notified that a particular play will contain actual smoking are viewed as "voluntarily" exposing themselves to smoke, this is not the only exposure that occurs during a stage production. The actors onstage are also exposed to secondhand smoke, as are the stagehands and other theater employees – yet the Theaters' proffered voluntary/involuntary distinction largely ignores them. The Theaters' position apparently is that when a theater tells its employees that they must subject themselves to secondhand smoke if they want to keep their jobs, any smoke exposure from that point on is

"voluntary." This state of affairs in the employment context is part of what the Indoor Smoking Ban was enacted to prevent. *See* C.R.S. § 25-14-205(j) (generally preventing smoking in workplaces).

Whether in bars or restaurants, or in workplaces, the best view of the governmental interest and legislative intent underlying the Indoor Smoking Ban is that the Colorado legislature wanted to avoid telling patrons and employees to "take it or leave it" – either accept the risks and discomfort that come with secondhand smoke exposure, or find entertainment or work elsewhere. Any other formulation of the underlying governmental interest behind the law would be flatly inconsistent with its substantive provisions, as well as its express recitation of purpose. There is no dispute that this is a substantial governmental interest or that it is furthered by the Indoor Smoking Ban ***even in the theater context***, and the Theaters' argument that the first subpart of the fourth *O'Brien* factor has not been met must fail accordingly.

2. The Indoor Smoking Ban Does Not Need to Be the Least Restrictive Law Possible to Be Narrowly Tailored.

The Theaters and *amici* further argue that the Indoor Smoking Ban does not satisfy the first subpart of the fourth *O'Brien* factor, even if it furthers the relevant

governmental interest, because it is not sufficiently "narrowly tailored." (Op. Br. at p. 17.) They cite hypothetical alternative regulations that they claim would adequately further the relevant interest, but in a manner less restrictive to speech. Most of these suggestions involve some sort of notification that a particular stage production would involve smoking to allow audience members to choose to avoid exposure if they had concern. The Theaters essentially contend that because Colorado has chosen to enact the Indoor Smoking Ban and not their proposed alternatives, the law is not narrowly tailored for the purposes of *O'Brien*.

This argument suffers from two fatal flaws. First, as noted above, the governmental interest served by the Indoor Smoking Ban is not simply allowing the public to "opt out" of situations where smoking might take place. There would be no reason to ban smoking in bars or restaurants or even workplaces if that was the case, just so long as these establishments announced beforehand whether smoking would be permitted. The undisputedly substantial governmental interest served by the act – as specified in the legislation itself – instead is to limit public exposure to smoke, regardless of whether or not people being exposed were notified.

This formulation should make it obvious that the alternative smoking regulations proposed by the Theaters are inadequate to promote Colorado's interest. It does not matter if a theater prospectively announces that a particular production will involve onstage smoking and gives audience members the chance to avoid it. The prospective attendees are still presented with the same Hobson's choice – suffer through the unwanted exposure or leave – that the Indoor Smoking Ban was designed to prevent.

Second, even if the Theaters or *amici* could devise a hypothetical solution that would adequately promote the government interest at issue while incidentally affecting the relevant expressive conduct in a less restrictive manner, this would have no effect on whether the Indoor Smoking Ban is narrowly tailored. It is well-established that a content-neutral law does not have to be the least restrictive alternative available to the legislature to be sufficiently narrowly tailored. *See Denver Publ.*, 896 P.2d at 314; *City of Erie*, 529 U.S. at 301-02 ("In any event, since this is a content-neutral restriction, least restrictive means analysis is not required."); *Ward*, 491 U.S., at 797-99 (same).

It thus is legally irrelevant how a private actor would go about furthering the substantial governmental interest at stake in the case if only ***it*** was given the

responsibility to propose, draft and enact the legislation. "Rather, the requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799 (*quoting United States v. Albertini*, 472 U.S. 675 (1985)); *accord Lewis*, 941 P.2d at 276.

The relevant question under the first subpart of the fourth prong of the *O'Brien* analysis therefore is not whether there are any alternatives that might incidentally affect the expressive conduct at issue in this case in a less restrictive manner – it is whether the government interest at stake would be negatively affected in the absence of the Indoor Smoking Ban. And whether one takes the (proper) view that the governmental interest furthered by the act is the limitation of public exposure to smoke regardless of prior notification, or whether one subscribes to the (improperly narrow) view that the governmental interest underlying the Indoor Smoking Ban merely was the prevention of exposure to secondhand smoke without informed consent, both interests would be served less effectively in the absence of the law.

Notwithstanding the virtually unanimous rejection of the "least restrictive means" in the *O'Brien* context, the Theatre Communications Group ("TCG")

argues in its *amicus* brief that Colorado has the duty to "precisely tailor[] its regulation" where it can do so in a manner that "less heavily" burdens speech, notwithstanding courts' express disavowal of the "least restrictive means" test. (TCG Am. Br. at p. 5.) The TCG argues that "commentators" support this theory and cites a single constitutional treatise to support its claim.

This creative argument has little merit. The sole case identified in the brief and the cited treatise, *Meyer v. Grant*, 486 U.S. 414 (1988), predates *Ward* and its numerous progeny firmly rejecting the "least restrictive means" theory. *See, e.g., City of Erie*, 529 U.S. at 301-02. *Meyer* has been overruled insofar as it ever required a challenged content-neutral law to be stricken as insufficiently narrowly tailored because a party to the litigation identified a "less" restrictive alternative.

Furthermore, the proffered distinction between a requirement that a ***less*** restrictive approach be taken where available to advance a substantial governmental interest, and a requirement that the ***least*** restrictive approach be employed, is almost certainly unworkable. What would happen under a "less restrictive" theory once a state abandoned its preferred content-neutral law in favor of one that is less – but not the least – restrictive to speech? Another party would file a lawsuit identifying an even less restrictive way to go about furthering the

state interest, of course. The challenges would spiral downward until there was no longer any possible regulation with a less restrictive effect on speech. The "less" restrictive test ultimately would be no different than the "least restrictive means" test that overwhelmingly has been rejected by the courts.

3. There Are Adequate Alternatives to Actually Smoking Onstage.

The second subpart of the fourth *O'Brien* requirement is that there must be acceptable alternative means of communication to convey the speech being incidentally affected by the content-neutral regulation. *See Denver Publ.*, 896 P.2d at 312-13, 316-17; *Ward*, 491 U.S. at 802. "The government may, by statute or ordinance, impose content-neutral restrictions on communicative activity if the restrictions are narrowly tailored to serve a significant governmental interest ***and leave open ample alternative channels for communication***." *St. John's*, 194 P.3d 475, 482 (Colo. App. 2008) (emphasis added) (citing *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764 (1994) and *Ward*, 491 U.S. at 791); *accord Denver Publ.*, 896 P.2d at 316-17.

The question of whether there is an acceptable alternative that will allow actors to portray smoking in the theatrical context in a manner that will effectively convey the desired message essentially consists of two parts. First, is there a

sufficiently realistic alternative to actually smoking onstage? This is a question of fact, and the trial court's finding on the issue can only be overturned by this Court if it is clearly erroneous. *See City and Cnty. of Denver*, 161 P.3d at 633; *Valdez*, 966 P.2d at 598. Second, given the factual finding concerning the realism (or lack thereof) of alternatives to actual onstage smoking, does this meet the *O'Brien* requirement that there be an acceptable alternative channel of communication? Applying this part of the *O'Brien* analysis to the facts determined by the trial judge is a legal question, and it must be resolved *de novo*. *See Lewis*, 941 P.2d at 271.[4]

It must be noted as an initial matter that the dispute in this case focuses on that first question. The Theaters contend that there is no adequate alternative to actual onstage smoking because there are no feasible substitutes to actual smoking that will allow actors to convey the desired message. (Op. Br. at pp. 18-20.) They cite the testimony of four witnesses from the trial court proceedings to support this. (*Id.*) Implicit in this argument is the concession that if there ***is*** a sufficiently

[4] Some decisions interpret *Lewis* as imposing a *de novo* standard in all cases involving the *O'Brien* analysis. However, this Court went to some pains there to note that there were no issues of disputed fact. *See Lewis*, 941 P.2d at 271 It presumably would revert back to the default rule that only clearly erroneous factual findings of the trial court can be disturbed where such disputed factual issues exist if only because there is no other workable approach. Many facts established at the trial level require an evaluation of a witness's demeanor to determine credibility, or an observation of a physical demonstration – and how could an appellate court possibly make such factual determinations based solely on a review of the record?

realistic way to portray smoking onstage without actually doing so, there will be an acceptable alternative to the expressive conduct incidentally affected by the Indoor Smoking Ban, and the fourth *O'Brien* factor will be met.

This Court need not look very far to resolve the factual issue central to this case, for one simple reason – the trial court considered extensive evidence on the question of whether there was an alternative to onstage smoking that might be sufficiently realistic to convey the desired message to the audience. The Theaters are correct that he heard testimony from a number of witnesses suggesting that fake or prop cigarettes cannot realistically replicate actual onstage smoking. But this is not the only evidence taken into account. The judge also observed a physical demonstration – put on by the Theaters' own witness – of the use of a fake or prop cigarette. His impression was unmistakable:

> Now, I've never seen any demonstration like that before, but I can tell you – and I am a fan of the theatre. I can tell you that what I saw the witness – I believe it was Mr. Webb on the fake cigarette, as Mr. Douglas has termed them, it seemed to be very real. It was fairly realistic. I was a distance of about, I don't know, four or five feet maybe, but I definitely saw smoke go out of the cigarette, and his efforts at reviving it. I don't know if they're a one-shot deal or what, but it certainly seemed like it was an alternative that could be utilized.

(Tr. 134:16-135:1.)

The district court considered the testimony from the various witnesses that fake or prop cigarettes were unrealistic in the theater context, but at the end of the day, it found that this evidence could not outweigh the observation of an actual real-world demonstration. This conclusion was buttressed by the fact that the onstage portrayal of smoking takes place in a theater (Tr. 135:2-135:7), and as noted above, one of the main tasks of any stage performance is to overcome the limitations inherent in that environment to portray fictitious events in a realistic manner.

Nor is the trial judge the only person to conclude that fake or prop cigarettes generally are adequate to simulate onstage smoking. In the motion of Crossroads Theater at Five Points LLC ("CTFP") for leave to submit an *amicus* brief, the prospective *amicus curiae* described a situation where a particular play called for the blowing of smoke rings. (CTFP Am. Cur. Mot. at ¶ 3.) CTFP argues that "however realistic" fake or prop cigarettes might appear, they are not suitable for this purpose.[5] This should be seen as a tacit admission that fake or prop cigarettes are, in fact, adequately realistic for the purpose of portraying onstage smoking.

[5] CTFP does not elaborate on its "smoke ring" problem in its *amicus* brief. In any event, the issue is not before this Court.

The Theaters obviously disagree with the factual conclusion reached by the trial court and implicitly echoed by CTFP, but they offer no legitimate reason why it is clearly erroneous. And absent any such evidence, they are stuck with the factual determination. Therefore, the legal question before this Court when determining whether the second subpart of the fourth *O'Brien* factor has been satisfied is straightforward: Given the realistic alternative to actual onstage smoking, is there an acceptable alternative channel of communication that will allow actors to convey the same message? The query answers itself under this formulation.

Furthermore, this is not the only alternative identified that might permit actors to use theatrical smoking to convey their desired message. The Court of Appeals noted that the Theaters could smoke onstage in an outdoor venue. (Slip Op. at 28-30.) The Theaters respond to that by arguing that it "ignore[s] the fact that [they] have only indoor facilities." (Op. Br. at p. 19.) Yet there is no requirement that a stage company produces its plays on its own premises – presumably there are outdoor facilities available for use. Nor is there any requirement that a person be allowed to engage in expressive conduct wherever or whenever he or she desires. *See, e.g., Heffron v. Intl. Soc. for Krishna*

Consciousness, Inc., 452 U.S. 640, 647-48 (U.S. 1981) ("It is also common ground, however, that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.").

The Theaters counter this observation by citing two U.S. Supreme Court decisions, *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) and *Southeast Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), for the proposition that a law abridging one's free speech rights will not be saved by the fact that the speaker could convey his or her message elsewhere. Both cases are inapposite. In *Conrad*, the issue before the court was whether a municipality effectively could ban a musical from being staged at any public theater within its jurisdiction. *See Conrad*, 420 U.S. at 552-53. The government defendant in the case argued that the play could be produced at unregulated private theaters. *Id.* In *Schad*, a borough prohibited adult dancing; it argued that patrons wishing to partake in that sort of entertainment could always go to nearby establishments in neighboring communities. *See Schad*, 452 U.S. at 76-77.

Schad and *Conrad* thus stand for the proposition that laws prohibiting protected expressive conduct ***anywhere*** within the defendants' control and

authority cannot be defended by arguing that some other jurisdiction allows it. These cases would have force here if the CDPHE was arguing that the Indoor Smoking Ban was permissible under *O'Brien* because persons wishing to smoke onstage could always go to nearby Wyoming – but it is not. The Theaters are welcome to produce a play involving actual smoking at any of the outdoor venues located throughout the state. That is enough to meet the fourth *O'Brien* factor.[6] *See Heffron*, 452 U.S. at 654 (upholding a Minnesota law dictating where solicitation activities could occur at the state fair); *American Civ. Liberties Un. of Colo. v. City and Cnty. of Denver*, 569 F. Supp. 2d 1142, 1164 (D. Colo. 2008) (upholding speech restrictions at a political convention and noting that the "ample alternatives" requirement "does not require that the speaker have the ability to engage in precisely the same means of expression in precisely the same location, nor… in the same manner as he or she wishes.").

[6] This conclusion is underscored by the fact that presumably only a tiny minority of the plays being performed by the Theaters involve expressive onstage smoking; Colorado is not telling any stage company that it must present ***all*** of its productions outdoors.

III. The Indoor Smoking Ban Applied in the Theater Context Does Not Violate Article II, Section 10 of the Colorado Constitution.

The second fundamental issue before this Court is whether the Indoor Smoking Ban violates Section 10 of the Colorado Constitution. This provision states: "[E]very person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty." Colo. Const., Art. II, § 10. It should be obvious that the text of the provision is very broadly worded and provides little instruction on how it should be applied in any particular case. Notwithstanding this lack of specific textual guidance, this Court has held that Section 10 provides more free speech protection than does the First Amendment in certain situations; the Theaters and *amici* essentially ask this Court to expand the list of more protected subjects to include theatrical smoking.

Two things are beyond dispute here. First, everyone agrees that the Colorado Constitution has been interpreted to be more protective of speech than the U.S. Constitution in certain situations. The focus of much of the Theaters' and *amicus curiae* briefing on this issue seems to be on convincing this Court that the scope of Section 10 is not coterminous with that of the First Amendment – but the CDPHE does not disagree with that characterization. Yet while the state

constitution unquestionably has been interpreted to provide more speech protection in certain situations, it also has been construed to match the scope of the First Amendment in others. *See, e.g., Z.J. Gifts D-2, LLC v. City of Aurora*, 93 P.3d 633, 638-39 (Colo. App. 2004); *see also In re Marriage of Newell*, 192 P.3d 529, 535 (Colo. App. 2008). The question before this Court is whether it would be appropriate to expand the free speech protection offered by the state constitution under the unique circumstances present in ***this*** case.

Second, just as everyone agrees that Section 10 has been interpreted to provide more speech protection in certain circumstances, no one disagrees that neither this Court nor any other has ever addressed a similar situation where a law tailored to protect the public health from some sort of direct physical harm (*e.g.*, secondhand smoke) incidentally affects expressive conduct in the theatrical context. Thus, this Court must approach the constitutional issue as a matter of first impression.

A. Colorado Decisions Suggest that It Would Be Inappropriate to Interpret Art. II, § 10 to Provide More Free Speech Protection than the First Amendment in This Context.

It is important to note as an initial matter that insofar as the Theaters are proceeding under some sort of theory that generally would afford more protection

to speech incidentally affected by a content-neutral "time, place or manner" law than is normally afforded under *O'Brien*, this claim must fail. This Court has applied the *O'Brien* intermediate scrutiny test on a number of occasions, *see, e.g.*, *Denver Publ.*, 896 P.2d at 312-13; *Lewis*, 941 P.2d at 275-78, and it has never suggested that Section 10 complicates this analysis in any way. Thus, if this Court decides that it is appropriate to interpret the Colorado Constitution in a manner that would afford more speech protection here than does the U.S. Constitution, it will almost certainly be because there is something unique about these particular circumstances, and not because there is any disagreement with the longstanding analysis applied to content-neutral laws.

The novelty of the particular fact pattern involved in this case does not mean that this Court has never confronted any similar sort of claim. To the contrary, this Court has applied the same *O'Brien* test discussed above to evaluate content-neutral laws incidentally affecting onstage expressive conduct challenged under both the state and federal constitutions. In *7250 Corp. v. Bd. of Cnty. Comm'rs for Adams Cnty.*, 799 P.2d 917 (Colo. 1990), it evaluated the constitutionality of a county ordinance regulating nude dancing at establishments without a Colorado liquor license. *Id.* at 918-19. The law in question imposed a variety of restrictions

on such businesses, limiting (for example) the age of patrons who could attend, the hours and days of operation and the permissible proximity to nearby residential property. *Id.* at 919. The plaintiffs challenging the law argued that it constituted an impermissible restriction of their free speech rights under the First Amendment and Section 10. *Id.*

The Court disagreed. It viewed the county ordinance at issue in the case as a content-neutral "time, place or manner" law and applied the *O'Brien* test to evaluate that claim. *Id.* at 924-27. The Court ultimately concluded that all four factors were satisfied, including the requirement that the law be narrowly tailored and that it permit alternative channels of communication. *Id.* at 926-27. Most important to the question relevant to this appeal, it applied the same *O'Brien* analysis to dispose of both the state and federal claims. *Id.*; *see also Z.J. Gifts D-2*, 93 P.3d at 639 (noting when confronted with a similar question that the *7250 Corp.* court had applied an identical federal and state analysis). The fact that the Court would decline to apply a different constitutional standard to resolve both state and federal claims in a case involving a similar sort of content-neutral law is highly indicative of the approach that should be adopted here.

The Colorado case most prominently discussed in the Theaters' Opening Brief echoes this analysis, if not the ultimate outcome. The Theaters cite *Marco Lounge, Inc. v. City of Federal Heights*, 625 P.2d 982 (Colo. 1981) for the proposition that "eliminating a type of protected speech, *i.e.*, nude dancing, violated both the First Amendment and the Colorado Constitution." (Op. Br. at p. 21.) Yet just as was the case with respect to *7250 Corp.*, the *Marco Lounge* court applied the federal and state constitutional analyses ***in precisely the same manner to evaluate the permissibility of the law at issue in the case.*** Once again, this approach strongly supports the view that Section 10 does not expand the scope of state free speech protection beyond that afforded by the First Amendment in the context of onstage expressive conduct.

This is not to say that the analogy between the *7250 Corp.* and *Marco Lounge* decisions and the instant matter is perfect – it is not. The laws at issue in those cases involved the regulation of nude dancing, and as discussed below in more detail, the free speech analysis in that context is highly esoteric for a number of reasons. Most notably, the governmental interest in such cases normally is indirect and hard to articulate, and there frequently is a suspicion that the law actually was intended to have a chilling impact on the free speech being affected

(*i.e.*, it is not content-neutral). But these concerns make the instant case a ***less*** appropriate vehicle to expand the free speech protections in the Colorado Constitution. It is hard to imagine a world where the state free speech provision is applied to the Indoor Smoking Ban in a much more protective manner than it is to the nude dancing ordinance at issue in *7250 Corp.* and *Marco Lounge*, but that is precisely what the Theaters ask this Court to do.

B. The Cases from Other States Discussed by the Theaters and the *Amici* Underscore Why This Court Should Decline to Interpret Section 10 Expansively to Invalidate the Indoor Smoking Ban.

The Theaters urge this Court to follow a number of cases from other jurisdictions, interpreting the relevant state constitutions in a way that provides more protection for expressive conduct in the "theater" context than does the First Amendment. *See 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). The fundamental problem for the Theaters (aside from the fact that authorities interpreting state constitutions in Massachusetts, Pennsylvania and New York are of limited precedential value to this Court) is that free speech principles developed in cases

involving nude dancing restrictions are particularly ill-suited to apply to different fact patterns for a number of reasons, as noted above.

First, there can be little doubt that the government interest at stake with respect to the Indoor Smoking Ban – limiting public exposure to secondhand smoke – is far more substantial than that involved in the nude dancing cases. *See, e.g., Hill*, 530 U.S. at 715 ("It is a traditional exercise of the States' police powers to protect the health and safety of their citizens" (internal quotation omitted).). The matter before this Court involves a regulation addressing a substantial public health risk; it is hard to see how this could possibly be true in the nude dancing context, despite the ultimately rejected efforts of at least one legislature to partially justify the ban based on public health grounds. *See Mendoza*, 827 N.E.2d at 188-89. And at the end of the day, courts are wary to say that a law making it substantially more difficult to engage in even marginal expressive conduct like nude dancing is narrowly tailored to protect the public health when the indirect risks being cited (*e.g.*, prevention of prostitution, rape and other sex crimes) are much better addressed directly. *See Pap's A.M.*, 812 A.2d at 613.

Second, the nude dancing cases are distinguishable because those decisions seem clear that the challenged laws were focused on prohibiting or at least

discouraging the expressive conduct at issue – in other words, they were not ***really*** content-neutral. *Id.* at 602 ("[W]e believe that this ordinance, which on its face prohibits all public nudity (and simulated nudity)... unquestionably was targeted at nude live dancing."); *see also Mendoza*, 827 N.E.2d at 197 (noting the argument that "the ordinance is content based because its language and the timing of its enactment unquestionably confirm that its purpose was to restrain nude dancing....").

There is no suggestion here that the Indoor Smoking Ban was intended to prevent or discourage the speech at issue in the case – the portrayal of smoking onstage. To the contrary, the main practical purpose of the measure clearly is to preclude smoking in non-expressive public venues like restaurants, bars and/or workplaces. If Colorado was more concerned with eliminating the onstage portrayal of smoking then one would think that it would go to greater pains to make sure that actors are not permitted to actually smoke during outdoor performances or use realistic fake or prop cigarettes. Yet all of these are allowed and even encouraged. Thus, the significant concern inherent in the other state cases that the nude dancing laws at issue really were intended to preclude expressive conduct is not present here.

Perhaps the decisions cited by the Theaters and the *amici* are most instructive insofar as they highlight ***why*** this lawsuit presents an especially poor case for this Court to expand the free speech protection afforded by Section 10. Unlike nude dancing laws, there can be no argument that the Indoor Smoking Ban furthers a concrete, crucial public health interest. Moreover, there is no lingering suspicion that the law was intended to restrict expressive conduct, despite whatever content-neutral purposes were expressed by the legislature enacting it – this is in stark contrast to the challenged nude dancing laws. In short, the briefs of the Theaters and *amici* and the cases cited therein provide a good source of reasons why this Court might be inclined to expand the scope of free speech protection afforded by Section 10 – ***and none of them apply here***.

CONCLUSION

For all of the foregoing reasons, the Court of Appeals did not err in upholding the decision of the trial court below, and this Court should ***affirm***.

Respectfully submitted this 9th day of March, 2009.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **APPELLEES' ANSWER BRIEF** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 9th of March addressed as follows:

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_____

United States Code Annotated Currentness
Constitution of the United States
Annotated
➡ Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances (Refs & Annos)

Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<This amendment is further displayed in three separate documents according to subject matter>

<see USCA Const Amend. I, Religion>

<see USCA Const Amend. I, Speech>

<see USCA Const Amend. I, Assemblage>

Amendment I. Freedom of Religion

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *

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<see USCA Const Amend. I, Assemblage>

Amendment I. Freedom of Speech and Press

* * * or abridging the freedom of speech, or of the press; * * *

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<see USCA Const Amend. I, Assemblage>

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<Notes of Decisions relating to Freedom of Speech and Press are displayed in three separate docu-

ments. Notes of Decisions for subdivisions VII to XXII are contained in this document. For Notes of Decisions for subdivisions I to VI see the first ranked document for USCA CONST AMEND. I-Speech. For Notes of Decisions for subdivisions XXIII to end see the third ranked document for USCA CONST AMEND. I-Speech.>

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Amendment I. Peaceful Assemblage, Petition of Grievances

* * * or the right of the people peaceably to assemble, and to petition the Government for a redress of griev- ances.

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<This amendment is further displayed in two separate documents according to subject matter,>

<see USCA Const Amend. I, Religion>

<see USCA Const Amend. I, Speech>

Amendment I. Peaceful Assemblage, Petition of Grievances

<Notes of Decisions relating to Peaceful Assemblage and Petition of Grievances are displayed in two separate documents. Notes of Decisions for subdivisions V to end are contained in this document. For Notes of Decisions for subdivisions I to IV see the first ranked document for USCA CONST AMEND. I-Assemblage.>

<For complete text of Amend. I, see USCA Const Amend. I, Full Text>

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<see USCA Const Amend. I, Religion>

<see USCA Const Amend. I, Speech>

Current through P.L. 111-4 approved 2-11-09
END OF DOCUMENT

Westlaw.

C.R.S.A. Const. Art. 2

C

West's Colorado Revised Statutes Annotated Currentness
Constitution of the State of **Colorado** [1876] (Refs & Annos)
Article II. Bill of Rights

Bill of Rights

In order to assert our rights, acknowledge our duties, and proclaim the principles upon which our government is founded, we declare:

C. R. S. A. Const. Art. 2, CO CONST Art. 2

Current with amendments adopted through the Nov. 4, 2008 General Election

END OF DOCUMENT

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C.R.S.A. Const. Art. 2, § 10

C

West's Colorado Revised Statutes Annotated Currentness
Constitution of the State of **Colorado** [1876] (Refs & Annos)
Article II. Bill of Rights

§ 10. Freedom of speech and press

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, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.

C. R. S. A. Const. Art. 2, § 10, CO CONST Art. 2, § 10

Current with amendments adopted through the Nov. 4, 2008 General Election

END OF DOCUMENT

Westlaw

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.

HISTORICAL AND STATUTORY NOTES

2008 Main Volume

Laws 2006, Ch. 22, § 9, provides:

"Effective date-applicability. This act shall take effect July 1, 2006, and shall apply to acts occurring on or after said date."

C. R. S. A. § 25-14-201, CO ST § 25-14-201

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

END OF DOCUMENT

Westlaw.

CO ST § 25-14-202
C.R.S.A. § 25-14-202

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.

HISTORICAL AND STATUTORY NOTES

2009 Electronic Update

Laws 2006, Ch. 22, § 9, provides:

"Effective date-applicability. This act shall take effect July 1, 2006, and shall apply to acts occurring on or after said date."

C. R. S. A. § 25-14-202, CO ST § 25-14-202

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

END OF DOCUMENT

Westlaw

CO ST § 25-14-203
C.R.S.A. § 25-14-203

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.

(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 accessor-

ies, either at 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.

HISTORICAL AND STATUTORY NOTES

2008 Main Volume

Laws 2006, Ch. 22, § 9, provides:

"Effective date-applicability. This act shall take effect July 1, 2006, and shall apply to acts occurring on or after said date."

C. R. S. A. § 25-14-203, CO ST § 25-14-203

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

END OF DOCUMENT

Westlaw.

CO ST § 25-14-204
C.R.S.A. § 25-14-204

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;

(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.

HISTORICAL AND STATUTORY NOTES

2008 Main Volume

Laws 2006, Ch. 22, § 9, provides:

"Effective date-applicability. This act shall take effect July 1, 2006, and shall apply to acts occurring on or after said date."

Laws 2007, Ch. 103, § 3(2), provides:

"(2) The provisions of this act shall apply to acts occurring on or after the applicable effective date of this act."

C. R. S. A. § 25-14-204, CO ST § 25-14-204

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

END OF DOCUMENT

Westlaw

CO ST § 25-14-205
C.R.S.A. § 25-14-205

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.

(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.

HISTORICAL AND STATUTORY NOTES

2009 Electronic Update

Laws 2006, Ch. 22, § 9, provides:

"Effective date-applicability. This act shall take effect July 1, 2006, and shall apply to acts occurring on or after said date."

Laws 2007, Ch. 103, § 3(2), provides:

"(2) The provisions of this act shall apply to acts occurring on or after the applicable effective date of this act."

C. R. S. A. § 25-14-205, CO ST § 25-14-205

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

END OF DOCUMENT

Westlaw.

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.

HISTORICAL AND STATUTORY NOTES

2009 Electronic Update

Laws 2006, Ch. 22, § 9, provides:

"Effective date-applicability. This act shall take effect July 1, 2006, and shall apply to acts occurring on or after said date."

C. R. S. A. § 25-14-206, CO ST § 25-14-206

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

END OF DOCUMENT

Westlaw.

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 author- ized

(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.

HISTORICAL AND STATUTORY NOTES

2009 Electronic Update

Laws 2006, Ch. 22, § 9, provides:

"Effective date-applicability. This act shall take effect July 1, 2006, and shall apply to acts occurring on or after said date."

C. R. S. A. § 25-14-207, CO ST § 25-14-207

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

END OF DOCUMENT

Westlaw.

CO ST § 25-14-208
C.R.S.A. § 25-14-208

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.

HISTORICAL AND STATUTORY NOTES

2009 Electronic Update

Laws 2006, Ch. 22, § 9, provides:

"Effective date-applicability. This act shall take effect July 1, 2006, and shall apply to acts occurring on or after said date."

CO ST § 25-14-208
C.R.S.A. § 25-14-208

C. R. S. A. § 25-14-208, CO ST § 25-14-208

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

END OF DOCUMENT

Westlaw

CO ST § 25-14-209
C.R.S.A. § 25-14-209

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.

HISTORICAL AND STATUTORY NOTES

2009 Electronic Update

Laws 2006, Ch. 22, § 9, provides:

"Effective date-applicability. This act shall take effect July 1, 2006, and shall apply to acts occurring on or after said date."

C. R. S. A. § 25-14-209, CO ST § 25-14-209

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

END OF DOCUMENT

Colorado General Assembly

Session Laws of Colorado 2006
Second Regular Session, 65th General Assembly

CHAPTER 22

HEALTH AND ENVIRONMENT

HOUSE BILL 06-1175 [Digest]

BY REPRESENTATIVE(S) May M. and Pommer, Larson, Balmer, Benefield, Berens, Boyd, Carroll T., Frangas, Hall, Lindstrom, McCluskey, McGihon, Riesberg, Soper, Stengel, Sullivan, Todd, Vigil, Borodkin, Plant, Coleman, Green, Marshall, Merrifield, and Romanoff;
also SENATOR(S) Grossman and Evans, Fitz-Gerald, Groff, Johnson, Tupa, Windels, Gordon, Shaffer, Veiga, and Williams.

AN ACT

CONCERNING ENACTMENT OF THE "COLORADO CLEAN INDOOR AIR ACT", AND, IN CONNECTION THEREWITH, PROHIBITING SMOKING IN INDOOR ENCLOSED AREAS, INCLUDING PLACES OF EMPLOYMENT.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Article 14 of title 25, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW PART to read:

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".

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.

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.

(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 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.

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;

(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) THE COMMON AREAS OF RETIREMENT FACILITIES, PUBLICLY OWNED HOUSING FACILITIES, AND NURSING HOMES, NOT INCLUDING ANY RESIDENT'S PRIVATE RESIDENTIAL QUARTERS;

(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."

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) THE RETAIL FLOOR PLAN, AS DEFINED IN SECTION 12-47.1-509, C.R.S., OF A LICENSED CASINO.

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.

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.

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.

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.

SECTION 2. Repeal. 25-14-101, Colorado Revised Statutes, is repealed as follows:

25-14-101. Legislative declaration. ~~The general assembly hereby declares that the smoking of tobacco or any other plant or weed under certain conditions is a matter of public concern and that in order to protect the public health, safety, and welfare it is necessary to control such smoking in certain public places.~~

SECTION 3. Repeal. 25-14-102, Colorado Revised Statutes, is repealed as follows:

25-14-102. Definitions. ~~As used in this article, unless the context otherwise requires:~~

~~(1) "Public meeting" means any meeting required to be open to the public pursuant to part 4 of article 6~~

~~of title 24, C.R.S.~~

~~(2) "Public place" means any enclosed, indoor area used by the general public or serving as a place of work including, but not limited to, restaurants, retail stores, other commercial establishments, governmental offices, waiting rooms of health care professionals, public conveyances, educational facilities, hospitals, nursing homes, auditoriums, arenas, assembly and meeting rooms, and rest rooms, but the term does not include enclosed offices occupied exclusively by smokers, even though such offices may be visited by nonsmokers.~~

~~(3) "Smoking" means the carrying of a lighted pipe, lighted cigar, or lighted cigarette of any kind and includes the lighting of a pipe, cigar, or cigarette of any kind.~~

SECTION 4. Repeal. 25-14-103, Colorado Revised Statutes, is repealed as follows:

25-14-103. Smoking prohibited in certain public places. ~~(1) Except as otherwise provided in this subsection (1), smoking is prohibited in the following public places:~~

~~(a) Elevators, museums, galleries, and libraries of any establishment doing business with the general public;~~

~~(b) (I) All hospital elevators and corridors and wherever combustible supplies or materials are stored and wherever flammable liquids or gases or oxygen is stored or in use in the hospital. In addition to the specific prohibitions provided in this subparagraph (I), hospitals shall:~~

~~(A) Allow all patients, prior to elective admission, to choose to be in a no smoking patient room and, when possible, accommodate such request;~~

~~(B) Prohibit employees from smoking in patient rooms;~~

~~(C) Require that visitors obtain express approval from all patients in a patient room prior to smoking.~~

~~(II) All areas of a hospital not specifically referred to in this paragraph (b) shall be considered smoking areas unless posted otherwise.~~

~~(III) Nothing in this section shall prohibit a hospital from banning smoking on all or part of its premises.~~

~~(IV) No other restrictions provided in this article shall apply to hospitals licensed pursuant to article 3 of this title or holding a valid certificate of compliance pursuant to section 25-1.5-103 (1) (a) (II).~~

~~(c) Waiting rooms and meeting rooms located in all buildings owned or operated by the executive and judicial branches of government of the state of Colorado or any political subdivision thereof except in areas designated for smoking;~~

~~(d) Any building used or designed primarily for the purpose of exhibiting any motion picture, stage drama, lecture, musical recital, or other such performance whenever open to the public; except that, unless otherwise prohibited by local ordinance or regulation, smoking shall be allowed in an area commonly referred to as a lobby if such lobby is reasonably separated from the spectator area and in designated seating areas of moving picture theaters where ventilation is adequate to achieve the purposes of this article. This prohibition applies also to enclosed sporting arenas.~~

~~(e) Public transportation vehicles when open to the public, except in designated smoking areas.~~

~~(f) Repealed.~~

~~(2) Restaurants and taverns are not subject to the specific prohibitions of this article, but restaurants and taverns are encouraged, whenever possible, to seat nonsmokers in an area away from smokers. Any public place where food is sold or served and in which neither a smoking nor a nonsmoking area is designated shall post a sign in a conspicuous place at or inside its entrance indicating whether or not provisions have been made for nonsmokers.~~

~~(3) The owner, manager, or any person in charge of a public place specified in subsection (1) of this section shall control smoking throughout such public place by posting signs which clearly designate nonsmoking and, where provided, smoking areas. Such signs shall be explicit and conspicuous, but the wording, size, color, design, and place of posting shall be at the discretion of the owner, manager, or person in charge.~~

~~(4) Those in charge of offices and commercial establishments that provide employment for the general public are encouraged to designate nonsmoking areas that are physically separated from the working environments where other employees smoke. Every effort shall be made to provide a separate area for nonsmokers in employee lounges and cafeterias.~~

SECTION 5. Repeal. 25-14-103.7, Colorado Revised Statutes, is repealed as follows:

25-14-103.7. Control of smoking in state legislative buildings. ~~(1) Except as provided in subsection (2) of this section, smoking is prohibited in all state legislative buildings.~~

~~(2) The legislative council created by section 2-3-301, C.R.S., or its designee:~~

~~(a) May designate areas in legislative buildings where smoking is permitted;~~

~~(b) Shall consider proposals to redesignate any area designated as a smoking area pursuant to paragraph (a) of this subsection (2);~~

~~(c) Shall establish a smoking policy for office space within legislative buildings; and~~

~~(d) Shall ensure that signs are posted that clearly designate nonsmoking and smoking areas.~~

~~(3) Notwithstanding the provisions of this section, the control or limitation of smoking in the chambers, antechambers, committee rooms of the senate and the house of representatives, and office space assigned to and occupied by legislators shall be governed by the provisions of section 2-2-404 (1.5), C.R.S.~~

~~(4) As used in this section, unless the context otherwise requires:~~

~~(a) "Legislative building" means any building which is owned or operated by the legislative branch and which is under the direction and control of such branch.~~

~~(b) "Smoking" shall have the same meaning as set forth in section 25-14-102 (3).~~

SECTION 6. Repeal. 25-14-104, Colorado Revised Statutes, is repealed as follows:

25-14-104. Optional prohibition. ~~The owner or manager of a public place other than one specifically provided in section 25-14-103 (1) may post, at his discretion, signs prohibiting smoking or providing smoking and nonsmoking areas. Such posting shall have the effect of including such public place in the public places where smoking is prohibited or restricted pursuant to section 25-14-103 (1).~~

SECTION 7. Repeal. 25-14-105, Colorado Revised Statutes, is repealed as follows:

25-14-105. Local regulations. ~~Nothing in this article shall prevent any town, city, or city and county, nor any county within the unincorporated areas thereof, from regulating smoking, and such county, town, city, or city and county is hereby expressly authorized to adopt ordinances embodying such regulations. Where such regulations are adopted on the local level as authorized in this section, the local regulations shall control to the extent of any inconsistency between them and this article.~~

SECTION 8. Repeal. 2-2-404 (1.5), Colorado Revised Statutes, is repealed as follows:

2-2-404. Legislative rules. (1.5) ~~Smoking in the state capitol and other legislative buildings shall be governed by section 25-14-103.7, C.R.S., except that the senate and the house of representatives each has the exclusive authority to adopt rules or joint rules, or both, governing the control or limitation of smoking in their respective chambers, antechambers, committee rooms, and office space assigned to and occupied by legislators.~~

SECTION 9. Effective date - applicability. This act shall take effect July 1, 2006, and shall apply to acts occurring on or after said date.

SECTION 10. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: March 27, 2006

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

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