SUPREME COURT, STATE OF COLORADO
Colorado State Judicial Building
2 East 14th Avenue
Denver, CO 80203

Colorado Court of Appeals, Opinion by Judge Bernard, Rothenberg, and Carparelli, JJ. concurring
Court of Appeals No. 06CA2260

District Court, City and County of Denver, Colorado
Judge Michael A. Martinez, Presiding
District Court No. 06Cv10876

Petitioners:
CURIOUS THEATRE COMPANY, a Colorado non-profit corporation, PARAGON THEATRE, a Colorado non-profit corporation, and THEATRE13, INC., a Colorado non-profit corporation

Respondents:
COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, and JAMES MARTIN, its executive director

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Case Number: 2008SC351

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PETITIONERS' REPLY BRIEF

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Petitioners Curious Theatre Company, Paragon Theatre, and Theatre13, Inc.[1] ("the Theatres") submit this Reply Brief.

INTRODUCTION

The State concedes that in order to survive the Theaters' constitutional challenge, the Smoking Ban must be "narrowly tailored" to further a substantial government interest ***and*** must leave open "ample alternative channels" of communication. Ans. Br. at 17-18. The Ban does not satisfy either of these stringent constitutional requirements.

In arguing to the contrary, the State makes sweeping, hyperbolic statements about the facts that are not only unsupported by the record but are contradicted by it. *See infra* § I.

Aside from invoking hyperbole, the State's chief defense is that fake or prop cigarettes, which allow actors to blow a few puffs of talcum powder, are adequate alternatives to lighted cigarettes that typically use cloves or tea leaves. The State contends this Court must defer to the trial court's "fact finding" that these prop cigarettes are an adequate alternative because that finding is not clearly erroneous.

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[1] Theatre13 recently ceased operations. The remaining two theaters continue to present plays, so the issues before this Court remain viable.

In fact, this Court reviews fact findings in First Amendment cases *de novo*. Moreover, the district court's supposed "finding" was at best equivocal. And the State's argument ignores the overwhelming evidence that prop cigarettes are not adequate alternatives to lighted cigarettes. *See infra* § II.

The State's other arguments are likewise untenable. In insisting that the Ban is narrowly tailored, the State expands the legislative purpose beyond preventing involuntary exposure to tobacco smoke. If the Legislature intended to limit all exposure to second-hand smoke, then it would have prohibited smoking outdoors and in non-public areas. The State also never addresses the Theaters' arguments concerning the Ban's scope. Instead, it claims that the Theaters are advocating for a least restrictive means test. The State cannot meet its burden of proving that the Ban is narrowly tailored by recasting and misstating the Theaters' position. *See infra* §§ III. A. & B.

The State also contends that outdoor venues provide ample adequate alternatives. The State would have the Theaters move their productions outdoors, even if they own only indoor venues, and even if this would mean presenting outdoor plays in winter. This argument borders on the absurd. *See infra* § III. C.

Finally, the Ban also violates the Colorado Constitution. In its responsive arguments, the State never directly addresses the analysis that state courts use in

determining whether similarly-worded constitutional provisions provide more protection than the First Amendment. Instead, it merely notes that the cases cited by the Theaters involved nude dancing. But expanded State constitutional protection has been afforded in other contexts. And in any event, the Smoking Ban, which effectively prohibits the Theaters from staging many classic American plays, presents at least as compelling a context for providing more protection as does nude dancing. The Court should therefore hold that the Ban violates Article II, section 10 of the Colorado Constitution. *See infra* § IV.

ARGUMENT

I. THE STATE'S ANSWER BRIEF CONTAINS A NUMBER OF UNSUPPORTED FACTUAL ASSERTIONS.

In its Answer Brief, the State makes a number of assertions that, while smoothly presented, have no support in the record. For example, the State hypothesizes about the myriad choices an actor must make in portraying smoking on stage, and asserts that "[i]t 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." Ans. Br. at 14. The State does not cite the record in this regard, which is not surprising since the evidence was to the contrary. The record demonstrates that whether to portray smoking in a play starts, and usually ends, with the playwright.

See, e.g., Tr. 36:5-18; 40:18-42:13; 87:9-88:5; 104:15-24. How theatrical smoking is portrayed is typically a decision of the director and actors, consistent with the vision of the playwright. *Id.* 37:5-38:12; 104:15-105:10.

The State goes on to paint a scenario of actors, stage hands, and other theater employees forced to endure exposure to second-hand smoke at the risk of their jobs. Ans. Br. at 22. Again, there is not only no record support for this assertion, but the testimony was to the contrary. *See, e.g.*, Tr. 38:13-39:5; 88:9-19. Indeed, many of Petitioner Paragon's "employees" are volunteers who can "volunteer to be around smoke or not." Tr. 67:14-22.

Finally, the State posits that prospective theater attendees face a "Hobson's choice" of suffering through unwanted exposure to second-hand smoke or leaving the theater. Ans. Br. at 25. The record actually conflicts with this assertion in two respects, and a third conflict is self-apparent. First, as the State acknowledges but denigrates, the Theatres' audience members are told in advance of theatrical smoking and can choose not to attend if they are concerned. *See, e.g.*, Tr. 43:2-12; 67:23-68:2; 84:1-12. Second, the evidence revealed that on-stage smoking takes place some distance from the audience, such that exposure is unlikely. *See, e.g.*, Tr. 39:6-22. Third, and self-evident, theatrical productions differ from bars and restaurants in that theatrical patrons typically buy tickets in advance to attend a

performance, rather than simply showing up on a given night and not being charged for admission. Further, the exposure (if any) at a theater is from the performers engaged in expression, while fellow patrons are (or were before the Ban) the smokers at restaurants and bars. Thus, the State's Hobson's choice is one that is manufactured, rather than an accurate reflection of reality.

As shown below, the State is forced to exaggerate matters because its interest in preventing theatrical smoking is tenuous, while the Ban's impact on free expression is drastic. Indeed, the State chooses to ignore evidence of the Ban's effect: many plays, including those of renowned playwrights, will not be presented in Colorado. Op. Br. at 9-10.

II. PROP CIGARETTES ARE NOT AN ADEQUATE ALTERNATIVE TO LIGHTED CIGARETTES.

The linchpin of the State's argument is a purported fact-finding by the district court regarding the adequacy of fake or prop cigarettes to portray smoking on stage. The State argues that, based on a brief in-court demonstration of a talcum cigarette, this Court must defer to the trial court's "fact finding" that prop cigarettes are an adequate substitute for real lighted cigarettes. Ans. Br. at 3, 6, 30-31. There are three fundamental problems with the State's argument. First, it is based on an incorrect standard of review. Second, it interprets the district court's

"finding" far more broadly than is reasonable. And third, it ignores the overwhelming evidence contrary to the district court's conclusion.

A. The Standard of Review is *De Novo*.

The State cites no authority supporting its view that the "clearly erroneous" standard of review applies to fact questions in First Amendment cases. Neither of the two standard-of-review cases cited by the State, Ans. Br. at 10, are First Amendment cases. Moreover, there is an obvious practical problem with the State's approach: it bestows upon a single district judge the authority to determine whether a certain means of expression is an adequate alternative. The *de novo* standard of review in First Amendment cases is meant to obviate the problems inherent in such an approach.

Consequently, "[i]n a First Amendment case, we have 'an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1219 (10th Cir. 2007) (*quoting Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984)). "Thus, we review the district court's ***findings of fact*** and its conclusions of law *de novo*." *Id.* (emphasis added). "We conduct our review '***without deference to the trial court.***'" *Id.* (emphasis added)

(*quoting Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995)). "This searching review is a consequence of the primacy of First Amendment speech protections ...." *Utah Licensed Beverage Ass'n. v. Leavitt*, 256 F.3d 1061, 1068 (10th Cir. 2001). This Court has adopted the independent review standard based on the reasoning in *Bose*. *See Lewis v. Colorado Rockies Baseball Club Ltd.*, 941 P.2d 266, 271 (Colo. 1997). Thus, the State's assertion that a deferential standard of review applies to the trial court's supposed factual finding is wrong.

B. The District Court Did Not Find Prop Cigarettes To Be An Adequate Alternative.

The basis for the district court's denial of injunctive relief was that theatrical smoking did not constitute expression. Tr. 131:16-24. Virtually as an aside, the court commented on the demonstration of a prop cigarette and noted that "[i]t was fairly realistic." But the court added that "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. 134:23-135:1. This demonstration took place in the witness chair of the courtroom, and not on a theatrical stage. The witness performing the demonstration – Judson Webb – also testified to the limits of these props and that their use "doesn't look real." *Id.* at 90:16-91:10. In any event, the court's statement that the props "could be utilized" is not a finding that they can fully

replace lighted cigarettes, particularly when the judge also revealed that he was unsure if the props are "a one-shot deal," which they essentially are. Tr. 91:8-10. The district court's statement, therefore, does not constitute a determination that prop cigarettes are an adequate alternative means of expression.

C. The Court's Conclusion Is Contrary to the Overwhelming Weight of the Evidence and is Clearly Erroneous.

Even if the district court's statement did constitute a factual finding that prop cigarettes are an adequate alternative, that finding is clearly erroneous. The State argues that the Theatres "offer no legitimate reason why it is clearly erroneous." Ans. Br. at 32. It thus ignores the Theatres' citation to the testimony of every witness who testified in the district court, all of whom had significant theatrical backgrounds and expertise, and stated that prop cigarettes are an inadequate substitute for lighted cigarettes. Op. Br. at 11. For example, an actor cannot portray a character inhaling or "drawing" on a cigarette if limited to use of the talcum prop. *Id.* In the face of such evidence, a contrary finding demonstrates the need for *de novo* review to protect free expression. And even if the district court's finding is evaluated under the more lenient standard, it is clearly erroneous.

III. THE BAN OTHERWISE FAILS THE *O'BRIEN* TEST.

A. A Complete Ban on Theatrical Smoking Is Not Consistent with the Legislative Intent.

Contrary to the State's assertion, there is nothing "disingenuous" about the Theatres' description of the legislative goal underlying the Ban. Ans. Br. at 21. The stated interest in the legislative declaration is to prevent involuntary exposure to second-hand smoke. C.R.S. § 25-14-202. "[P]reserv[ing] and improv[ing] the health, comfort and environment of the people of this state by eliminating exposure to tobacco smoke," *id.*, is consistent with that goal. But if the legislature intended to limit all second-hand exposure, as suggested by the State, then it would have prohibited smoking outdoors and in non-public areas, as well. Rather than the convoluted, overbroad interpretation of the legislative declaration advanced by the State, Ans. Br. at 20-22, the more logical view is that the legislature expanded the scope of the Ban so as to avoid the difficulty of determining whether a citizen has consented to second-hand exposure.

There is nothing inherently objectionable about such an approach, except when free expression is impacted. At that point, courts must determine whether the limit on free expression meets the requirements of *O'Brien*. That process requires an examination of the legislative intent, which leads back to the express

language of the declaration. And that express language begins by focusing on involuntary exposure.

Absent from the State's brief is a meaningful justification for preventing willing citizens from being exposed to theatrical smoking, other than the paternalistic argument that avoiding exposure is in their best interest. But that argument contradicts a second part of the legislative declaration, which expresses the need to balance health concerns with "unwarranted governmental intrusion into, and regulation of, private spheres of conduct and choice . . . ." The State's position does not strike an appropriate balance, in the context of free expression, by extending the Ban beyond involuntary exposure.

B. The Ban is Not Narrowly Tailored.

Rather than directly address the Theatres' argument that the Ban is not narrowly tailored, the State re-labels the argument as "least restrictive means," and argues tautologically that this is not the correct test. Ans. Br. at 25-27. The State also makes a "slippery slope" argument that party after party will challenge any restrictions "until there is no longer any possible regulation with a less restricted effect on speech." Ans. Br. at 28. In reply, the Theatres will simply reiterate that it is the State's burden to demonstrate narrow tailoring. *See* Op. Br. at 17-18; *Denver Publishing Co. v. City of Aurora*, 896 P.2d 306, 319 (Colo. 1995). Here,

the State can only do so by broadening the intent of the Ban to encompass protecting everyone – whether they choose to be protected or not – from exposure to indoor smoking. Obviously, if the purpose of the Ban is a total prohibition, rather than avoiding involuntary exposure, then only a total prohibition will achieve that purpose. But as the Theatres have already shown, the State's premise is erroneous, as is the conclusion it then draws.

C. The State's Outdoor Alternative is Inadequate.

While the State does not meet other parts of the *O'Brien* test, the biggest failure is its argument that there are ample adequate alternative means of expression. The State continues to assert that outdoor plays are one such alternative, Ans. Br. at 32, even going so far as to claim that outdoor theatrical smoking is not only allowed but "even encouraged." *Id.* at 42. No citation is provided for this encouragement. The State's failure to cite the record is matched by its failure to address the following: (a) all the Petitioners have indoor theaters; (b) it is unrealistic to suggest that a theater company wishing to present *Who's Afraid of Virginia Woolf?* can do so by moving to an outdoor venue. Red Rocks Amphitheater in December is not an adequate alternative.

Finally, as previously demonstrated, prop cigarettes are not an adequate alternative. Nevertheless, the State plunges ahead with this argument while

ignoring the danger it poses to the judiciary. Both the trial court and the court of appeals assumed the roles of playwright, director and actor in determining that prop cigarettes could be used. They substituted their judgment of how to portray theatrical smoking for that of witnesses actually engaged in this form of expression. The United States Supreme Court long ago expressed doubt about the wisdom of judges acting as news editors in determining what is newsworthy and of public interest. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) ("We doubt the wisdom of committing this task to the conscience of judges."). This Court should be equally reticent to assume the mantle of theatrical director at large.

IV. THE BAN VIOLATES THE STATE CONSTITUTION

In their opening brief, the Theatres referenced various factors applied by the Pennsylvania Supreme Court in determining whether to extend increased protection under its state constitution. Op. Br. at 24. The Theatres went on to assert that those factors justify extending more protection here under the Colorado Constitution. *Id.* at 24-25. The State ignores this analysis.

Instead, the State focuses primarily on two cases – *7250 Corp. v. Board of County Commissioners for Adams County*, 799 P.2d 917 (Colo. 1990) and *Marco Lounge, Inc. v. City of Federal Heights*, 625 P.2d 982 (Colo. 1981) – and makes the over-the-top statement that "[i]t 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 those cases. Ans. Br. at 40. Hyperbole is probably not helpful to this Court, but the Theatres could just as easily assert that it would be extraordinary to provide greater protection to the expressive aspects of nude dancing in strip clubs than to free expression in the Theaters' production of classic American plays. It is also worth noting that much of the case law extending constitutional protection to theatrical productions occurred as the result of the uproar over nudity in the presentation of the musical "*Hair*." *See, e.g., Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975).

The State emphasizes that all of the cases the Theatres cite as extending greater protection to free expression under state constitutions, involve nude dancing. In doing so, the State ignores the constitutional analysis set forth in those cases, and the refusal of other state courts to follow U.S. Supreme Court precedent that inadequately protected free expression.

In any event, expanded state constitutional protection for expression has occurred outside the context of nude dancing. For example, New York's highest court reviewed whether the government may invoke public nuisance laws to close a book store because of illegal sexual acts by the store's customers, *People ex rel Arcara v. Cloud Books, Inc.*, 503 N.E.2d 492 (N.Y. 1986), after the U.S. Supreme

Court held that closure of the store did not violate the First Amendment, 478 U.S. 697 (1986). On remand, the state court held that closure nevertheless violated New York's constitution. The court found the state had not proven that it had "chosen a course no broader than necessary to accomplish its purpose." 503 N.E.2d at 495.

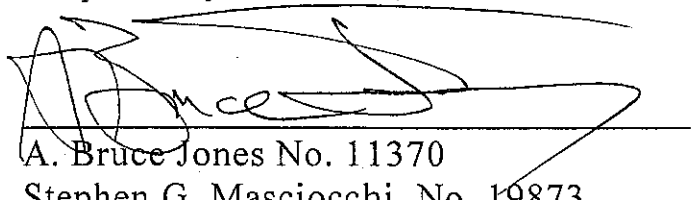
Obviously, nude dancing is different than selling books, which is different than theatrical productions. But despite these differences, a complete ban on a certain type of expression is constitutionally offensive in Colorado where "every person shall be free to speak, write or publish whatever he will on any subject . . . ." If this Court concludes that the Smoking Ban, as applied to theatrical smoking, does not violate the First Amendment based on *O'Brien*, it nevertheless should extend greater protection under the state constitution and rule in favor of the Theatres.

CONCLUSION

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

Dated: March 30, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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