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Colorado Court of Appeals, Div. 2 Opinion by Judge Bernard; Rothenberg and Carapelli, JJ., concurring Court of Appeals No.: 06CA2260 District Court, City and County of Denver Judge Michael A. Martinez, Presiding No.: 6CV10876	
Petitioners: **CURIOUS THEATRE COMPANY, a Colorado non-profit company; PARAGON THEATRE, a Colorado non-profit company; and THEATRE13, INC., a Colorado non-profit company,** **Respondents:** **COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT; and DENNIS E. ELLIS, Executive Director**	▲ COURT USE ONLY ▲ **CASE No.: 08-SC-351**
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BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF COLORADO

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*One of the truths we hold to be self-evident is that a government that tells its citizens what they may **say** will soon be dictating what they **think**. But in a country that puts such a high premium on freedom, we cannot allow ourselves to be the captives of orthodox, culturally imposed thinking patterns. Indeed, I can conceive no imprisonment so complete, no subjugation so absolute, no debasement so abject as the enslavement of the mind.*

Aguilar v. Avis Rent A Car Sys., Inc.,
980 P.2d 846, 895 (Cal. 1999) (Brown, J., dissenting)[1]
(emphasis in original)

*

Amicus Curiae American Civil Liberties Union of Colorado ("ACLU") submits this brief as a friend of the Court in the pending appeal of *Curious Theatre Co. v. Colo. Dep't of Public Health & Environment*, __ P.3d __, 2008 WL 732113 (Colo. App. Mar. 20, 2008), *cert. granted in part*, No. 08SC351,

[1] Justice Brown's dissent argues that the free speech clause of the California Constitution, which is virtually identical to the analogous provision of the Colorado Constitution, prohibits the issuance of an injunction under the California Fair Employment and Housing Act restraining a manager from using any derogatory racial or ethnic epithets directed at or descriptive of Latino employees. *See Aguilar*, 980 P.2d at 894 (citing CAL. CONST., art I, § 2 and *Dailey v. Superior Ct.*, 44 P. 458 (Cal. 1896)) (Brown, J., dissenting).

2008 WL 5064860 (Colo. Dec 02, 2008). In the second certified question[2], *i.e.*, this Court asked whether the Court of Appeals erred in holding that Article II, Section 10 of the Colorado Constitution provides no greater protection of expression than is available under the federal constitution. In this brief, the ACLU explains that the Colorado Constitution does indeed provide greater protection than the First Amendment, both as a general proposition and as applied in this case. As a result, the Colorado Clean Indoor Air Act ("the Smoking Ban") is unconstitutional under the Colorado Constitution as applied to displays of smoking by actors in theatrical productions.

I. INTEREST OF THE AMICUS CURIAE

The ACLU of Colorado is the state affiliate of a nationwide, non-partisan, non-profit organization with 300,000 members dedicated to protecting and advancing the federal and state constitutional and civil rights of all Americans. The Colorado affiliate was founded in 1952, and numbers approximately 10,000 members. The organization has long been active, both nationally and statewide, in First Amendment issues, and the

[2] The ACLU's brief here is limited to second *certiorari* question.

state affiliate has a particular interest in issues relating to the free speech guarantees of the Colorado Constitution. Because the ACLU of Colorado is dedicated to the constitutional rights of all Coloradoans, the organization has a unique perspective on the free speech rights of playwrights, actors, and theatrical producers, as well as the rights of the audience members in Colorado who wish to see and hear the performances staged by these speakers.

II. SUMMARY OF ARGUMENT

The provisions of Article II, Section 10 of the Colorado Constitution have long been held to extend greater protection of speech than does the First Amendment to the United States Constitution. These Colorado holdings, running from cases involving libel to obscenity, from access to public forums to privacy of book purchases, have arisen from and found their essential rationale in the text and historical context of the state constitutional provision adopted in 1876. That free speech clause was animated by the desire of the framers of the Colorado Constitution and the voters who adopted the charter to absolutely protect from any prior restraint any speech on a matter of public concern, imposing retrospective legal liability for such speech only when the speech

constitutes an "abuse" of the liberty. In the context of the numerous antecedent state constitutional provisions in other states that set out freedom of speech provisions similar or identical to Colorado's free speech clause, and on which Colorado's free speech clause was based, the history of these clauses demonstrates that the state legislature in Colorado may not enact a law that imposes liability for speech if the statute or regulation at issue imposes a "material burden" on truthful speech on matters of public concern. In this case, however, the State has indeed enacted such a law, impermissibly imposing a material burden on truthful speech on matters of public concern when such speech involves displays of smoking by actors in theatrical performances. As a result, the Smoking Ban may not, consistent with the Colorado Constitution, be applied against such displays.

III. ARGUMENT

A. As A Generic Proposition, There Can Be No Dispute That Article II, Section 10 Provides Greater Protection To Free Speech Than The Federal First Amendment.

At this late date in the evolution of the jurisprudence of the Colorado Constitution, there can be no dispute whatsoever that Article II, Section 10[3] provides greater protection for the freedom of speech in Colorado than does the First Amendment, as this Court has explained in more than a dozen cases. *See, e.g.*, *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 & 1061 (Colo. 2002); *CF&I Steel, L.P. v. United Steel Workers of Am.*, 23 P.3d 1197, 1200 (Colo. 2001); *Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 271-72 (1997); *Lorenz v. State*, 928 P.2d 1274, 1284 n.17 (Colo. 1996); *Denver Publ'g Co. v. City of Aurora*, 896 P.2d 306, 309 n.4 (Colo. 1995); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 58 (Colo. 1991); *People v. Ford*, 773 P.2d 1059, 1066

[3] The text of Colorado's free speech clause reads as follows:

> 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.

COLO. CONST., art. II, § 10 (1876).

(Colo. 1989); *Parrish v. Lamm*, 758 P.2d 1356, 1365 (Colo. 1988); *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 356 (Colo. 1985); *Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103, 1109 (Colo. 1983); *People v. Berger*, 185 Colo. 85, 89, 521 P.2d 1244, 1246 (1974); *People v. Vaughan*, 183 Colo. 40, 49, 514 P.2d 1318, 1323 (1973); *In re Hearings Concerning Canon 35*, 132 Colo. 591, 592-93, 296 P.2d 465, 467 (1956); *Fort v. People ex rel. Coop. Farmers' Exch., Inc.*, 81 Colo. 420, 430, 256 P. 325, 329 (1927); *Cooper v. People ex rel. Wyatt*, 22 P. 790, 798 (1889); *see also Holliday v. Regional Transp. Dist.*, 43 P.3d 676, 681 (Colo. App. 2001); *Pierce v. St. Vrain Valley Sch. Dist.*, 944 P.2d 646, 649 (Colo. App. 1997), *rev'd on other grounds*, 981 P.2d 600 (Colo. 1999).

Indeed, the generic proposition that Article II, Section 10 provides greater protection than the First Amendment has become so firmly entrenched in the opinions of Colorado's courts that the idea sometimes seems to have become unmoored from its textual basis, announced with almost *ipse dixit* faith and lacking reasoned analysis as to what the constitutional provision actually means in a particular case. *See, e.g.*, *Z-J Gifts D-2, LLC v. City of Aurora*, 93 P.3d 633, 638-39 (Colo. App. 2004) (recognizing that Article II, Section 10 has been held to provide greater liberty for sexually explicit speech in the obscenity context,

but then holding, without analysis, that the greater protections of the Colorado Constitution are inapplicable to zoning regulations).

In some cases, the doctrine of greater protection under Article II, Section 10 has become so deeply woven into Colorado law that the provision is no longer cited as the basis for rules of law that have become fundamental to Colorado's social intercourse. Thus, for example, in *Diversified Management* and its predecessor case *Walker v. Colorado Springs Sun*, this Court made clear that the Colorado Constitution requires application of the "actual malice" standard – *i.e.*, clear and convincing evidence of reckless disregard of the truth – in any libel case involving statements on matters of general or public concern, rather than in only those involving plaintiffs who are public figure or public official, which is the outer limit of the First Amendment requirement. *See Diversified Mgmt.*, 653 P.2d at 1106; *Walker v. Colo. Springs Sun, Inc.*, 188 Colo. 86, 96, 538 P.2d 450, 456 (1975), *overruled on other grounds in Diversified Mgmt.*, 653 P.2d at 1110. This rule – that actual malice applies in "public concern" cases as well as public official and public figure cases – forms the basis for myriad Colorado libel decisions. *See Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351, 1361 (Colo. 1983); *Bowers v. Loveland Publ'g Co.*, 773 P.2d 595, 596 (Colo. App. 1988); *Seible v. Denver Post Corp.*,

782 P.2d 805, 808 (Colo. App. 1989); *Lewis v. McGraw-Hill Broad. Co.*, 832 P.2d 1118, 1122-23 (Colo. App. 1992); *Smiley's Too, Inc. v. Denver Post Corp*, 935 P.2d 39, 41-42 (Colo. App. 1996), *Student v. Denver Post Corp.*, 1996 WL 756965, 24 Media L. Rep. 2527, 2529-30 (BNA) (Colo. App. Aug. 29, 1996); *Sky Fun 1, Inc. v. Schuttloffel*, 8 P.3d 570, 575 (Colo. App. 2000), *aff'd in part and rev'd in part on other grounds*, 27 P.2d 361 (Colo. 2001); *United Food & Commercial Workers Union v. Ute City Tea Party Ltd.*, 2000 WL 1575536, 28 Media L. Rep. 2075, 2078 (BNA) (Colo. Dist. Ct. (Pitkin Cty. Feb. 10, 2000); *see also Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 309 n.1 (10th Cir. 1981); *Quigley v. Rosenthal*, 327 F.3d 1044, 1058 (10th Cir. 2003); *Miles v. Ramsey*, 31 F. Supp. 2d 869, 875 (D. Colo. 1998); *Ramsey v. Fox News Network, LLC*, 351 F. Supp. 2d 1145, 1148 (D. Colo. 2005). Indeed, in requiring application of this form of strict scrutiny to libel claims pertaining to publications on matters of public concern, Colorado law has thereby held true to the original intent of Article II, Section 10, albeit without actually citing the constitutional provision, by focusing protection on statements concerning public affairs. *See Cooper*, 22 P. at 798 (holding that one of the central objects of this provision is to "guard the press against the trammels of political power, and secure to the whole people

a full and free discussion of public affairs.") (quoting *State v. Morrill*, 16 Ark. 384, 403 (1855)).

Colorado's decisions holding that Article II, Section 10 provides greater protection to speech interests than does the federal constitution are just one branch in a well-watered tree of state constitutional jurisprudence recognizing any number of areas where the Colorado Constitution provides greater protections of liberty than does the United States Constitution. *See, e.g.*, *People v. Rodriguez*, 112 P.3d 693, 698 & 702 (Colo. 2005) (holding that Article II, Section 23 ensures a right to a jury of twelve in all criminal cases in courts of record); *Tattered Cover*, 44 P.3d at 1056 (Colo. 2002) (rejecting the limits of *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1979), and holding that Colorado Constitution requires a more substantial justification from the government than is required by the Fourth Amendment when law enforcement officials attempt to use a search warrant to obtain the purchase records of the customer of an innocent, third-party bookstore); *People v. Haley*, 41 P.3d 666, 671-72 (Colo. 2001) ("[T]his court has, for over a century, concluded that our constitution provides broader protection to private property rights than does the United States Constitution."); *People v. Mason*, 989 P.2d 757, 759 (Colo. 1999) ("We have afforded suspects in Colorado greater rights than are available under the

federal Constitution."); *Jackson v. State*, 966 P.2d 1046, 1054-55 (Colo. 1998) (affirming injunction to protect a county sheriff's right to a fixed salary as mandated by Article XIV, Section 15 of the Colorado Constitution); *Cent. Colo. Water Conservancy Dist. v. Simpson*, 877 P.2d 335, 347 (Colo. 1994) (citing the established "principle that the takings clause of our constitution prohibits governmental conduct that might not be deemed a taking for purposes of the federal Constitution"); *People v. May*, 886 P.2d 280, 282 (Colo. 1994) (holding under Article II, Section 7 that a dog sniff of an express mail package was a search); *People v. Young*, 814 P.2d 834, 842-43 (Colo. 1991)("We have recognized and exercised our independent role on a number of occasions and on several have determined that the Colorado Constitution provides more protection for our citizens than do similarly or identically worded provisions of the United States Constitution."), *superseded on other grounds by statute*, § 16-12-102(1), Colo. Rev. Stat. (1993), *as recognized in People v. Vance*, 933 P.2d 576 (Colo. 1997); *People v. Lamb*, 732 P.2d 1216, 1220-21 (Colo. 1987) (holding under Article II, Section 25 that Colorado's protection of procedural due process is broader than that under the federal constitution, and that in Colorado, a person must receive notice of a subpoena to the person's bank for production of the person's bank records); *People v. Unruh*, 713 P.2d 370, 377-

78 (Colo. 1986) (holding under Article II, Section 7 that a dog sniff search of a safe taken by a burglar from the defendant's home was a search); *People v. Oates*, 698 P.2d 811, 815-16 (Colo. 1985) (holding that Article II, Section 7 ensures protection of a reasonable expectation of privacy in commercially purchased goods despite no corresponding right under the Fourth Amendment); *People v. Corr*, 682 P.2d 20, 27-28 (Colo. 1984) (holding that under Article II, Section 7 of the Colorado Constitution a reasonable expectation of privacy exists in telephone toll records); *People v. Sporleder*, 666 P.2d 135, 141-42 (Colo. 1983) (holding that Article II, Section 7 ensures protection of a reasonable expectation of privacy in a telephone pen register despite no corresponding federal protection); *Charnes v. DiGiacomo*, 200 Colo. 94, 103, 612 P.2d 1117, 1124 (1980) (holding that Article II, Section 7 ensures protection of a reasonable expectation of privacy in bank records); *Saxe v. Bd. of Trustees of Metro. State College*, 179 P.3d 67, 70-73, 79 (Colo. App. 2007) (reversing the trial court's dismissal of claims for injunctive relief under the Colorado Constitution's equal protection provision in action brought on behalf of tenured professors at the college), *cert. denied*, No. 07SC301, 2008 WL 698945 (Colo. Mar. 17, 2008); *Sanger v. Dennis*, 148 P.3d 404, 419 (Colo. Ct. App. 2006) (affirming injunction against administrative rule limiting political contributions

from unions, on the basis of union members' claims under Article XXVIII of the Colorado Constitution).

Fundamentally, therefore, the weight of precedent flowing from the Colorado Constitution clearly requires a recognition in this case that Article II, Section 10 provides greater protection of speech than does the First Amendment.[4] *See Bock*, 819 P.2d at 59 ("Colorado's tradition of ensuring a broader liberty of speech is long. For more than a century, this Court has held

[4] In this regard, a particularly salutary effect of the Court's resolution of this issue, albeit one not directly presented by the *certiorari* question, will be to drive a stake through the heart of the benighted argument gripping the federal courts in Colorado that there is no private cause of action for injunctive relief under Article II, Section 10. *See, e.g.*, *Arndt v. Koby*, 309 F.3d 1247, 1255 (10th Cir. 2002); *Greeley Publ'g Co. v. Hergert*, No. 05-00980, 2006 WL 1581754, at *15 (D. Colo. June 6, 2006); *Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1161-62 (D. Colo. 2001); *Brammer-Hoelter v. Twin Peaks Charter Academy*, 81 F. Supp. 2d 1090, 1097-98 (D. Colo. 2000); *Vanderhurst v. Colo. Mountain College Dist.*, 16 F. Supp. 2d 1297, 1304 (D. Colo. 1998). This Court's decisions in *Bock* and *Tattered Cover* simply cannot be squared with the notion that injunctive relief is unavailable under Article II, section 10. *See Bock*, 819 P.2d at 63 (directing that summary judgment be entered in favor of the plaintiffs' claim for injunctive relief under Article II, section 10); *Tattered Cover*, 44 P.3d at 1061 (granting injunctive relief under Article II, section 10). Thus, any ruling in this case in favor of greater protection of speech under the Colorado Constitution would do well to explicitly note the error of the argument in the cited federal cases, which contend, erroneously, that there is no private cause of action for injunctive relief under Article II, Section 10.

that Article II, Section 10 provides greater protection of free speech than does the First Amendment.").

B. The Court Of Appeals' Distinction Based On A Public Health Rationale For The Smoking Ban Is Devoid Of Any Textual Basis in Article II, Section 10.

In this case, the Court of Appeals asserted that Colorado's well-established doctrine of greater protection for speech under the Colorado Constitution does not and should not apply in this case. *See Curious Theater*, 2008 WL 732113, at *12. The Court of Appeals reached this conclusion ostensibly because of its view that the greater protection of speech under the Colorado Constitution has not previously been applied to regulations intended to promote public health. *Id.* This rationale, however, was not based on any textual analysis of Article II, Section 10 or its original intent; and indeed, the text and history of this provision simply does not support reliance on a rationale grounded on "a state interest connected with public health." *Id.*

In its earliest pronouncement on the intent of this constitutional provision, announced within a few years of the original drafting and passage of the Colorado Constitution, this Court declared that one of the fundamental rationales for Colorado's broader free speech clause is to "secure to the whole people a full and free discussion of public affairs." *Cooper*, 22 P. at 798; *see*

also Bock, 819 P.2d at 58. This declaration in *Cooper* arises in a case testing the constitutionality under Article II, Section 10 of a conviction of a newspaper publisher for contempt of court for publishing stories that were found to have been intended to interfere with a pending criminal case. *See Cooper*, 22 P. at 799.

In analyzing the constitutional issue, this Court reviewed the decisions of other states with similar or identical free speech clauses in their constitutions. The Court noted that these state constitutional provisions were intended, as was Colorado's, to secure to the people the ability to comment freely on public affairs and to hold their public officials to account. *See id.* 22 P. at 796-97 (citing *Storey v. People*, 79 Ill. 45 (1875); *Ex parte Hickey*, 12 Miss. (4 S. & M.), 1845 WL 1999 (1845)). Thus, for example, in *Ex parte Hickey*, the Mississippi Supreme Court held that "the crucible of our state constitution" has forged an inviolate right of the public, and the press in particular, to criticize the judiciary even if such criticism might otherwise be considered a contempt of court under the English common law. 12 Miss. (4 S. & M.), 1845 WL 1999, at *17.

Although *Cooper* upheld the publisher's conviction, this Court also forthrightly declared that Colorado's free speech clause ensures that the people

of the state may "fully and freely discuss the fitness or unfitness of all candidates for the positions to which they aspire; criticise freely all decisions rendered, and by legitimate argument establish their soundness or unsoundness; comment on the fidelity or infidelity with which judicial officers discharge their duties." 22 P. at 799. Indeed, in its order considering a petition for rehearing, Chief Justice Helm reiterated for this Court that under Article II, Section 10, "The right of the press, without fear of punishment for contempt, in the interest of the public good, to challenge the conduct of parties, jurors, and witnesses, and to arraign the judge himself at the bar of public opinion, in connection with causes that have been fully determined, is not denied by the decision filed in this case. . . . Let our position not be misunderstood. We recognize no limitation upon the privilege of newspapers to fairly and reasonably review and comment upon court proceedings from day to day as they take place. We do not shield judges or parties, jurors or witnesses, from hostile criticism by the press." *Cooper*, 22 P. at 802.

This animating idea – that speech on public affairs lies at the heart of the protections of the state constitutional free speech clause – has been carried forward by this Court in cases involving such varied applications as photographic access to the state's courts, distributing leaflets in privately owned

shopping malls and speech in newspapers. *See In re Hearings Concerning Canon 35*, 132 Colo. at 592-93, 296 P.2d at 467; *Bock*, 819 P.2d at 64; *Diversified Mgmt.*, 653 P.2d at 1109. Throughout all the long history of this evolution of Colorado's free speech jurisprudence, the essential basis for greater protection of the speech at issue is the importance of protecting the freedom to discuss and debate matters of public concern. *See, e.g.*, *United Food*, 28 Media L. Rep. at 2080-81 (BNA) (applying the "actual malice" strict scrutiny standard to libel claims arising from speech concerning union organizing efforts at the Aspen City Market grocery store)*; see also AAFCO Heating & Air Conditioning Co. v. Northwest Pubs., Inc.*, 321 N.E.2d 580, 585-86 (Ind. App. 1974) (holding that the identical provision of the Indiana Constitution's free speech clause requires protection of debate on matters of public concern by imposing the strict scrutiny actual malice standard for "public concern" libel claims, rather than for only public official or public figure claims under the First Amendment).

This proposition that greater protection should be afforded to speech on matters of public concern harkens back to the specific history of this particular constitutional provision, which was present in virtually identical form in twenty-six other state constitutions at the time the Colorado Constitution was drafted in 1876. *See Ford*, 773 P.2d at 1065 n.6. In this regard, for example, the 1836

antecedent of the Texas Constitution had virtually the same language, reflecting the desire of Texans at that time to preserve their ability to speak freely on matters of public affairs in the face of perceived maltreatment from the Mexican government. *See Davenport v. Garcia*, 834 S.W.2d 4, 7 (Tex. 1992). Indeed, no less a figure in Texas history as Steven Austin championed the need for strong protection of free speech in light of his struggles with the Mexican government. *See id.* And, over the course of Texans' political struggle during the following forty years, leading up to Texas' 1876 constitution, this necessity for broad protection of the freedom of speech continued to animate the Texas Constitution: "Continued inclusion of an expansive freedom of expression clause and rejection of more narrow protections indicates a desire in Texas to ensure broad liberty of speech." *Id.* at 8.

Of course, Colorado's history from its early days may not reflect so stark a struggle as Texas', but that history, especially including the efforts to gain statehood,[5] demonstrated to Colorado's founders the central importance of the

[5] *See* Sandra I. Rothenberg, *The Birth of Free Speech in Colorado* at 5 (1998) (LLM dissertation at University of Virginia, on file with Colorado Supreme Court Library, KFC 2212.S6.B67) ("Because its loyalties were not firmly committed to either the Union or the Confederate cause, the line between free

Continued on following page . . . .

freedom of speech. In light of this historical understanding of the underpinnings of Colorado's free speech clause, the appropriate analysis of the constitutionality of a measure under Article II, Section 10 is not whether the speech at issue affects public health, but rather whether the speech involves a matter of public concern. *See Bock*, 819 P.2d at 58-59. In this context, a useful hypothetical scenario illustrates the application of Article II, Section 10: Assume the General Assembly were to enact a statute that prohibits any person from disclosing the identity or publishing the photograph of a state health inspector, on the rationale that such disclosure would prevent state health inspectors from making unannounced or under-cover inspections to protect the public's health. There is no question that such a statute would run aground directly on the explicit language of Article II, Section 10 mandating that "No law shall be passed impairing the freedom of speech." COLO. CONST., art. II, § 10; *see also K. Gordon Murray Prods., Inc. v. Floyd*, 125 S.E.2d 207, 213 (Ga. 1962) (holding that virtually identical language of the Georgia Constitution prohibits a city from

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speech and insurrection was often blurred.") As Judge Rothenberg noted in her dissertation, "early Colorado court decisions were also influenced by the particular manner in which this state was settled and by its Frontier tradition." *Id.* at 3.

enforcing a licensing regime for any exhibition of movies: "The words of the Constitution 'no law shall ever be passed to curtail, or restrain' [are] irreconcilable with any law, including a city ordinance that does curtail or restrain.").

As is apparent from this hypothetical and the case law in other states, any statute in Colorado that prohibits the dissemination of truthful speech on a matter of public concern is subject to the strictest level of constitutional scrutiny under the Colorado Constitution.

C. The Applicable Standard Under Article II, Section 10 Is Whether The Smoking Ban Imposes A Material Burden On A Core Constitutional Value.

Understanding now that the expressive conduct of smoking on stage in a theatrical performance is speech, and further understanding that such speech, when communicated on a matter of public concern, is protected by Article II, Section 10 of the Colorado Constitution, the only remaining issue for the Court in this case is to determine what locution of a strict scrutiny test should be developed to measure the constitutionality of laws or regulations that attempt to impair speech.

In this regard, the most thoughtful analysis of the impact of the different text of a state constitutional free speech clause, in contrast to the text of the First

Amendment, comes from Indiana Chief Justice Randall T. Shepard.[6] The analysis appears in his opinion for the Indiana Supreme Court in a case involving the constitutionality, under the Indiana Constitution, of a conviction for disorderly conduct, where the defendant's sanctioned conduct was speech on public affairs. *See Price v. State*, 622 N.E.2d 954 (Ind. 1993). In *Price*, Chief Justice Shepard reviewed the jurisprudential foundations of Indiana's free speech clause, which is virtually identical to Colorado's. *See* 622 N.E.2d at 958-60. The Indiana Supreme Court concluded that under the Indiana free speech clause, "the State may not punish expression when doing so would impose a material burden upon a core constitutional value." *Id.* at 960. In this regard, the court explained that what constitutes a "material" burden does not involve a weighing of government interests in public health, welfare and safety against individual liberty interests, "nor is it influenced by the social utility of the state action at issue. Instead, we look only at the magnitude of the

[6] *See also* Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 440 (1996) ("The center of American constitutionalism is . . . the states' diverse experiments in formulating innovative constitutional principles – through both amendment and interpretation – to address next-generation fundamental values. . . .").

impairment. If the right, as impaired, would no longer serve the purpose for which it was designed, it has been materially impaired." *Price* at 960 n.7.

In its effort to find content and meaning to both the privilege and abuse sections of the Indiana Constitution's free speech clause, the opinion in *Price* stands as a beacon for this Court in crafting its own test for the identical language of the Colorado Constitution's free speech clause. Thus, under Article II, Section 10, the test for the constitutional validity of the Smoking Ban is whether the statute imposes a "material burden" on the core value of speech on a matter of public concern. *See Price*, 622 N.E.2d at 960.

This test is in fact different from and materially more protective of speech than is the so-called *O'Brien* test that applies under the First Amendment. The fact, however, that a different test should apply under Article II, Section 10 than applies under the First Amendment simply underscores the extent to which the different constitutional provisions emanate from different historical traditions and provide differing levels of protection. *See Davenport*, 834 S.W.2d at 12 ("When a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights.").

D. The Smoking Ban Impermissibly Imposes A Material Burden On The Core Constitutional Value Of Protecting Speech On A Matter Of Public Concern.

In applying the appropriate Colorado constitutional standard to the Smoking Ban, the Court should be guided by the long-standing doctrine that the government bears the burden of proving the constitutionality of any statute or regulation that impairs protected speech. *See People v. Bryant*, 94 P.3d 624, 628 (Colo. 2004); *Seven Thirty-Five E. Colfax*, 697 P.2d at 370. Thus, the State must carry the burden in this case to provide sufficient evidence to survive the applicable strict scrutiny test, *i.e.*, that the Smoking Ban does not impose a material burden on speech involving a matter of public concern. *See Price*, 622 N.E.2d at 960.

In the proceedings below, the State presented no evidence whatsoever to show that the Smoking Ban did not impair speech on matters of public concern. Instead, the plaintiffs created a more than sufficient record to demonstrate that the Smoking Ban would indeed impair speech on matters of public concern. Indeed, such well-known and award-winning plays as David Mamet's *Glengarry Glen Ross* and Edward Albee's *Who's Afraid of Virginia Woolf?* use smoking as essential tools in their narrative structure and political commentary. That these theatrical works, as well as virtually any other theatrical work,

involve commentary on public affairs or matters of public concern cannot be disputed. *See Williams v. Cont'l Airlines, Inc.*, 943 P.2d 10, 17 (Colo. App. 1996) ("The boundaries of public concern cannot be readily defined, but must be determined on a case-by-case basis. Generally, a matter is of public concern whenever it embraces an issue about which information is needed or is appropriate, or when the public may reasonably be expected to have a legitimate interest in what is being published.") (internal quotations omitted); *Lewis*, 832 P.2d at 1121 (holding that speech pertains to a matter of public concern when it involves "the use of names, likenesses or facts in giving information to the public for purposes of education, amusement, or enlightenment when the public may reasonably be expected to have a legitimate interest in" the subject). As a result, the use and display of smoking as narrative devices in these plays and other theatrical performances falls within the core value of Article II, Section 10, which is commentary on matters of public concern. *See Bock*, 819 P.2d at 60.

In light of the state of the record in this case, there can be only one conclusion: the Smoking Ban imposes an impermissibly material burden on the core value of speech on a matter of public concern. As a result, the Smoking Ban must be struck down as applied to displays of smoking by actors in

theatrical performances. Enforcing the statute's prohibitions in such circumstances violates of Article II, Section 10 of the Colorado Constitution.

IV. CONCLUSION

For the foregoing reasons, the ACLU respectfully submits that this Court must reverse the judgment of the Colorado Court of Appeals as being inconsistent with the historical and fundamental protections of free expression enshrined in the Colorado Constitution.

RESPECTFULLY SUBMITTED this 26th day of January, 2009.

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify this Brief of Amicus Curiae American Civil Liberties Union of Colorado contains 5,262 words, as counted by Microsoft Word's word-processing system, including headers, footnotes, and quotations.

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CERTIFICATE OF SERVICE

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