SUPREME COURT, STATE OF COLORADO
Case No. 94SA36

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

THE DENVER PUBLISHING COMPANY, d/b/a, the Rocky Mountain News,

Plaintiffs-Appellees

v.

CITY OF AURORA, COLORADO; Paul E. Tauer, in his official capacity as Mayor of the City of Aurora, Colorado; and James Everett, in his official capacity as Chief of Police of the City of Aurora, Colorado,

Defendants-Appellants

Appeal from Arapahoe County District Court,
Case No. 93CV2451,
The Honorable John P. Lepold, Judge

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I. Issues Presented for Review

Whether the Arapahoe County District Court erred in applying a "strict scrutiny" standard to Aurora's ordinance concerning solicitation on or near streets and highways, thereby establishing the probability that the ordinance would be declared unconstitutional in violation of the plaintiff's right to free speech. Whether the Arapahoe County District Court erred in determining medians and the travelled lanes of roadways to be traditional public fora for purposes of First Amendment analysis.

II. Statement of the Case

The League hereby adopts and incorporates by reference the statement of the case contained in the opening brief of the Appellants.

III. Summary of Argument

The Aurora ordinance is essentially a regulation of particular type of conduct or activity, to wit the act of people wading into traffic to engage in sales and solicitations with passing motorists, and is facially neutral as to the content of any speech which may accompany such conduct. At most it has only an incidental effect on speech. As such it is not unlike hundreds of other ways municipalities regulate activity in public streets. The standards for evaluating this sort of exercise of the police power were laid down long ago in U.S. v. O'Brien, 391 U.S. 367, 20 L.Ed. 2d 672, 88 S.Ct. 1673 (1968) and have been applied consistently by both federal and

Colorado courts ever since. The trial court erred in either ignoring or misapplying the O'Brien standard and instead applying a "strict scrutiny" standard to Aurora's ordinance. Furthermore, of secondary importance to the disposition of this case, the court erred in finding medians and travelled lanes of roadways to be traditional public fora for the exercise of First Amendment Rights.

IV. Argument

A. Municipalities have traditionally enjoyed a broad prerogative to regulate traffic and the use of the public streets. This regulation takes many different forms, all of which would be seriously undermined by the standard of review applied by the trial court.

It would not be an exaggeration to say that the use of public streets is the most traditional, the most conventional, the most commonplace field of municipal regulation. Acting under their general police power, plenary home rule powers, and the broad enabling authority of Section 31-15-702 (1) (a) (VI) and (VII)[1], cities adopt and enforce a myriad of ordinances to ensure the safe and convenient flow of motor vehicles and pedestrians on the streets. Although the principle objective of these regulations is traffic safety, many such ordinances may be said to implicate First Amendment rights in some way, given the fact that the streets simultaneously serve as both a conduit for traffic and a forum for exercise of the freedom of expression. As the

[1] The statute reads: "(1) The governing body of each municipality has the power . . .(VI) to regulate and prevent the use of streets, parks and public grounds for signs. Signposts, awnings, awning posts, and power and communication poles, and for posting handbills and advertisements; to regulate and prohibit the exhibition and carrying of banners, placards, advertisements, or handbills in the streets or public grounds or upon the sidewalks; and to regulate and prevent the flying of flags, banners, or signs across the streets or from houses; (VII) to regulate traffic and sales upon the streets, sidewalks, and public places and to regulate the speed of vehicles, cars, and locomotives within the limits of the municipality."

U.S. Supreme Court recently observed, "The government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable." Ladue v. Gilleo, 62 LW 4477 (Decided June 14, 1994).

It appears to be undisputed in this case that the Aurora ordinance at issue is, in a large sense, not unlike any other ordinance which regulates the behavior and activity of certain persons using the streets, adopted for the purpose of protecting the health, safety and welfare of the public at large. No one, including the district court, seems to dispute the legitimate and substantial interest which Aurora or any other city has in traffic safety. The parties diverge, however, on the manner in which the ordinance's purely incidental effects on free speech must be evaluated.

The League wishes to underscore for the court the extremely wide array of common street regulations which may be said to have an incidental effect on speech, and which therefore will be affected by the outcome of this case. To name just a few: many different types of regulations on transient merchants, everything from push carts to ice cream trucks, addressing how, when and where vehicles may be deployed and parked, the use of noisemakers and other advertising devices, obstructions of streets and sidewalks, etc.; street franchise requirements for telecommunications utilities and others; regulation of vehicular noise; regulations and prohibitions relating to the posting of signs in the public right-of-way and other sign laws which are adopted in the name of traffic safety; requirements for street closure permits and parade permits; etc.

In an astounding and unprecedented development, the trial court in this case has ruled that such ordinances shall now be subject to "strict scrutiny." Presumably, this means that the whole array of regulations involving the public streets must henceforth be justified by a compelling government interest, not merely an "important" or "substantial" government interest as has been assumed to be the standard in the past.

B. The Aurora ordinance is a "content neutral" regulation of a particular type of conduct and has only an incidental effect on speech, and therefore it should be subject to the standard of review set forth in U.S. v. O'Brien.

In the interest of traffic safety and the safety of those whom it purports to regulate, the Aurora ordinance prohibits *all* forms of solicitations for money in traffic, *regardless of the purpose for which the cash solicitation is being made.* The ordinance does not discriminate in favor of cash solicitations for some purposes but not others. It does not purport to regulate what the solicitor may say or how he may express himself to induce a sale or the content of his speech at all. It simply says, "For the sake of everybody's safety, stay out of the middle of the street!"

Accordingly, in the face of a First Amendment challenge, this ordinance must be evaluated in light of the standards laid down in U.S. v. O'Brien, *supra,* as adopted by this court in Williams v. Denver, 622 P.2d 542 (Colo. 1981). The appropriate framework for reviewing a viewpoint neutral exercise of the police power is as follows:

> "(A) government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

The U.S. Supreme Court has consistently applied the O'Brien test to a variety of content-neutral time, place and manner restrictions on speech, e.g. Clark v. Community for Creative Non-Violence, 468 US 288, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984); City Council v. Taxpayers for Vincent, 466 US 789, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984); U.S. v. Albertini, 472 US 675, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985); Ward v. Rock Against Racism, 491 US 781, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989).

This court has agreed that the O'Brien test provides the proper standard for evaluating an ordinance which is merely a "regulation of conduct" but which "threatens First Amendment rights," Williams v. Denver, *supra,* at 546. Williams and its progeny, most notably City of Lakewood v. Colfax Unlimited, 634 P.2d 52 (Colo. 1981) demonstrate that this court has established a clear dichotomy between content neutral ordinances which merely regulate the time, place and manner of speech, as contrasted to ordinances which purport to regulate the content of what is being expressed.

Both Williams and Colfax Unlimited, like some of the U.S. Supreme Court jurisprudence on this issue, are cases involving signs and billboard regulations. The League would submit that these decisions are very much on point with the facts in this case, because the principal, purported rationale for sign regulations is often traffic safety and, if anything, they have an even more dramatic "incidental effect" on speech than the ordinance in this case.

The decision in Colfax Unlimited illustrates the dichotomy between content-based and content-neutral regulations. In reviewing a host of provisions in the Lakewood sign code, some of which purported to limit signs expressing "ideological messages" this court said, "Although ideological expression is subject to reasonable time place and manner regulations, few governmental interests--and none advanced in this case--are sufficiently weighty to justify restrictions on the content of ideological speech." *Supra,* at 62 (citations omitted). On the other hand, the court also said, "We find nothing objectionable in the provisions which merely limit the size, type, and setback of signs conveying ideological messages. These neutral restrictions which are narrowly drawn to promote the City's traffic safety and aesthetic interests impose only an incidental burden on First Amendment freedoms." *Supra,* at 63.

The court did indicate in Colfax Unlimited that a municipality must demonstrate a "substantial interest justifying (an) ordinance which demonstrably impinges on First Amendment freedoms," *supra* at 65; however, this is a far cry from the compelling interest standard which would presumably accompany the novel "strict scrutiny" review announced by the trial court in this case. Moreover, the court in Colfax Unlimited was ultimately deferential to the city, holding "The choice of reasonable time, place and manner regulations is within the legislative prerogatives" of the city council, *supra* at 71.

And if the O'Brien mode of analysis was good enough for this court for an ordinance so pointedly directed at ideological expression, it should certainly be adequate for an ordinance such as Aurora's which is broadly addressed to the solicitation of sales. "Speech proposing a

commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression," City of Cincinnati v. Discovery Network, 507 US ____, 123 L. Ed. 2d 99, 113 S. Ct. (1993), citing Ohralik v. Ohio State Bar Association, 436 US 447 (1978).

It is difficult to discern in this case whether the trial court supplanted the O'Brien standard with a strict scrutiny standard (the court certainly used the term "strict scrutiny" although the term is not mentioned in any of the time, place and manner precedents cited above) or if the court simply misapplied the O'Brien test to the facts of this case (the trial court did cite O'Brien in passing and seemed to acknowledge some of its requirements). A point by point review of the O'Brien standard as it should be applied to the Aurora ordinance is in order.

Viewpoint or content neutrality. The trial court specifically found that the Aurora ordinance was aimed at the "secondary effect of the hawker's activity" and did not violate principles of content neutrality. Interestingly, the court also observed that the Plaintiff was not even claiming that the ordinance constitutes an attempt at censorship. (Instead, in misplaced reliance on City of Cincinnati v. Discovery Network, *supra,* the plaintiff apparently attempted to ~~agree~~ argue that an ordinance which regulated selling in the streets was somehow (hypothetically) discriminatory because it would not also regulate the act of giving away items in the streets. The trial court rejected this argument.)

Important or Substantial Government Interest. The trial court did acknowledge that traffic safety concerns were legitimately at issue in the case, but did not clearly apply the

O'Brien standard. Nevertheless, given that this court has clearly found traffic safety to be an important and substantial interest in cases such as Williams v. Denver, *supra,* Aurora's reliance on this rationale would appear to be unassailable.

Government interest is unrelated to suppression of free expression. The trial court apparently overlooked this criterion altogether. However, it is clear from the record that the purpose of the Aurora ordinance is to protect life and limb and to keep traffic moving efficiently, not to suppress speech.

Restriction on speech no greater than essential to furtherance of government interest. (In Lakewood v. Colfax Unlimited, this Court also seemed to require that a time place and manner regulation leave "ample alternative channels for communication," *supra* at 62; see also Ladue v. Gilleo, *supra.)* Here, the trial court erred in two distinct ways, first by substituting its own judgement about what was "essential" to further Aurora's interest, and second, in a fit of hyperbole, finding that the plaintiff in this case had no reasonable alternative means of communication. In second guessing the Aurora city council on how narrowly tailored the ordinance should have been, the trial court acknowledged the holding of the U.S. Supreme Court in U.S. v. Albertini, *supra,* then proceeded to ignore it. In Albertini the court said:

> "Regulations that burden speech incidentally or control the time place and manner of expression must be evaluated in terms of their general effect. Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. Instead, an incidental burden on speech is no greater than essential, and therefore permissible under O'Brien so long as

> the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Supra* at 472 US 688-89, 86 L. Ed. 2d 548.

The trial court rejected this highly deferential standard because Albertini dealt with speech on a military base; however, the U.S. Supreme Court did not give any indication that its reasoning should be limited only to military bases. Indeed, the Supreme Court later adopted the Albertini standard for noise regulations in a public park, disapproved a lower court's "sifting through all the available or imagined alternatives," and categorically rejected a "less-restrictive-alternative analysis" in Ward v. Rock Against Racism, *supra.* In that case, the court flatly declared:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place and manner of protected speech must be narrowly tailored to serve the government's legitimate, content neutral interests but that it need not be the least restrictive or least intrusive means of doing so." 491 US at 798; 105 L.Ed. 2d at 680.

Lest there be any confusion in Colorado, this court should also expressly adopt the Albertini/Ward standard for this and future time, place and manner cases.

In this case, the trial court seemed to confuse the medium (i.e. wandering into traffic to make a solicitation) with the message (i.e. the solicitation itself), and therefore apparently mischaracterized the Aurora ordinance as a "total ban" on a particular type of speech. However,

as the U.S. Supreme Court observed while *upholding* a total ban of sign posting on public property in City Council v. Taxpayers for Vincent, *supra,* "Here, the substantive evil is not merely a possible by-product of the activity, but is created by the medium of expression itself. . . . (T)herefore, the application of the ordinance in this case corresponds precisely to the substantive problem which legitimately concerns the city. The ordinance curtails no more speech than is necessary to accomplish its purpose." 466 US 810, 80 L. Ed. 2d 790. Exactly the same analysis should apply to the Aurora ordinance.

The trial court's finding of "no reasonable alternative means of communication" defies the text of the ordinance itself, the evidence on the record, and common sense. Excepting medians or travel lanes, the ordinances leaves hawkers free to conduct their business elsewhere along the streets and highways or on any other public property for that matter. Moreover, the particular plaintiff in this case must somehow be getting its "speech" across to potential customers, given the never ending refrain (repeated through a variety of media) boasting that the Rocky Mountain News leads the region in circulation.

Properly applying the O'Brien standard and the numerous other precedents governing content neutral time, place and manner regulations, this court should reverse the judgement of the trial court. See: Acorn v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986); U.S. Labor Party v. Oremus, 619 F.2d 683 (7th Cir. 1980), upholding ordinances substantially similar to the Aurora ordinance.

C. The trial court erred in applying a "strict scrutiny" analysis to Aurora's ordinance.

The strict scrutiny standard would only appear to be appropriate for evaluating regulations which target particular speech content (e.g. obscenity) and when an equal protection claim is mounted as in Tattered Cover Inc. v. Tooley, 696 P.2d 780 (Colo. 1985), or perhaps when an entire category of speech (e.g. political leafletting) is totally barred from a traditional public forum as in Bock v. Westminster Mall, 819 P.2d 55 (Colo. 1991). However, as discussed above neither of these circumstances exist in this case. Content neutral time, place and manner regulations are fundamentally different and are analyzed according to an entirely different paradigm.

Even in a case such as Bock v. Westminster Mall, even while this court was reaffirming the special status of expressive rights under the Colorado Constitution, the court recognized the distinction for time, place and manner regulations and said the mall owner would be free to adopt them, 819 P.2d at 63.

This court should expressly reject the applicability of strict scrutiny analysis to content neutral time, place and manner regulations.

D. The trial court erred in determining travelled lanes and medians to be traditional public fora.

The League hereby adopts and incorporates by reference the Appellant's arguments on

the status of medians and travel lanes under traditional public forum analysis, with the following additional observations.

In a sense, the determination of whether or not medians or travel lanes are public fora is somewhat secondary to the proper outcome of this case. Certainly, if the court were to determine that these area were not public fora, such a decision would be dispositive because Aurora would then have free reign to heavily regulate or prohibit speech in such locations. However, even if this court were to determine that the medians and lanes were public fora, it would in no way undermine the various arguments made herein. Cases such as Taxpayers for Vincent and Ward v. Rock Against Racism uphold reasonable time place and manner restrictions under the O'Brien standard precisely in traditional public fora, i.e. streets and parks respectively, and, applying the same standards, this court should follow suit in approving the Aurora ordinance.

It is axiomatic that streets are traditional public fora; however modern streets take many different forms ranging from cul-de-sacs to superhighways, and consist of many different components including sidewalks, curbs, drainage structures, signs and signals, medians, guardrails and other safety devices, light poles, landscaping and benches. To reiterate, use of streets and appurtenant facilities is perhaps the most prominent subject of municipal regulation. Under these circumstances, it is simplistic to argue that the entire assemblage of area and facilities which are physically part of a modern city street system are fair game for anyone desiring to "speak" whenever and wherever they choose. Instead, the court is urged to consider

these observations from City Council v. Taxpayers for Vincent, "the existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending upon the character of the property at issue" and certain public property may be "reserved for its intended purpose." 466 US at 814, 80 L. Ed. 2d at 793.

This court should consider the "character" of medians, travel lanes and interstate highways and their "intended purpose" in the realm of motor vehicle traffic, and determine that these particular components of the street are not traditional fora for pedestrians engaged in sales and solicitations.

E. Municipalities must be permitted to remove persons from the roadway who may constitute a "dangerous condition" within the meaning of the Government Immunity Act.

In closing, the League would expand upon a point mentioned in passing by the trial court. The court alluded to the potential for liability associated with regulating and maintaining roadways, and the understandable desire by the city to eliminate hazards in the interest of risk management. This public policy consideration should not be ignored.

Under the Governmental Immunity Act, sovereign immunity is waived for dangerous conditions in municipal roadways, Section 24 10-103, -106, C.R.S. In recent years, this court and the court of appeals have liberally construed what may constitute a "dangerous condition." It need not be a condition of the roadway surface itself. It could be a creature or object which enters the travelled way, thereby obstructing traffic and creating a hazard, State of Colorado v.

Moldovan, 842 P. 2d 220 (Colo. 1992); Schlitters v. Dept. of Highways, 787 P.2d 656 (Colo. App. 1989); Belfiore v. Dept. of Highways, 847 P.2d 244 (Colo. App. 1993). The Belfiore decision is particularly germane to the instant case, because therein the court found the state potentially liable for an obstruction in the roadway which was not caused directly by the state or any of its agents, but by third parties. The court held that a claim could be asserted under the Governmental Immunity Act on the theory that "appropriate steps were not taken (by the state) to avoid the danger."

It would be ironic at best and manifestly unjust at worst for the courts to simultaneously expand municipal tort exposure for dangerous conditions in roadways while imposing a new "strict scrutiny" standard on ordinances which are designed to mitigate such dangers.

V. Conclusion

Wherefore, for the reasons stated herein, the League urges the court to reverse the decision of the Arapahoe County District Court in this case and dissolve the injunction heretofore entered by the trial court.

Respectfully submitted this 18th day of July, 1994.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Motion of Colorado Municipal League as amicus curiae was placed in the U.S. Postal System on the 18th day of July, 1994, addressed to the following:

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