No. 01-1859

IN THE
Supreme Court of the United States

RONALD P. WHITE,

Petitioner,

v.

SOUTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RENEE L. GIACHINO *
REID ALAN COX
CENTER FOR INDIVIDUAL FREEDOM
901 N. Washington Street, Suite 402
Alexandria, VA 22314
(703) 535-5836

KINGSLEY R. BROWNE
WAYNE STATE UNIVERSITY
LAW SCHOOL
471 W. Palmer Avenue
Detroit, MI 48202
(313) 577-0476

* Counsel of Record — *Counsel for Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Freedom (the "Center") is a non-partisan, non-profit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including, but not limited to, free expression rights, property rights, privacy rights, freedom of association, and religious freedoms. Of particular importance to the Center in this

[1] This brief is filed with the written consent of both parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

case is the need to vigilantly safeguard an individual's constitutionally protected right of free expression without regard to the medium employed.

SUMMARY OF ARGUMENT

If ever there has been a case that merited summary reversal by this Court, this is the case. The decision below[2] squares with neither this Court's long-standing constitutional protection for artistic expression under the Free Speech and Free Press clauses of the First Amendment nor this Court's precedents applying First Amendment analysis to "time, place, or manner" restrictions.

The central flaw in the South Carolina Supreme Court's decision is not that it erred in crafting a balance between the expressive interests of tattoo artists and their clients, on the one hand, and the State's interest in public health and safety, on the other. Rather, the court refused to engage in any examination of the Petitioner's expressive interests at all on the erroneous grounds that, in the absence of some "particularized message," tattooing simply is not expression and, even if it were, the State's asserted interest in public health and safety obviates the need to engage in First Amendment analysis.

This Court's precedents make clear the dual error of the state court's analysis. First, constitutional protection under the First Amendment extends to artistic expression even when the art does not convey "a narrow, succinctly articulable message." Second, a state's assertion of a public health and safety interest does not preempt First Amendment scrutiny; instead, the asserted interest is an integral part of that analysis. Had the court below properly examined the regulation as a "time, place, or manner" restriction, it would have been compelled to strike it down because

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[2] The South Carolina Supreme Court upheld Petitioner Ronald P. White's conviction for engaging in the art of tattooing. *See State v. White*, 348 S.C. 532, 560 S.E.2d 420 (2002). The State of South Carolina completely bans and criminalizes tattooing by anyone other than a licensed physician or surgeon, and even then it is allowable only when medically necessary. *See* S.C. CODE ANN. § 16-17-700.

a complete ban on the art of tattooing is not "narrowly tailored" to advance the State's legitimate interest in public health and safety.

ARGUMENT

I. THE SOUTH CAROLINA SUPREME COURT'S REFUSAL TO RECOGNIZE FIRST AMENDMENT PROTECTION FOR THE ART OF TATTOOING DISREGARDS THIS COURT'S PRECEDENT.

Faced with this Court's well-established precedents to the contrary, the South Carolina Supreme Court held that the First Amendment is inapplicable to artistic expression unless the art at issue "is 'sufficiently imbued with elements of communication.'" *State v. White*, 348 S.C. 532, 538, 560 S.E.2d 420, 423 (2002) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). Applying this standard, the court below found that the art of tattooing is not expression "within the boundaries of [the] First Amendment" because "tattoo[ing] is not sufficiently communicative to warrant [constitutional] protection[ ]." *White*, 348 S.C. at 537-538, 560 S.E.2d at 423. This decision stands in stark conflict with this Court's unanimous pronouncement in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), that "a narrow, succinctly articulable message is not a condition of constitutional protection" for expression under the First Amendment.[3] *Id*. at 569.

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[3] The South Carolina court was led astray by its failure to appreciate the nature of the issue in *Spence v. Washington*, 418 U.S. 405 (1974), which was an "as applied" challenge to a statute aimed generally at "conduct." The *Spence* Court's examination of the communicative nature of Spence's conduct—taping a peace sign on a flag—came in the context of deciding whether a regulation not aimed primarily at expression could constitutionally be applied to someone who claimed that his particular violation of the law was for expressive purposes. Such a claim necessarily requires an analysis of whether his conduct conveyed a discernible message. This case, however, is a facial challenge to a restriction banning what is asserted to be an entire class of expression, so the question is simply whether it is expression, not whether it is the expression of a clearly discernible particularized message.

For more than a half century, this Court has consistently held that the umbrella of the First Amendment shields artistic expression without regard to the medium employed by the artist, *see*, *e.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (First Amendment protection for motion pictures), or whether the art "convey[s] a 'particularized message,'" *Hurley*, 515 U.S. at 569 (quoting *Spence*, 418 U.S. at 411). Specifically, this Court has noted that First Amendment protections unequivocally extend to "pictures, films, paintings, drawings, and engravings," *Kaplan v. California*, 413 U.S. 115, 119-20 (1973), as well as live and recorded entertainment, including motion pictures, radio and television programs, and musical and dramatic works, *see Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981). Thus, the freedom of expression protected under the First Amendment reaches "beyond written and spoken words as mediums of expression . . . and unquestionably shield[s] [the] painting of Jackson Pollock, [the] music of Arnold Schoenberg, [and the] Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569. Were the South Carolina court's analysis to prevail, much of the most critically acclaimed art and literature would lose its constitutional protection by virtue of the critics' inability to agree about what message it conveys.

If painting and verse, and even an offensive slogan emblazoned on a jacket, are "unquestionably shielded" by the First Amendment's freedom of expression, then so, too, must the tattoo art created by Petitioner Ronald P. White. *Id.*; *see also Cohen v. California*, 403 U.S. 15 (1971). After all, the only difference between the Petitioner's art and the "unquestionably shielded" painting, verse, and slogan is the medium employed by the artist. Petitioner has simply chosen to execute his art on the skin of individuals who commission the art rather than on canvas or paper. While such a distinction in artistic medium may implicate different state regulatory interests, it does not remove the resulting expression from the purview of the First Amendment. Therefore, this Court's intervention is necessary to establish that the First Amendment's protection of an individual's right of artistic expression extends beyond particularized messages conveyed via traditional media.

II. SOUTH CAROLINA'S LEGITIMATE PUBLIC HEALTH INTEREST IN REGULATING THE ART OF TATTOOING DOES NOT COMPLETELY EXEMPT THE RESTRICTION FROM SCRUTINY UNDER THE FIRST AMENDMENT.

The decision below rejects application of any First Amendment scrutiny whenever a state invokes public health and safety interests to justify a challenged regulation, even when the restriction burdens constitutionally protected expression. Specifically, the South Carolina Supreme Court held that the State's ban and criminalization of the art of tattooing was wholly immune from First Amendment scrutiny because the "invasion of human tissue" implicated the State's interest in the "protection of public health and general welfare." *White*, 348 S.C. at 538-39, 560 S.E.2d at 423-24. This analysis is flatly inconsistent with this Court's precedents, which require an examination of a state's articulated interest as an integral part of the First Amendment scrutiny applicable to all restrictions that burden expression. *See*, *e.g.*, *Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 662 (1994).

This Court has never held that a state's asserted interest in public health and safety exempts a regulation that burdens expression from all First Amendment scrutiny. Rather, a state's interest is an important part of the First Amendment calculus, and an examination of that interest is necessary even when the asserted interest concerns public health and safety. For example, in *Hill v. Colorado*, 530 U.S. 703 (2000), this Court subjected a statute restricting expression near abortion clinics to First Amendment scrutiny notwithstanding the unquestioned legitimacy of the states' interest in "protect[ing] the health and safety of their citizens." *Id.* at 715 (citation omitted). The statute was upheld not simply because it was intended to protect health and safety but because it satisfied the requirements that this Court has established for laws regulating the "time, place, or manner" of expression. The South Carolina Supreme Court, however, never engaged in that critical inquiry.

III. SOUTH CAROLINA'S BAN ON THE ART OF TATTOOING CANNOT BE UPHELD AS A VALID TIME, PLACE, OR MANNER RESTRICTION.

Despite this Court's clear mandate that "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions," *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000), the court below relied on "a general presumption of validity for legislative acts when subjected to constitutional attack, which can be overcome only by a clear showing that the act violates some provision of the Constitution," *White*, 348 S.C. at 536, 560 S.E.2d at 422. Only when the challenging party can show that there is "'no room for reasonable doubt that it violates some provision of the Constitution,'" the court held, does the burden shift to the state to defend it. *Id*. at 537, 560 S.E.2d at 422 (citation omitted). With all due respect to the South Carolina court, *Amicus* submits that the court placed the burden of proof on the wrong party.

Once the burden is placed where it belongs, the unconstitutionality of the restriction could not be more obvious. When a regulation that restrains expression "is justified without reference to the content of [the] regulated speech," *Hill*, 530 U.S. at 720, it is subject to intermediate scrutiny under the First Amendment and is constitutionally permissible only when "'it furthers an important or substantial governmental interest; . . . the governmental interest is unrelated to the suppression of free expression; and . . . the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest,'" *Turner Broad. Sys., Inc.*, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).[4]

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[4] This Court has noted that "the four-factor standard of *United States v. O'Brien*, 391 U.S. 367 (1968), for validating a regulation of expressive conduct . . . is little, if any, different from the standard applied to time, place, or manner restrictions." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984). Nonetheless, it should be noted that the encroachments on expression challenged in *O'Brien* and *Clark* targeted predominantly non-expressive conduct—burning a draft card and camping in a public park, respectively—and, unlike the South Carolina restriction, only incidentally limited constitutionally protected expression.

The regulation must also leave open ample alternative channels for expression. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791, 797-98 (1989); *accord Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). It was the obligation of the State to establish that its restriction satisfies these requirements, but the court below did not require the State to carry that burden.

The South Carolina statute can satisfy some of the "time, place, or manner" requirements, but it plainly cannot satisfy all of them. Assuming the State's interest was in fact to protect public health and safety — as opposed to singling out a particular art form because of its traditional association with outcasts or its incompatibility with orthodox religious beliefs — that interest is legitimate and unrelated to the content of any particular tattoo. However, there is no evidence in the record below that a complete ban and criminalization of the art of tattooing leaves open ample alternative channels of expression.

The restriction most clearly founders with regard to the requirements that it actually *further* the State's legitimate interest and restrict no more speech than necessary in doing so. The extent to which the statute actually furthers the State's interest in public health and safety remains a mystery because, as the state court noted, the State "failed to introduce current evidence of the risks associated with tattoos." *White*, 348 S.C. at 540, 560 S.E.2d at 424. Thus, whether the restriction *substantially* furthers the State's *important* interest is impossible to ascertain, and the restriction should be struck down on that ground alone.

The restriction also plainly fails to satisfy the narrow tailoring requirement. The means utilized to further the State's asserted interest must not be "substantially broader than necessary to achieve the government's interest," *Ward*, 491 U.S. at 800, and may not "burden substantially more speech than . . . necessary to further the government's legitimate interest[ ]," *id*. at 799. Thus, "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.'" *Id*. (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Under this standard and given the record below, South Carolina's ban and criminalization of an entire art form is extraordinarily overbroad.

South Carolina, having passed its regulation in 1966, is one of only two remaining states that completely ban the art of tattooing. *See* OKLA. STAT. tit. 21, § 841; S.C. CODE ANN. § 16-17-700. At least one similar restriction was recently struck down as violating the First Amendment. *See Lanphear v. Massachusetts*, No. 99-1896-B (Super. Ct., Suffolk County, Mass., Oct. 20, 2000) (declaring a Massachusetts statute banning the art of tattooing "void as violative of the First Amendment"). A complete ban appears substantially broader than necessary to achieve the State's asserted interest in public health and safety because modern sterilization techniques can ensure the safety of tattooing without foreclosing the entire art form as an expressive medium. The very fact that only two states retain statutes completely banning the art of tattooing strongly suggests that South Carolina's ban impermissibly burdens substantially more expression than necessary. In short, South Carolina has not proved—and probably cannot prove—that its legitimate asserted interest in public health and safety would be achieved less effectively absent a complete ban. After all, forty-eight states have chosen substantially less restrictive means, such as sterilization and licensing requirements, to protect their citizens from any dangers associated with the art of tattooing, and South Carolina has provided no explanation at all for why the course chosen by almost all other states would fail to protect its legitimate interests. Therefore, South Carolina's chosen means—banning and criminalizing an entire art form—are constitutionally impermissible.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RENEE L. GIACHINO *
REID ALAN COX
CENTER FOR INDIVIDUAL FREEDOM
901 N. Washington Street, Suite 402
Alexandria, VA 22314
(703) 535-5836

KINGSLEY R. BROWNE
WAYNE STATE UNIVERSITY
LAW SCHOOL
471 W. Palmer Avenue
Detroit, MI 48202
(313) 577-0476

* Counsel of Record

Counsel for *Amicus Curiae*

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