

DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Plaintiff: <p style="text-align: center;">JACK JOHNSON</p> Defendants: <p style="text-align: center;">THE COLORADO BOARD OF EXAMINERS OF ARCHITECTS; DUANE A. BOYLE, KAREN L.W. HARRIS, NICHOLAS A. JOVENE, JR., JAMES H. BRADBURN, MICHAEL E. ONEY, SALLY L. COREY, and WILLIAM H. NEWELL, in their individual capacities and in their official capacities as members of the Colorado Board of Examiners of Architects</p>	
<u>O R D E R</u>	

THIS MATTER comes before the court on a motion to dismiss filed by defendants and a motion for summary judgment filed by plaintiff. The matter was set for trial but the court vacated the trial because of its conclusion that the facts are undisputed.

The facts underlying this case are as follows. Plaintiff is an elected member of the Aspen City Council. Defendant, Colorado Board of Examiners of Architects, is a Colorado state administrative agency established under §§12-4-101 *et seq.* During his campaign for a seat on the Aspen City Council in the year 2005 plaintiff used the word “architect” to describe himself on at least two occasions. Plaintiff represents that although he used the word “architect” he clarified his use of the word by saying he is trained as an architect, not licensed by the state of Colorado to practice as an architect. In both instances plaintiff represents he was not using the term architect in a commercial sense or soliciting business as an architect, but merely using it as a descriptive part of a political campaign.

Defendant Board of Examiners of Architects issued a cease and desist order July 26, 2005 directing that plaintiff be barred from using the word architect in “any” manner to describe himself until such time as he is properly licensed by the Board. (A copy of the cease and desist order was attached as Exhibit C to plaintiff’s complaint.) Defendants point out that on February

3, 2006 the Board issued a new order rescinding its prior cease and desist order. (A copy of that order rescinding the cease and desist order is attached as Exhibit 2 to defendants' motion to dismiss the complaint.)

Plaintiff's first claim for relief is for a violation of 42 U.S.C. §1983 for violation of plaintiff's First Amendment rights under 42 U.S.C. §1983. His second claim is for judicial review of the administrative action taken by defendant Board of Examiners of Architects under Rule 106(a)(4) of the Colorado Rules of Civil Procedure.

The first issue the court must address is defendants' motion to dismiss the complaint as moot due to the withdrawal of the cease and desist order. That motion is granted only in part. The court believes that the rescission of the cease and desist order leaves the court without jurisdiction as to the second claim, judicial review of administrative action. Withdrawal of the order renders moot this court's Rule 106 review of the administrative action.

However, the court concludes that rescinding the administrative order does not have the same impact on the first claim. Accordingly, this court will decide the issue of the cease and desist order as it impacted plaintiff's First Amendment right to freedom of speech.

The right to freedom of speech is contained in the First Amendment to the U.S. Constitution and Art. 2, §10 of the Colorado Constitution. The Colorado Supreme Court has recognized that interference with this right is subject to "strict" or "exacting" scrutiny. In *Tattered Cover v. City of Thornton*, 44 P.3d 1044 (Colo. 2002) the Supreme Court, in addressing the right to freedom of speech stated as follows:

Specifically, courts have recognized that a very high level of review, referred to as "strict scrutiny" or "exacting scrutiny" is to be undertaken when governmental action collides with First Amendment rights. *See e.g., Playboy Entm't Group*, 529 U.S. at 813, 120 S.Ct. 1878; *Buckley v. Valeo*, 424 U.S. 1, 64-65, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) ("this type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." This heightened standard is necessary because governmental action that burdens the exercise of First Amendment rights compromises the core principles of an open democratic society.

(*Tattered Cover v. City of Thornton*, 44 P.3d at 1057.)

The factual context of the statements at issue here demonstrate that not only was plaintiff exercising his free speech rights but also he was exercising them within a political context.

Therefore the court concludes that the actions taken by defendants in this case are subject to strict scrutiny.

The Colorado Supreme Court discussed what is necessary to withstand a strict scrutiny review in *Tattered Cover v. City of Thornton*. The court stated:

In order to withstand strict scrutiny, the government must have some “compelling” interest at stake *see e.g. Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963). Anything less will not justify an abridgement of fundamental speech rights. *Beverly v. United States*, 468 F.2d 732, 748 (5th Cir. 1972) (“it is simply a statement of long recognized horn-book principles of constitutional law to say that no government, either state or federal, may encroach upon First Amendment rights without the demonstration of a compelling interest.”).

(*Tattered Cover v. City of Thornton, id.*)

Defendants had a statutory basis for the cease and desist order they issued under C.R.S. §12-4-101, the regulatory authority and purpose vested in the Colorado State Board of Examiners of Architects. That statute provides:

The regulatory authority established by this article is necessary to safeguard the life, health, property, and public welfare of the people of this state and to protect them against unauthorized, unqualified and improper practice of architecture.

The court concludes that the Board’s statutory authority is principally designed to ensure the safety of the public by making certain that architects who design structures are licensed to do so. That interest is no doubt a valid state interest to protect the public. The question becomes whether that interest is “compelling”.

The Supreme Court in *Tattered Cover v. Thornton* discussed a variety of matters concerning the application of the strict scrutiny test to actions that abridge or may abridge the First Amendment right of free speech. The discussion includes the need for a substantial connection between the government’s action and the interest the government seeks to further, and in particular addresses what the Colorado Supreme Court referred to as a “chill” on the exercise of free speech.

Further, when government action implicates fundamental expressive rights, courts have imposed a few other requirements

that must be met in order for the government action to withstand strict scrutiny. For instance, courts commonly require that government action be no broader than necessary to advance its compelling interest. *See, e.g. Shelton v. Tucker*, 364 U.S. 479, 481, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); *Bursey*, 466 F.2d at 1083 (stating that the government must show that “the incidental infringement upon First Amendment rights is no greater than is essential to vindicate its subordinate interest”). That is, government action must not chill the exercise of fundamental expressive rights any more than absolutely necessary to advance the government’s interest. This requirement is frequently referred to as the “least restrictive means” requirement. *See, e.g. Buckley*, 424 U.S. at 68, 96 S.Ct. 612.

(*Tattered Cover v. Thornton*, *supra*, at 1057-1058.)

Based upon the “least restrictive means” requirement from *Tattered Cover v. Thornton* the court turns now to the authority of the Board of Examiners of Architects. Its authority, as noted above, is to protect the people against unauthorized, unqualified and improper “practice” of architecture. Does the cease and desist order in this case attempt to accomplish that goal by the “least restrictive means”? The answer is that it does not.

The authority granted to the Board of Examiners of Architects relates to persons who are practicing architecture. Practicing architecture, the court assumes, involves designing buildings and other structures which will be utilized by the citizens of Colorado. In the present case the description given by plaintiff of himself as an architect was not meant to solicit persons to engage him as an architect to design buildings or other structures. Rather, use of the term “architect” was designed to educate the voting public as to plaintiff’s educational background as that background might qualify him for elective office. The Board’s blanket cease and desist order was far more restrictive than it needed to be in order to protect the interests which were the Board’s charge. Therefore the court concludes that plaintiff has made out his claim for violation of his First Amendment right.

The court finds that defendants’ order, which has now been withdrawn, violated plaintiff’s rights to free speech guaranteed by the First Amendment of the United States Constitution. This court finds that §12-4-113(1)(b) and §12-4-113(1)(c)(I) are constitutional. The court finds that the use of those statutory provisions as a basis to issue the cease and desist order was not justified in that such order violated plaintiff’s First Amendment rights. The court concludes that further action by defendant Board against plaintiff which is not a commercial solicitation by plaintiff seeking architectural work must be narrowly tailored to satisfy the “least restrictive means” requirement set forth in *Tattered Cover v. Thornton*, *supra*.

Judgment enters in favor of plaintiff and against defendant on plaintiff's first cause of action and defendants are enjoined from further actions against plaintiff which do not apply the "least restrictive means" to enforce defendants' regulatory authority to protect the people of Colorado "against unauthorized, unqualified and improper practice of architecture."

The court finds that by prevailing on his first cause of action plaintiff may be entitled to fees and costs under 42 U.S.C. §1988. Plaintiff may file such motion for fees and costs within 15 days of receipt of this order.

Done this 9th day of May, 2006.

BY THE COURT:



H. Jeffrey Bayless
District Judge

cc: