

Nos. A05-178 and A05-179

**State of Minnesota
In Supreme Court**

State of Minnesota,

Respondent,

vs.

Luke A. Otterstad,

Petitioner (A05-178),

Robert A. Rudnick,

Petitioner (A05-179).

PETITIONERS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATUTE AND ORDINANCE INVOLVED

Minn. Stat. § 609.74 provides in relevant part:

Whoever by an act or failure to perform a legal duty intentionally does any of the following is guilty of maintaining a public nuisance, which is a misdemeanor:

(1) Maintains or permits a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public; or

(2) Interferes with, obstructs, or renders dangerous for passage, any public highway or right-of-way, or waters used by the public;

The City of Anoka sign ordinance in effect in September 2004¹ provides in relevant part:

Section 36-82 Compliance with Article, etc.; Permits

All signs hereafter erected, constructed or maintained, except official traffic and street signs, shall conform with the provisions of this article and any other ordinances or regulations of the City. A sign permit shall be required for each sign, the fee for which shall be determined by a fee schedule established by resolution of the City Council. The following information shall be filed with the Building Official prior to issuance of a sign permit: . . .

Section 36-82.1 Exempted signs

- (a) The following signs are exempt from the requirements of this Article:
- (1) Informational signs not exceeding two (2) square feet in area displayed strictly for the convenience of the public, including signs which identify restrooms, waste receptacles, addresses, door bells, mailboxes, or building entrances.
 - (2) Memorial plaques, cornerstones, and historical tablets.
 - (3) Wall or window occupational signs or marquee, awning or canopy signs giving the name or profession of a business, provided the sign does not exceed four (4) square feet in area.

¹ The ordinance has since been amended and recodified. *See* Anoka, Minn. City Code, ch. 74, art. VIII.

- (4) Public signs, street signs, warning signs, railroad crossing signs, signs of public service companies for the purpose of safety, or private traffic directional signs of not over eight (8) square feet.
- (b) The following signs do not require a permit or permit fee; however, the other requirements of this Article shall apply:
- (1) Temporary political signs.
 - (2) Temporary real estate signs pertaining only to the sale, rental, or development of the premises upon which they are displayed.
 - (3) Construction signs designating the architects, lending institutions, engineers, or contractors when placed on a site where a building is to be constructed within 90 days.
 - (4) Temporary window signs.
 - (5) Other exterior temporary signs of under twelve (12) square feet.

Section 36-83 General regulations

The following regulations shall apply to all signs hereinafter permitted in all districts:

- (a) Signs shall not be permitted within the public right-of-way or easements, except that the City Manager or a designee of the City Manager, for a period not exceeding two weeks, may allow temporary signs and decorations to be erected upon or strung across the right-of-way. A banner permit is required for erection of such a sign. . . .

LEGAL ISSUES

I. Whether the public nuisance statute, Minn. Stat. § 609.74(1), which makes it a crime “intentionally” to “maintain[] . . . a condition which unreasonably . . . endangers” public safety, is properly read to reach the entirely peaceful acts of political protesters on a highway overpass in holding signs (directed at the motorists passing below) depicting an aborted fetus, where there was no evidence of any disruption of traffic on the highway and the protesters asserted a good-faith belief that their conduct was protected by the First Amendment. The trial court and the Court of Appeals adopted this novel construction of Section 609.74(1) and rejected petitioners’ related challenges to the sufficiency of the evidence supporting their convictions.

Most apposite authorities: *State v. Stevenson*, 656 N.W.2d 235 (Minn. 2003); *State v. Koenig*, 666 N.W.2d 366 (Minn. 2003); *State v. Hoyt*, 304 N.W.2d 884 (Minn. 1981); *State v. Brechon*, 352 N.W.2d 745, 749 (Minn. 1984); U.S. Const. 1st Am.; Minn. Stat. § 645.16; Minn. Stat. § 609.02, subd. 9(3); Minn. Stat. § 609.605; Minn. Stat. Ann. § 609.74, Advisory Committee cmt. (1963).

II. Whether the application of the Minnesota public-nuisance statute to the petitioners is an unconstitutional content-based restriction of their First Amendment right to freedom of speech. The trial court and the Court of Appeals rejected this as-applied challenge.

Most apposite authorities: *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *Ovadal v. City of Madison*, 416 F.3d 531 (7th Cir. 2005); U.S. Const. 1st Am.

III. Whether the City of Anoka’s sign ordinance should be read to reach petitioners’ conduct, and if so, whether the ordinance’s near-prohibition on all types of signs, including political signs, on the city’s streets and sidewalks is an unconstitutional restriction on speech.

The Court of Appeals and the trial court construed the ordinance to prohibit the petitioners' protest and rejected their First Amendment challenge to the ordinance so construed.

Most apposite authorities: *United States v. Grace*, 461 U.S. 171 (1983); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *Goward v. Minneapolis*, 456 N.W.2d 460 (Minn. App. 1990); *Olmanson v. LeSueur County*, 693 N.W.2d 876 (Minn. 2005); U.S. Const. 1st Am.; Anoka City Code §§ 36-82, 36-82.1, 36-83 (1997); Anoka City Code § 74-446 (2005).

IV. Whether Minn. Stat. § 609.74(1) is unconstitutionally vague on its face in violation of the Due Process Clause of the Fourteenth Amendment and the First Amendment.

The trial court and the Court of Appeals rejected petitioners' vagueness challenge.

Most apposite authorities: *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Cox v. Louisiana*, 379 U.S. 536 (1965); *State v. Machholz*, 574 N.W.2d 415 (Minn. 1998); U.S. Const. 1st Am., 14th Am.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case arises out of two political protests that occurred approximately six weeks before a congressional election. On September 21, 2004, and again on September 23, 2004, petitioners Robert A. Rudnick and Luke A. Otterstad were arrested while holding signs on the sidewalk of the Ferry Street bridge above Highway 10, in the City of Anoka. The signs used words and a graphic image to express opposition both to abortion and to the candidacy of Patty Wetterling, who was running for a seat in Congress. *See* App. 88-89.

Rudnick and Otterstad were tried jointly in a "paper trial" before Anoka County District Court Judge Michael J. Roith. They were convicted of violating the City of Anoka's sign ordinance, Section 36-83(a), on September 21, 2004, and of maintaining a public nuisance on September 23, 2004, in violation of Minn. Stat. § 609.74(1).

Rudnick and Otterstad filed Notices of Appeal on January 28, 2005. They challenged their convictions on multiple grounds: (1) Minn. Stat. § 609.74(1) does not criminalize their protest activities; (2) the statute is unconstitutionally vague on its face in violation of the First Amendment and the Due Process Clause; (3) the statute as applied to them is an unconstitutional content-based restriction on their First Amendment rights; and (4) the Anoka sign ordinance does not prohibit their conduct and, if it does, the ordinance violates the First Amendment. The Court of Appeals affirmed the convictions on December 27, 2005 in an unpublished decision authored by Chief Judge Toussaint and joined by Judges Willis and Huspeni.

Rudnick and Otterstad petitioned for review of the Court of Appeals' decision on January 26, 2006, and this Court granted the petition in an order dated March 28, 2006.

STATEMENT OF FACTS

A. Rudnick And Otterstad Display The Graphic Political Signs

Petitioners Rudnick and Otterstad oppose abortion, and they oppose Patty Wetterling, who in 2004 ran for a seat in the U.S. House of Representatives as the representative of Minnesota's sixth congressional district (which includes Anoka). *See, e.g.,* Kevin Duchscher, *Kennedy, Wetterling Go Toe to Toe*, Star. Trib., Oct. 25, 2004, at 1B. Rudnick and Otterstad decided to express their political views by displaying two signs on the public sidewalk of the Ferry Street bridge above Highway 10, in Anoka. On September 21, 2004, they placed their signs against the bridge's chain-link fence so that the signs were visible to motorists in the west-bound lanes of the highway below. App. 55-56. The time was late

afternoon, approximately 4 p.m., and rush-hour traffic was “bumper-to-bumper.” *See* App. 53, 64.

Both signs were about four feet high, and because they were displayed side by side, they produced an effect of one very long sign that was four feet high and 13-14 feet in length. *See* App. 5. The first sign, which was five to six feet long, contained a poster with the word “ABORTION” at the top in six-inch letters and a photograph of an aborted fetus in the middle. App. 54, 88. The photograph itself was 54 inches long and 18 inches high. The second sign, which was approximately eight feet long, displayed, in large capital letters, the message “Patty Wetterling is Pro-Abortion.” App. 89. Both signs were on styrofoam backing, and there were no markings or images on the reverse side of the signs. App. 54-55.

During the protest on September 21, an anonymous caller telephoned the Anoka police department and complained about “an anti-Patty Wetterling poster . . . which showed a graphic picture of an aborted fetus” on the Ferry Street bridge. App. 3 (police report). In response, Officer Anthony Newton was dispatched; when he arrived at the bridge, he told petitioners that “they needed to remove the signs.” *Id.* “One of the [petitioners]” responded by saying “he was not going to remove the signs due to the First Amendment.” *Id.* Newton radioed for assistance, and Sgt. Michael Goodwin answered the call. *Id.* While Officer Newton was waiting for Sgt. Goodwin with Rudnick and Otterstad, Newton observed a “rear end accident” on the bridge “due to onlookers.” App. 4. Goodwin later described this as “a ‘gawker’ related accident.” App. 7.

When Sgt. Goodwin arrived, he told petitioners that they were creating a public nuisance. When they still refused to remove their signs, Goodwin arrested them. App. 4, 6. Goodwin's supplemental report on the incident notes that Newton told petitioners that "they would need to remove the sign as it was extremely graphic in nature and a call was received from a concerned citizen and they were creating a public nuisance." App. 5.

The record contains no evidence of any traffic problems caused by the signs. The accident on Ferry Street reported by Officer Newton could not have been caused by anything on the signs, because the signs were blank on the side facing Ferry Street. A police report said that the accident was "due to onlookers" – onlookers, presumably, who were observing a distracting confrontation between Newton and petitioners. In any case, there is nothing in the police reports to indicate that the signs caused any traffic problems, distractions, or accidents below the Ferry Street bridge on Highway 10.

On September 23, 2004, at the same location and at approximately the same time of day, Rudnick and Otterstad displayed signs that were nearly identical to the ones they had displayed two days earlier. App. 60-63. The signs were again visible to motorists in the west-bound lanes of Highway 10, where the traffic was again jammed. App. 7. Sgt. Goodwin noticed Rudnick and Otterstad on the bridge. He asked them to remove the signs and, when they refused, arrested them again. *Id.* Goodwin's report states that he then took down "the very graphic, approximately 4' x 16', anti-abortion poster[.]" *Id.* The Anoka Police Department's incident report for the September 23 arrests states: "Officer came upon two males protesting on overpass by displaying a very graphic anti-abortion poster. Males

refused to take poster down.” App. 9. Again, there is nothing in the record to suggest that the signs that day caused any accidents or other traffic problems on the highway below or on the bridge.

B. Trial Court Proceedings

Rudnick and Otterstad were each charged with ten misdemeanor counts, but the state eventually agreed to drop all charges but two: (1) violation on September 21 of the Anoka sign ordinance, which (under the state’s reading) imposes a general prohibition against virtually all signs in the “public right-of-way or easements,” and (2) violation on September 23 of the public-nuisance statute, Minn. Stat. § 609.74(1). App. 38-39. The parties agreed to a “paper trial” in which the prosecutor offered the signs and police reports as exhibits, read stipulated facts into the record, and recited the facts that the state would present through its witnesses. App. 39.

With respect to the count charging the September 21 protest,² the trial court ruled that temporary political signs are not exempt from the Anoka ordinance’s ban on signs in the public rights-of-way or easements. App. 41-48. The parties stipulated that the signs were “temporary political signs” for purposes of the Anoka ordinance, that they were placed in a public right-of-way or easement, and that petitioners did not obtain permission from Anoka for their display. App. 42, 63.

The court also determined that a conviction on the sign ordinance count required proof of three elements:

² This count was designated Count 9. *See* App. 35-36.

1. First, the defendant knowingly placed a sign.
2. Second, the location of the sign was within the public right-of-way or easement.
3. Third, the defendant's act took place on or about September 21, 2004 in the County of Anoka.

App. 25-26 (emphasis removed). The court convicted each defendant on this count. App. 73.

On the public nuisance count,³ the court determined that a violation of Minn. Stat. § 609.74(1) required proof of three elements:

1. First, the defendant acted intentionally.
2. Second, by such an[] act, the defendant maintained or permitted a condition that unreasonably endangered the safety of any considerable number of members of the public.
3. Third, the defendant's act took place on or about September 23, 2004 in the County of Anoka.

App. 20. With respect to the first element, the court stated (App. 74-75) that it would apply the definition of "intentionally" in Minn. Stat. § 609.02, subd. 9(3), which requires that "the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, would cause that result." The court reasoned (App. 75) that the defendants'

actions of holding up signs obviously were done to attract attention, to publicize a message through a picture and also through writing. Those acts are all intentional. . . . [A]ny position they may take or belief they may hold . . . is not the issue. They did hold the signs up. The signs say what they say.

With respect to the second element of this count, the court found:

The nature of the signs, especially the photograph, are of such a nature as to distract an ordinary reasonable individual from the normal operation of their car, to divert

³ This count was designated Count 2. See App. 35-36.

their attention to the written message that is next to it, and to take their attention away from the operation of not only their own vehicle but also surrounding vehicles that are traveling on the double-lane highway with them. That would constitute maintaining a public nuisance in that it would endanger the safety of individuals.

Now, I suppose numerous reactions of drivers seeing these signs are possible. . . . Some may notice; some may react in support or in opposition of the message being conveyed by the signs. The issue is that the strength of the potential reactions of those individual drivers is what the defendants intentionally are after, in other words, conveying their message and drawing attention to that message and creating a reaction in the drivers.

App. 76-77.

The trial judge asked the defendants if they had anything to say before sentencing.

Rudnick spoke:

Well, I spent a lot of my life as a commercial driver, I drive all over the continent, and I guess the analogy that I would make is if I as driver of a large commercial vehicle was stuck in rush hour traffic and, just by way of analogy, it was bumper-to-bumper . . . and I was distracted by an attractive woman down to my left and I tapped the car in front of me, it would be my fault for being distracted, not hers for being pretty. I believe the analogy isn't exact, that it's close enough for horseshoes

And that this was a First Amendment exercise, done in good faith. Very similar charges have been dropped in many other municipalities in this very state and in other states[, c]reating a good-faith situation here. And that also it was a First Amendment exercise during the election cycle, about the election cycle.

App. 79.

The judge sentenced each defendant to a total of 60 days in jail, \$600 in fines, and two years' probation, the conditions of which are that each defendant is not to "create a public nuisance so as to endanger public safety" or to "post *any* type of sign within the right-of-way of *any* public road or highway."⁴ App. 80-81 (emphasis added). The judge stayed the terms

⁴ The latter restriction – in effect, a prior restraint on petitioners' expression on any public sidewalk and over any road for two years – sweeps more broadly than the statute and

of incarceration and \$200 of each defendant's fines. He stayed payment of the remainder of the fines, but not the probation, for the pendency of the appeal. App. 80-82.

C. The Court Of Appeals' Decision

The Court of Appeals affirmed. It first addressed the meaning of Minn. Stat. § 609.74(1) and the sufficiency of the evidence supporting the conviction for maintaining a public nuisance. The court concluded that the state had met its burden of proving intent under Minn. Stat. § 609.74(1) because petitioners' purpose was to draw attention to their message, and "[d]eliberately distracting drivers from the task of driving and redirecting their attention to the signs would have as a natural and probable consequence endangerment of drivers' safety." *State v. Otterstad*, 2005 WL 3527236, at *3 (Dec. 27, 2005). The Court of Appeals rejected petitioners' argument that they fell within an exception for a good-faith belief that they were exercising their First Amendment rights, reasoning that petitioners "were aware that they had distracted the public and car accidents⁵ had occurred." *Id.* Finally, the Court of Appeals disagreed that the phrase "maintain[] . . . a condition" in Minn. Stat. § 609.74(1) requires some measure of "permanence." *Id.*

Turning to petitioners' First Amendment challenges to the application of the public-nuisance statute, the court reasoned that the restrictions on Rudnick and Otterstad's expression were content-neutral because the government's "justification" for removing their

ordinance under which petitioners were convicted and reflects a marked insensitivity to First Amendment concerns. *See also* App. 81 (trial judge explained that for purposes of this condition of probation, "post" means to "display, cause to be exhibited, or in any way cause to be visible within that right-of-way").

⁵ As discussed below, *see infra* note 9, the record reflects only one accident.

signs – “protection of citizens’ health and safety” – “is unrelated to the content of speech.” *Id.* at *4. Moreover, the court explained, “the statute contains no language prohibiting speech or communication and, here, only incidentally prohibits expression that adversely affects” public safety. *Id.* Additionally, the police officers did not act “for the purpose of suppressing unpopular views.” *Id.* at *5.

Third, the Court of Appeals dispensed with petitioners’ facial challenge to the statute based on the void-for-vagueness doctrine. It articulated the standard for evaluating the vagueness challenge as follows: “[V]agueness must be judged in light of the conduct that is charged to be violative of the statute.” *Id.* (citation omitted). The court determined that “[i]f ordinary people would understand that appellants’ conduct would endanger the public safety of a considerable number of the public, the statute is not unduly vague.” *Id.*

Lastly, the Court of Appeals rejected petitioners’ challenge to their convictions under the Anoka sign ordinance. As an initial matter, the appellate court agreed with the trial court’s construction of the ordinance. *Id.* at *6. Next, the Court of Appeals concluded that the ordinance was a valid time, place, or manner regulation. The city had “non-content based reasons for regulating signs to protect the public,” namely public safety and aesthetics, *id.* at *7, and even though “the ordinance creates four categories of exempt signs based on their content, [t]he content of the exempted signs is exclusively neutral information as opposed to political opinion.” *Id.* The Court held that the ordinance is sufficiently narrow because it “is limited to ‘signs’ which are ‘affixed’ to a structure,” it “excepts banners

obtained by permit,” it “does not affect expression through picketing, leafleting, or speaking,” and billboards “are presumably an option to reach the highway drivers.” *Id.* at *8.

SUMMARY OF ARGUMENT

The convictions under the Minnesota public-nuisance statute cannot stand. The Court of Appeals failed to apply well-established principles of lenity in the construction of criminal statutes. The court should not have rejected petitioners’ challenge to the sufficiency of the evidence of intent. It was able to do only by equating an intent to communicate their message (which Rudnick and Otterstad did have) with an awareness that they were unreasonably distracting drivers from their driving – which, at least on this record, Rudnick and Otterstad did not have. Moreover, the term “intentionally” in the statute excludes cases in which defendants have a good-faith claim that their conduct is authorized by law. Here, petitioners had a good-faith claim (which was expressed to the officers at the scene of the protest) that the First Amendment protected their expressive activities. Finally, by its plain meaning the term “condition” requires “a certain degree of permanence.” This requirement is not satisfied – and, so far as appears, has never been understood to be satisfied – by individual acts of political protest.

The application of the public-nuisance statute to petitioners also violates their First Amendment rights. The removal of the signs and petitioners’ subsequent convictions were content-based restrictions, because they were motivated purely by concerns about the impact on motorists below of the imagery on the political signs. The Supreme Court has been quite clear that “[l]isteners’ reaction to speech is not a content-neutral basis for

regulation.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Because the measures were content-based, and it is undisputed that the speech was taking place in a traditional public forum, the restrictions are subject to strict scrutiny – which means that they must be narrowly drawn and must serve a compelling state interest. The speech restrictions here fail both requirements. And even if the removal and criminal convictions are considered content-neutral, they are still unconstitutional. The state has not even tried to show – and it cannot – that the wholesale removal of Rudnick and Otterstad’s protest from the public forum was narrowly tailored and left open alternative channels of communication.

Anoka’s sign ordinance should be read to avoid constitutional problems. The lower courts erred in rejecting petitioners’ reading – under which the exemption for “temporary political signs” serves to exempt such signs from the banner permit process that otherwise governs the placement of signs in the right-of-way. The alternative is a blanket prohibition on *all* signs communicating anything but the most mundane functional information in the public streets, sidewalks, and thoroughfares of Anoka. Such a restriction, because it forecloses an entire medium of expression in a traditional public forum, is subject to strict scrutiny, which it cannot possibly withstand. The ban likewise fails to pass muster as a reasonable time, place, or manner regulation because it is not content-neutral or narrowly tailored, and does not leave open sufficient alternative channels of communication.

Finally, the Minnesota public-nuisance statute – which, because petitioners’ challenge implicates the First Amendment, the Court of Appeals should have examined on its face rather than merely as applied – is unconstitutionally vague. Indeterminate terms like “annoy”

and “endangers the . . . morals, comfort, or repose” invite arbitrary enforcement and fail to provide fair notice of what conduct is criminalized. Alternatively, the statute can be saved through a narrowing construction, one that recognizes that its proscriptions do not extend to individual acts of political protest and cannot be used to criminalize activities undertaken in a good-faith belief that they are protected by the United States Constitution.

ARGUMENT⁶

I. Petitioners Did Not Violate Minnesota’s Public-Nuisance Statute

The Court of Appeals erred in its construction of Minn. Stat. § 609.74(1). “The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16; *accord State v. Stevenson*, 656 N.W.2d 235, 238 (Minn. 2003). “Penal statutes are to be construed strictly so that all reasonable doubt concerning legislative intent is resolved in favor of the defendant.” *State v. Koenig*, 666 N.W.2d 366, 372-73 (Minn. 2003); *accord State v. B.Y.*, 659 N.W.2d 763, 767 (Minn. 2003). Thus, “courts should resolve ambiguity concerning the ambit of [a criminal] statute in favor of lenity.” *Stevenson*, 656 N.W.2d at 238. Had the Court of Appeals applied these principles, it would have determined that petitioners’ public-nuisance convictions under Section

⁶ All issues raised in this appeal are questions of law subject to de novo review. *See, e.g., Hamilton v. Comm’r of Public Safety*, 600 N.W.2d 720, 722 (Minn. 1999). The constitutionality of a statute is a legal question reviewable de novo, *id.*, as is the interpretation of a statute, *In re Estate of Palmer*, 658 N.W.2d 197, 199 (Minn. 2003). The trial court’s conclusions are also fully reviewable in this court, because the trial court applied statutory language to undisputed facts. *See, e.g., Wallin v. Letourneau*, 534 N.W.2d 712, 715 (Minn. 1995).

609.74(1) cannot stand because petitioners had no intent to endanger public safety, and they did not maintain any “condition.”

A. The Record Contains No Evidence That Petitioners Had The Requisite Intent

The criminal code defines “intentionally” for purposes of all criminal prohibitions to mean “that the actor either has a purpose to do *the thing or cause the result specified or believes* that the act performed by the actor, if successful, *will cause that result.*” Minn. Stat. § 609.02, subd. 9(3) (emphasis added). In this case, the “result” in question, by the terms of the statute and the legal standards used by the trial court, is that “the defendant maintained or permitted a condition that unreasonably endangered the safety of any considerable number of members of the public.” App. 20. Thus, to convict petitioners under the public-nuisance statute, the state was required to prove that petitioners, in displaying their signs, had a purpose to maintain a condition that endangers public safety, or believed that the display would create a condition that endangers public safety.

Here, there is no such proof. The Court of Appeals’ analysis of the issue began as follows:

Appellants state that they placed the signs above the rush hour traffic “in order to draw attention to their message.” Intent to get the message to “any considerable number of members of the public” may be inferred from their choice of rush hour in a place where traffic was bumper-to-bumper.

2005 WL 3527236, at *3. Thus far, petitioners do not disagree. But the Court of Appeals added:

Deliberately distracting drivers from the task of driving and redirecting their attention to the signs would have as a natural and probable consequence endangerment of

drivers' safety. Therefore, the state met its burden of proving the requisite intent under the public nuisance statute.

Id. (citation omitted). The flaw here is that the court has *equated*, with no analysis or evidentiary support, two very separate things: an intent to get a message out, and the deliberate distraction of motorists from their driving in a way that is likely to endanger their safety.

As this Court is well aware, highways in Minnesota – and across the United States – are strewn with billboards and signs on overpasses designed to impart a wide variety of information to drivers. Frequently the signs have considerably more words and require considerably more time to read and process, than did the single image and the four-word slogan in this case.⁷ Moreover, roadside picketing and other protests are commonplace in this country. The intent of those who post such signs and conduct such activities surely is to *attract* motorists' attention, but that does not mean that their intent is to *distract motorists from driving*. The entire system of signage in this country is grounded on the premise that drivers can do more than one thing at once, or at least that calling upon them to do so does not “unreasonably endanger” them.

The Court of Appeals' only support for its abbreviated analysis was one citation for the proposition that “[b]locking traffic . . . may be understood by ordinary people of common intelligence as disturbing the peace,” *see* 2005 WL 3527236, at *3 (citing *City of Edina v.*

⁷ If the Court of Appeals was implicitly agreeing with the trial court that “[t]he nature of the signs, especially the photograph, are of such a nature as to distract an ordinary reasonable individual from the normal operation of their car,” App. 76, then the Court of Appeals also implicitly accepted that the removal of the signs was in fact content-based. *See* point II *infra*.

Dreher, 454 N.W.2d 621, 623 (Minn. App. 1990)). That, however, is entirely beside the point. There is no indication that Rudnick and Otterstad's signs caused any blocking of traffic or otherwise created a hazard. It is undisputed that the bumper-to-bumper traffic on the highway was a function of the time of day, not of petitioners' activities. In fact, the only evidence of any kind of effect on the highway below the overpass is a single anonymous telephone call made two days earlier to complain about the signs. Nor does the accident⁸ on the bridge, likely related to the confrontation with Officer Newton, save the state's case. Because the signs faced outward onto the highway below, petitioners can hardly be said to have sought to "distract" anyone on the overpass behind them with *the back* of their signs.

Accordingly, the state did not meet its burden of proving that petitioners either had a purpose to maintain a dangerous condition or believed that their signs would create a dangerous condition. The Court of Appeals' contrary conclusion was based on logical leaps and violated the rule requiring doubts about the reach of a criminal statute to be resolved in favor of the defendant.

⁸ The Court of Appeals believed that there was more than one accident. See 2005 WL 3527236, at *3. The only reference in the evidence to another accident, however, comes in Sgt. Goodwin's September 21 report, in which he says: "I explained to them . . . they were creating a public nuisance as an accident had already occurred in front of them" – this is the accident that Officer Newton observed and reported – "and another accident approximately ten minutes earlier." App. 6. There is, however, no evidence of an earlier accident beyond this casual reference. No earlier accident is mentioned in the report of Officer Newton, who was on the scene before Sgt. Goodwin, or in the subsequent report of Sgt. Goodwin, which refers only to a single "'gawker' related accident." App. 7.

B. Petitioners' Good-Faith Belief In The Legality Of Their Activities Negates The Intent Requirement

The other reason why the intent element of the statute is not met here is that petitioners believed in good faith that they had a right to display their signs. The word “intentionally” was specifically added to the public-nuisance statute in order to “eliminate those cases where there is a good-faith claim on the part of the defendant that he has a right to continue with the activity in which he is engaged. This claim he should be entitled to make without the possibility of a criminal penalty hanging over him.” Minn. Stat. Ann. § 609.74 Advisory Committee cmt. (1963) (hereinafter “Advisory Committee comment”).⁹

The addition of the word “intentionally,” therefore, was designed to import into the public-nuisance context a limitation similar to the “claim of right” defense. The claim of right defense “arises primarily in trespass cases, and is codified in the statute creating that crime, but may arise in other situations as well.” 9 HENRY W. MCCARR & JACK S. NORDBY, MINNESOTA PRACTICE SERIES: CRIMINAL LAW AND PROCEDURE § 47.29 (3d ed. 2005). “‘Claim of right’ means that a person has a reasonable belief of license or permission.” *State v. Bell*, 2006 WL 1390246 (Minn. App. May 23, 2006). In the trespass context, conviction generally requires that the defendant have been without a claim of right. *See* Minn. Stat. § 609.605. Thus, “[a]n act which . . . might appear to be trespass is not in fact a trespass, if the

⁹ The Advisory Committee comments are entitled to great deference. As contemporaneous legislative history, they are a permissible guide to the legislature’s intent. *See* Minn Stat. § 645.16(7). Beyond that, this Court has specifically approved this particular committee’s comments as a “reliable indicator[] of the legislature’s intended application and scope.” *State v. Johnson*, 273 Minn. 394, 397, 399, 141 N.W.2d 517, 520, 521 (1966).

act is committed in good faith by one who actually and sincerely believes that he is authorized . . . to do the act in question.” *State v. Hoyt*, 304 N.W.2d 884, 891 (Minn. 1981). As this Court has explained: “If the defendant has a claim of right, he lacks the criminal intent which is the gravamen of the offense.” *State v. Brechon*, 352 N.W.2d 745, 749 (Minn. 1984); *accord Bell*, 2006 WL 1390246 (same in context of theft).

The same is true here. Just as one cannot be guilty of trespass if one believes in good faith that one has a right to enter onto the land in question, so too criminal liability for public nuisance cannot be imposed on one who has “a *good faith claim* . . . that he has a *right to continue with the activity*” in question. Advisory Committee comment (emphasis added). In this case, petitioners had a good-faith claim that their protest activities were protected by the First Amendment. This point is not actually in dispute, but if there is any doubt, it should be dispelled by Rudnick and Otterstad’s citation of the First Amendment to the officers who arrested them.

The Court of Appeals dismissed the good-faith defense by noting that the defendants “were aware that they had distracted the public and car accidents^[10] had occurred. . . . Also, two days earlier appellants had been cited for creating a public nuisance.” 2005 WL 3527236, at *3. Assuming without conceding that the Court of Appeals is correct about the petitioners’ awareness, it is still no answer. The defense here is that petitioners believed in good faith that they had a *federal constitutional right* to continue protesting – a right that, of course, trumps any prohibition imposed by state law. That is, Rudnick and Otterstad

¹⁰ The reference should have been singular, not plural. See *supra* note 8.

“actually and sincerely believe[d],” *Hoyt*, 304 N.W.2d at 891, that the First Amendment permitted their protest in a traditional public forum *even if* Minn. Stat. § 609.74(1) – minus the word “intentionally” – covered their activities. The Court of Appeals’ rejection of these arguments was erroneous.

C. Petitioners Did Not “Maintain” Any “Condition”

Under Minn. Stat. § 609.74(1), a public nuisance requires some degree of permanence, and not merely a discrete act. As the Advisory Committee explained:

“Creates a condition” is new. The purpose is to emphasize the characteristic feature of a nuisance; namely, that it is something which is more than a single act but is a state of affairs or situation or condition, harmful to the public. . . . “A certain degree of permanence . . . is usually a part of the conception of a nuisance.”

If single specific acts are sought to be prohibited, they should be the subject of a separate statute defining the act as a crime.

Advisory Committee comment (citation omitted) (quoting *Commonwealth v. Patterson*, 138 Mass. 498 (1885) (Holmes, J.), which held that one illegal sale of intoxicating liquors could not violate a prohibition against “maintain[ing]” a “common nuisance”). *See also County of Berks v. Allied Waste Industries, Inc.*, 66 Pa. D. & C. 4th 429, 446 (Pa. Com. Pl. 2004) (allegation that odors from landfill were public nuisance deficient because, among other problems, it did not “establish . . . whether the odors are of a continuing nature or produce a permanent or long-lasting effect”). As the Advisory Committee’s comments indicate, the word “condition” has a “special meaning” in nuisance law, and therefore, according to Minnesota rules of statutory construction, is to be “construed according to [that] special meaning.” Minn. Stat. § 645.08(1).

The act of holding up a sign in political protest has none of the permanent or lasting character required by the words “maintain” or “condition.” Indeed, to our knowledge, Section 609.74(1) has never before been applied to the act of picketing or holding a sign. On the contrary, the statute has rather been used to prosecute defendants for ongoing activities such as storing solid waste on land, *State v. Wood*, 2005 WL 757921, at *1 (Minn. App. Apr. 5, 2005), maintaining a junkyard, *State v. Byman*, 410 N.W.2d 921, 922 (Minn. App. 1987), allowing livestock to wander onto neighbors’ property, *State v. Myers*, 1992 WL 20756, at *1 (Minn. App. Feb. 11, 1992), and creating an odor from narcotics in a motel room, *State v. Anderson*, 2002 WL 1968814, at *1-*3 (Minn. App. Aug. 27, 2002). In fact, a separate provision of the nuisance statute – Section 609.74(2) – specifically targets conduct that affects a highway, but reaches such conduct *only* if it “[i]nterferes with [the highway], obstructs [it], or renders [it] dangerous for passage.”

The Court of Appeals affirmed the trial court’s finding of a “condition” on two grounds, neither of which is sound. First, citing Minn. Stat. § 645.16, the appellate court reasoned that “[w]hen words are clear and free from ambiguity, courts need not look beyond the explicit words to determine the legislative intent.” 2005 WL 3527236, at *3. But that is not what Section 645.16 says. Rather, that statute provides that “[t]he object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature” and that “[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” In this case, however, “the words of [the statute] in their

application to [this] situation” are *not* “clear and free from all ambiguity.” Accordingly, it is entirely appropriate to consult the legislative history in order to “ascertain and effectuate the intention of the legislature,” *see* Minn. Stat. § 645.16(7), and in particular to consult the Advisory Committee notes, *see* note 9 *supra*.

The Court of Appeals’ second ground for affirming the finding of a “condition” is that Rudnick and Otterstad had protested on an earlier date and thus were repeating their actions on the date of the offense. 2005 WL 3527236, at *3. But the petitioners were *not prosecuted* for maintaining a public nuisance on September 21. They were prosecuted *only* for maintaining a public nuisance on September 23 (and indeed a charge of violating the public-nuisance statute on September 21 *was dropped* by the state). Under these circumstances, petitioners’ actions two days earlier are entirely irrelevant to whether the state proved the required offense conduct for the later date. And even if the earlier protest could be considered, surely the Court of Appeals did not mean that a “condition” might consist of two discrete political protests of limited duration that occurred two days apart.

The Court of Appeals, therefore, erred in its construction of the public-nuisance statute and its assessment of the evidence supporting the public-nuisance convictions. Each of its conclusions is mistaken for separate reasons, but all share the fundamental problem that they disregarded the court’s obligation to use lenity in construing criminal statutes.

II. The Application Of The Public-Nuisance Statute To Petitioners Violated Their First Amendment Rights

Only one issue bearing on the petitioners' as-applied challenge to the public-nuisance statute is actually in dispute: Were the removal of the petitioners' signs, and their criminal convictions for displaying those signs, based on the content of petitioners' expression or were they instead content-neutral? The importance of this determination stems from values at the heart of the First Amendment:

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, *or its content*. . . . Any restriction on expressive activity *because of its content* would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972) (emphasis added) (citation omitted).

A. The Removal Of Petitioners' Signs And Their Subsequent Convictions Were Content-Based Restrictions That Violated The First Amendment

The state conceded below that petitioners were engaged in political expression and that the sidewalk on the Ferry Street bridge is a "traditional public forum," Resp. Br. 12,¹¹ a type of property that "occupies a special position in terms of First Amendment protection."

¹¹ See also *Ovadal v. City of Madison*, 416 F.3d 531, 536 (7th Cir. 2005) (pedestrian overpass above highway was a traditional public forum); *Faustin v. City and County of Denver*, 268 F.3d 942, 950 (10th Cir. 2001) (sidewalk on overpass above highway was a traditional public forum).

United States v. Grace, 461 U.S. 171, 180 (1983).¹² The principles governing limits imposed by the state on political speech in a traditional public forum are well established:

For the state to enforce a content-based exclusion [in a traditional public forum,] it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Perry Educ. Ass'n, 460 U.S. at 45 (citation omitted); see also *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998).¹³

The state has never suggested that the restrictions at issue here could withstand strict scrutiny. And with good reason: there is no showing of the requisite narrow tailoring, nor is any government interest at issue here compelling for purposes of the First Amendment. Accordingly, if the restrictions placed on petitioners' political expression were content-based, they plainly violated the First Amendment. The only way the restrictions could even stand a chance of passing constitutional muster is if they were content-neutral.¹⁴

¹² See also *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (“‘[T]ime out of mind’ public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum.”); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (same).

¹³ The analysis would be different if the petitioners' speech fell into one of the narrow categories of speech that receive reduced or no First Amendment protection, including “fighting words,” incitement, and “true threats.” See *Virginia v. Black*, 538 U.S. 343, 358-59 (2003). No one suggests here that petitioners' speech falls into such a category.

¹⁴ As we explain below, the restrictions are unconstitutional even if they are treated as content-neutral.

They were, however, nothing of the kind. “Government regulation of expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech.’” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis omitted) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293(1984)).¹⁵ In this case, the removal of the signs, and petitioners’ criminal convictions for displaying them, were decidedly justified *with* reference to the content of the speech.

The two police officers believed that petitioners’ signs were a nuisance precisely because the graphic imagery they displayed was likely to distract drivers below. Sgt. Goodwin’s first report specifically notes that Officer Newton told petitioners that “they would need to remove the sign *as it was extremely graphic in nature* and a call was received from a concerned citizen and they were creating a public nuisance.” App. 5 (emphasis

¹⁵ The state relied below on the Supreme Court’s statement in *Ward* that “[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” 491 U.S. at 791. That may be the “principal inquiry”—because “suppression of uncongenial ideas is the worst offense against the First Amendment” (*Hill v. Colorado*, 530 U.S. 703, 746 (2000) (Scalia, J., dissenting)) — “but it is not the *only* inquiry.” *Id.* The Supreme Court has clarified that “while a content-based *purpose*” — for example, government disagreement with a message — “may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases.” *Bartnicki v. Vopper*, 532 U.S. 514, 526 n.9 (2001) (citation and internal quotations omitted). That principle also underlies the many authorities cited below (see pages 25-26, *infra*) for the proposition that listeners’ reactions are *not* a content-neutral basis for regulating speech.

Moreover, the *Ward* statement quoted above was directed to time, place, or manner cases “in particular.” This, however, is not a time, place, or manner case at all. As explained in text below, the restrictions at issue here served as a blanket bar to petitioners’ protests in the public forum, not a limitation on, for example, the particular location or time of day of the protest.

added). Beyond that, the police reports are filled with references to the “graphic” signs and the “very graphic anti-abortion poster.” *See* App. 3-9. In fact, the reports give absolutely no indication of what was wrong with the signs *other than* their graphic nature. Plainly, what troubled the officers was the likely *impact* of the gruesome image on drivers.

Petitioners’ public-nuisance convictions were based specifically on this consideration.

The state argued at trial:

I would ask the Court to find that *these particular signs and the content of the signs and the placement of the signs would have certainly distracted* not only a large number of members of the public, but I’d submit anyone who glanced upwards, outwards, forwards out of their vehicle, not just the drivers, either, but passengers

App. 69 (emphasis added). Consistent with that argument, the trial court found:

The nature of the signs, especially the photograph, are of such a nature [sic] as to distract an ordinary reasonable individual from the normal operation of their carThe issue is that the strength of the potential reactions of those individual drivers is what the defendants intentionally are after, in other words, conveying their message and drawing attention to that message and creating a reaction in the drivers.

App. 76-77 (emphasis added). In the Court of Appeals, the state continued its attempts to justify the convictions with reference to the content of the signs. *See* Resp. Br. 11 (“[T]he impact of their signs were endangering the safety of a considerable number of members of the public. The contents of the signs speak for themselves.”); *id.* at 17.

The problem with all of this, of course, is that the U.S. Supreme Court has made it absolutely clear that a regulation that “suppresses expression out of concern for its likely communicative impact” is not content-neutral because it “cannot be justified without reference to the content of the regulated speech.” *United States v. Eichman*, 496 U.S. 310,

317-18 (1990) (citation and internal quotation marks omitted). “Listeners’ reaction to speech is not a content-neutral basis for regulation.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *accord Lewis v. Wilson*, 253 F.3d 1077, 1081 (8th Cir. 2001), *cert. denied*, 535 U.S. 986 (2002) (state’s restriction on custom license plate reading “ARYAN-1” invalidated because “the mere possibility of a violent reaction to the [car owner]’s speech is simply not a constitutional basis on which to restrict her right to speak”); *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365, 373 (D.C. Cir. 1992); *see also United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 811-12 (2000) (restriction justified by “concern for the effect of the subject matter on young viewers” was the “essence of content-based regulation”). Because the removal of petitioners’ signs and their convictions were based on concerns – or rather, unsupported speculation – about the possible impact of the protests on viewers, the removal and convictions were content-based.

Contrary to the Court of Appeals’ suggestion, *see* 2005 WL 3527236, at *4, it does not matter that petitioners were charged under a statute “aimed at protecting the public safety and welfare” rather than at suppressing free speech. So long as the statute *was applied in this case* to restrict speech based on its content, the restrictions at issue were content-based measures and must satisfy strict scrutiny. It is well established that the *content-based application* of a *facially content-neutral* statute is scrutinized in the same way as a statute that is content-based on its face.

Thus, for example, in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), the defendant gave a provocative speech and was convicted of disorderly conduct under a city ordinance that prohibited “making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace.” *Id.* at 2 n.1. This ordinance was facially content-neutral, but because it was used to punish Terminiello *for his speech* – that is, on the basis of its content – the Court agreed with him that “the ordinance *as applied to his conduct* violated his right of free speech under the Federal Constitution.” *Id.* at 3 (emphasis added), 5.¹⁶ This case is no different. Regardless of whether the public-nuisance statute on its face is aimed at the restriction of speech, it was used that way in this case, and that use must be judged accordingly.

Also irrelevant, again contrary to the Court of Appeals’s suggestion, *see* 2005 WL 3527236, at *5, is whether the officers had any “purpose of suppressing unpopular views.” A restriction can be content-based even if not motivated by a desire on the part of government actors to suppress particular views. *See* note 15 *supra*.

Nor is the analysis changed in any way because petitioners’ expression was disturbing or offensive. As the Supreme Court has repeatedly emphasized,

a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates

¹⁶ *See also* Eugene Volokh, *Speech as Conduct*, 90 CORNELL L. REV. 1277, 1285 (2005):

When a law generally applies to a wide range of conduct, and sweeps in speech together with such conduct, there is little reason to think that lawmakers had any motivation with regard to speech, much less an impermissible one. Nonetheless, such a law should still be unconstitutional when applied to speech based on its content – even though the legislature’s motivations may have been quite benign.

dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may . . . have profound unsettling effects as it presses for acceptance of an idea.

Terminiello, 337 U.S. at 4; *see also Virginia v. Black*, 538 U.S. 343, 358 (2003) (“The hallmark of the protection of free speech is to allow ‘free trade in ideas’ – even ideas that the overwhelming majority of people might find distasteful or discomforting.”); *Playboy*, 529 U.S. at 826 (“The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly.”).

Moreover, and again contrary to the state’s submission in the Court of Appeals,¹⁷ if a person does not wish to be exposed to offensive expression, it is that person’s responsibility to ignore it, not the speaker’s burden to keep silent or the government’s place to muzzle the speaker. As the Supreme Court has explained, “[m]uch that we encounter offends our esthetic, if not our political and moral, sensibilities. . . . [T]he burden normally falls upon the viewer to avoid further bombardment of (his) sensibilities simply by averting (his) eyes.” *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975) (citation and internal quotations omitted).

Rudnick and Otterstad believe that they have an obligation not only to oppose political candidates who support abortion, but also to communicate to the public what they regard as the full horror of the procedure. They insist on using gruesome images because they believe it is the *only* way to get their message across effectively. Like George Orwell, petitioners

¹⁷ *See* Resp. Br. 17-18 (complaining that petitioners’ protest would “force the photograph and its message upon persons who chose not to view it while driving”).

believe that merely debating this contentious issue through the use of abstract language obscures the true reality:

In our time, political speech and writing are largely the defence of the indefensible. Things like the continuation of British rule in India, [and] the Russian purges and deportations . . . can indeed be defended, but only by arguments which are too brutal for most people to face Thus political language has to consist largely of euphemism, question-begging and sheer cloudy vagueness. . . . *Such phraseology is needed if one wants to name things without calling up mental pictures of them. . . . A mass of Latin words falls upon the facts like soft snow, blurring the outlines and covering up all the details.*

George Orwell, *Politics and the English Language*, in 4 THE COLLECTED ESSAYS, JOURNALISM & LETTERS: IN FRONT OF YOUR NOSE, 1946-1950, at 127, 136-37 (S. Orwell & I. Angus eds., 1968) (emphasis added). Because Orwell believed that “[p]olitical language . . . is designed to make lies sound truthful” and “to give an appearance of solidity to pure wind,” he urged expository writers to begin by “think[ing] of a concrete object, . . . think wordlessly,” and then find the words that fit the “pictures or sensations” one is talking about. *Id.* at 138-39. Petitioners hope to elicit the same reaction in those who see their signs. It is simply not possible, we submit, for petitioners to communicate their message – with all of its emotional content – without the use of these graphic images. Regardless of whether one agrees with petitioners’ views, it is clear that the First Amendment protects their right to express themselves in this way.

Other courts have come to the same conclusion on similar facts. In *Ovadal v. City of Madison*, 416 F.3d 531 (7th Cir. 2005), Ovadal displayed banners reading “Homosexuality is sin” and “Christ can set you free” on an overpass above a highway. When the police learned of traffic problems (real ones, not the speculative kind at issue here) on the highway

resulting from drivers becoming “disturbed” or angry in response to the signs, the police sought advice from the city attorney,¹⁸ and eventually decided to remove Ovadal from the overpass. *Id.* at 533-34. The city insisted that it “ended the protest only because it created a safety hazard, not because the officers disagreed with the message.” *Id.* at 537. The Seventh Circuit, quoting *Forsyth County* for the proposition that “[l]isteners’ reaction to speech is not a content-neutral basis for regulation,” 505 U.S. at 134, held that if the city was selectively banning Ovadal because of drivers’ reaction to his speech, that would be an impermissible content-based restriction. 416 F.3d at 537-38. “[I]t is the reckless drivers, not Ovadal, who should have been dealt with by the police, perhaps in conjunction with an appropriate time, place, and manner restriction on Ovadal.” *Id.* at 537.

To the same effect is *Grove v. City of York*, 342 F. Supp. 2d 291 (M.D. Pa. 2004). There, abortion protesters marched in a city parade carrying a number of signs, including ones with photographs of aborted fetuses. Police officers confiscated the signs with the photographs, but not the other signs. *Id.* at 297-98. The evidence was undisputed that the police were concerned about the *reactions* of onlookers to the images. *Id.* at 302. The police insisted that their actions were content-neutral because they were concerned only with the “effect that the pictorial signs had on the crowd and the potential for the situation to escalate out of control.” *Id.* at 302-03. The district court, however, had no trouble concluding that

¹⁸ It is not uncommon for police officers to consult with a city attorney about how to handle a free speech issue. *See, e.g., Frye v. Kansas City Mo. Police Dep’t*, 375 F.3d 785, 788 (8th Cir. 2004); *World Wide Street Preachers’ Fellowship v. City of Owensboro*, 342 F. Supp. 2d 634, 636 (W.D. Ky. 2004). There was no such consultation in this case, despite the petitioners’ invocation of the First Amendment at the time of their arrests.

the officers' actions were content-based: "The Supreme Court has stated that government regulation of speech or assembly activities, motivated by anticipated or actual listener reaction to the content of the communication is not content-neutral." *Id.* at 303 (citing *Forsyth County*).

To be sure, as the Court of Appeals noted, the Eighth Circuit upheld restrictions on roadside protesters who used posters with images of an aborted fetus in *Frye v. Kansas City Mo. Police Dep't*, 375 F.3d 785 (8th Cir. 2004). Assuming for argument's sake that *Frye* was correctly decided, the case is readily distinguishable. In *Frye*, the police officers, having actually observed traffic disturbances, but also understanding that the demonstrators had a First Amendment right to protest (neither of which was true in this case), did not compel the protesters to leave or bar them from speaking. Instead, the police gave the protesters the option of moving further away from where they were standing (immediately adjacent to a busy intersection). *Id.* at 788. The panel, over a vigorous dissent by Judge Beam, held that the officers' actions, which limited only the *place* of protest, passed constitutional muster as a reasonable time, place, or manner limitation. *Id.* at 790-91. In this case, by contrast, the police did not try to find a solution that would have addressed any alleged traffic problems while still permitting the petitioners to continue their demonstration. Instead, the police simply informed Rudnick and Otterstad that they could not hold their signs and eliminated them from the public forum.

For all of the reasons discussed above, the restrictions on petitioners' speech were content-based. In order for those restrictions to survive constitutional scrutiny, therefore, the

state would have show that they were narrowly drawn to serve a compelling state interest. Although the interest cited by the state and the court below – traffic safety – is important, it is not considered “compelling” for purposes of First Amendment strict scrutiny (and the state has never suggested otherwise).¹⁹ Furthermore, the state has not even tried to show – let alone carried its burden of showing – that the restrictions at issue here were narrowly drawn. Rather than ask the petitioners to move to a different location, for example, or choose a different time of day, the police simply demanded that Rudnick and Otterstad end their display and, when they refused, they were arrested and convicted of a misdemeanor. These blunt actions come nowhere close to being narrowly drawn. *Cf. Grove*, 342 F. Supp. 2d at 304-05; *World Wide Street Preachers’ Fellowship*, 342 F. Supp. 2d at 641.

B. Even If The Restrictions Imposed On Petitioners Are Treated As Content-Neutral, They Were Still Unconstitutional

Even if this Court concludes – and we insist emphatically that it should not – that the burdens imposed on petitioners’ speech were content-neutral, those burdens would still be unconstitutional. The intermediate level of scrutiny applicable to content-neutral regulations requires the state to show that they are “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” *Perry Educ. Ass’n*, 460 U.S. at 45. None of those requirements is met here.

¹⁹ See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (describing traffic safety as a “substantial governmental goal[]”) (emphasis added); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) (“[A] municipality’s asserted interest[] in traffic safety . . . , while significant, ha[s] never been held to be compelling.”); *State v. Dahl*, 676 N.W.2d 305, 309 (Minn. App. 2004), *review denied* (Minn. June 15, 2004) (calling traffic safety a “substantial government interest”).

First, as just discussed, the state has not even tried to show that the measures in question were narrowly tailored. Similarly, the measures imposed on petitioners have not left ample alternative channels of communication. The petitioners were not asked to protest in another place or at another time; they were simply forced to leave on pain of arrest. Finally, although traffic safety may be a “significant government interest,” there is no evidence on this record, aside from one heckling comment from a motorist, that petitioners’ posters threatened that interest. “When the government defends a regulation on speech . . . , it must do more than simply posit the existence of the disease sought to be cured.” *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994) (citation and internal quotations omitted).

III. The Anoka Sign Ordinance Either Does Not Reach Petitioners’ Conduct Or Is An Unconstitutional Prohibition Of An Important Medium Of Expression In A Traditional Public Forum

There are two ways to read the City of Anoka’s sign ordinance.²⁰ Under one reading, which was rejected below, petitioners did not violate the ordinance. Under the other reading, which was accepted below, they did violate the ordinance – but the ordinance is unconstitutional. Either way, the convictions cannot stand.

A. The Ordinance Can And Should Be Read To Avoid The Constitutional Problems With Prohibiting All Political Signs From The Public Streets And Sidewalks Of Anoka

“If a statute is ambiguous, the construction that avoids constitutional problems should be used, even if such a construction is less natural.” *Olmanson v. LeSueur County*, 693

²⁰ All references to the ordinance, unless otherwise noted, are to the version that was in force in September 2004 and used to convict the petitioners.

N.W.2d 876, 879 (Minn. 2005). As we show below, the lower courts' reading of the ordinance creates serious constitutional problems. That alone is reason enough for this Court to adopt a reasonable alternative reading under which no violation was committed by petitioners.

Section 36-82.1(b) of the ordinance provides that several categories of signs, including temporary political signs, "do not require a permit or permit fee" but are otherwise subject to all of the other requirements of the sign ordinance. See page ix, *supra*. Section 36-83(a) in turn prohibits all signs "within the public right-of-way or easements," *unless* the City Manager first grants permission with a "banner permit." In other words, § 36-83(a) contemplates a permit process for displaying signs in the public right-of-way.²¹ Petitioners argued below that "temporary political signs" – it is undisputed that the petitioners' posters qualify as such – are not subject to the banner permit requirement, because temporary political signs, along with signs in the other § 36-82.1(b) categories, "do not require a permit." Accordingly, signs in those categories, unlike most other signs, should be permitted in the public right-of-way *even if* no banner permit is sought.

The courts below disagreed. They apparently assumed that the phrase "do not require a permit" in § 36-82.1(b) refers only to the *general* permit requirement applicable to *all* (non-exempt) signs in all locations, *see* Anoka City Code § 36-82 (1997), and does *not* refer to the *special banner permit* required for signs in the public right-of-way. Accordingly, they

²¹ For ease of reference, we use the term "public right-of-way" as a shorthand for "public right-of-way or easements." There is no material distinction for purposes of this case between the public right-of-way and public easements.

concluded that even political signs are subject to the presumptive prohibition in § 36-83(a) on signs in the public right-of-way. *See* 2005 WL 3527236, at *6.

But the petitioners' textual argument is hardly far-fetched. The city, for one, clearly believes this is a plausible interpretation, because it recently amended the ordinance in a way that appears specifically designed to foreclose this very argument. The current equivalent to § 36-83(a) now clarifies the scope of any banner permit for displaying signs in the public right-of-way. Here is the new version (with changes shown from the version in effect in September 2004):

Signs shall not be permitted within the public right-of-way or on easements, except that the City Manager or a designee of the City Manager, for a period not exceeding two weeks, may allow temporary signs and decorations **for local community event[s]** to be erected upon or strung across a site designated by the right-of-way City. A banner permit is required for erection of such a sign **signs, which will be permitted for a period not exceeding two (2) weeks. Banners that promote religious, political, business or personal causes will not [be] permitted.**

Anoka City Code § 74-446(a) (2005) (emphasis added); Anoka City Code § 36-83(a) (1997).

Under the new version, a banner permit will be granted only for advertisements for “local community events” and not for signs “that promote religious, political, business or personal causes.” That is, the new version makes it absolutely clear that political signs are flatly prohibited in the right-of-way – no banner permit will be granted for them. Because the earlier version contains no such explicit limitation, it is entirely reasonable to construe the earlier version as allowing temporary political signs. In fact, this construction is the only way to avoid the constitutional problems created by the lower courts' reading.²²

²² The current version of the Anoka ordinance, because it clearly bans political signs and other types of signs from the public right-of-way, has the same constitutional problems that

B. As Interpreted Below, The Sign Ordinance Is Unconstitutional Because It Effectively Prohibits All Signs, Political And Otherwise, From The Public Streets And Sidewalks Of Anoka

If the lower courts' interpretation of the ordinance is accepted, then the ordinance imposes a near-blanket prohibition on expressive signs in the public right-of-way and easements. The only exceptions are for the completely exempted categories in § 36-82.1(a) and any sign as to which a banner permit has been obtained. But the exempted categories are narrow ones used purely for functional rather than expressive purposes. See pages viii-ix, *supra* (memorial plaques, certain informational signs, etc.). They leave no room for signs designed to express an opinion or communicate a message. And the banner permit exception, at least under the construction of the lower courts, is also quite specialized.²³

It is undisputed that the "public right-of-way" includes public streets and sidewalks,²⁴ and the parties agreed that both the Ferry Street bridge and the sidewalk next to it were part of the public right-of-way. App. 63. Accordingly, Anoka's sign ordinance, at least as construed and applied in this case, prohibits *all* political signs in and alongside *all* streets, sidewalks, and thoroughfares in the city.

the old version would have if the construction put on the old version by the state and the courts below were accepted. The current version, however, is not at issue here.

²³ See App. 48 (trial court explaining that "the local church down the street, when they have their Fun Fest in the late fall, stringing a sign across the street that advertises that. That's the kind of sign that would fall within the [banner] permit requirement . . .").

²⁴ See App. 72 (trial court finding that "[o]n the sidewalk of Ferry Street would be within the right-of-way or easement of Ferry Street.").

Streets and sidewalks, along with parks, are “historically associated with the free exercise of expressive activities.” In these traditional public forums,

the government’s ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions “are content-neutral, are narrowly tailored to serve a significant government interest, *and leave open ample alternative channels of communication.*” *Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling government interest.*

United States v. Grace, 461 U.S. 171, 177 (1983) (citations omitted) (emphasis added).

These principles compel the invalidation of Anoka’s sign ordinance. First of all, the ordinance is in practice an absolute prohibition in the city’s streets and sidewalks of a “particular type of expression”: the display of signs. Accordingly, the ban in the right of way is subject to strict scrutiny, which it cannot possibly withstand. Traffic safety and aesthetics, the interests advanced by the city, are simply not compelling for First Amendment purposes.²⁵ Moreover, the elimination of *all* signs (except for certain functional items and, with the city manager’s blessing, certain banners) from alongside *every* public thoroughfare is nowhere close to being narrowly drawn.

Even if, however, the ban on signs in the right-of-way is analyzed to see whether it is a reasonable “place” regulation, it still fails. First, the ban is not content-neutral, since, as the Court of Appeals acknowledged, 2005 WL 3527236, at *7, it exempts certain categories

²⁵ On traffic safety, see *supra* page 32 & n.19. On aesthetics, see, e.g., *Metromedia, Inc.*, 453 U.S. at 507-08 (describing “the appearance of the city” as a “*substantial* governmental goal[]”); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) (municipality’s interest in “aesthetics, while significant, [has] never been held to be compelling”); *Goward v. City of Minneapolis*, 456 N.W.2d 460, 466 (Minn. App. 1990) (holding that “aesthetic interest alone cannot be a compelling state interest”).

“based on their content.”²⁶ See *Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998) (exceptions similar to those here from prohibition on signs on public property were content-based distinctions); *Advantage Media, L.L.C. v. City of Hopkins*, 379 F. Supp. 2d 1030, 1039-41 (D. Minn. 2005) (sign ordinance likely content-based because of distinctions among various categories, including business signs, directional signs, governmental signs, monuments, name plates, construction signs, and real estate signs); see also *Goward v. City of Minneapolis*, 456 N.W.2d at 465 (noting that exceptions applicable to “for sale” and “for rent” signs “impermissibly inverts first amendment values” and explaining that city “may not treat commercial speech more favorably than political speech”). Additionally, for the reasons discussed above, the ban is not narrowly tailored.

Most importantly, the ban does not leave open ample alternative channels of communication. So far as the ordinance is concerned, *there is no place in Anoka that Rudnick and Otterstad can go to get their message out*. Any street or the area alongside it, any sidewalk, and any public easement is off-limits to their display. It is no answer to say, as the Court of Appeals did, that the ordinance “does not affect expression through picketing, leafleting, or speaking.” 2005 WL 3527236, at *7. The issue “is not merely whether

²⁶ To be sure, this conclusion is in tension with *Brayton v. City of New Brighton*, 519 N.W.2d 243 (Minn. App. 1994), which was cited by the court below. *Brayton*, however, was wrongly decided and in any case is difficult to reconcile with the well-reasoned decision of the Eighth Circuit a year later in *Whitton v. City of Gladstone*, 54 F.3d 1400 (8th Cir. 1995). The *Brayton* ordinance permitted only one political or opinion sign on residential property, except during the campaign season, when residents were allowed as many political or opinion signs as there were ballot issues and candidates. 519 N.W.2d at 246. This regulation is obviously content-based – at certain times of the year, whether a sign was permitted was purely a function of its content. *Whitton*, on the other hand, recognizes that regulations applicable to political signs alone are indeed content-based. 54 F.3d at 1403-04.

alternative forums exist, but whether the alternative forums are adequate.” *Goward*, 456 N.W.2d at 467. Rudnick and Otterstad seek to express themselves with a striking visual image, not through pickets, leaflets, or speeches. “The First Amendment protects [petitioners’] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so.” *Meyer v. Grant*, 486 U.S. 414, 424 (1988). And the Court of Appeals’ suggestion that “[b]illboards, too, are presumably an option to reach the highway drivers,” 2005 WL 3527236, at *8, cannot be taken seriously. Highway billboards, unlike the styrofoam posters used here, are impractical for individual political protesters. *See Goward*, 456 N.W.2d at 468 (“The cases recognize that signs are a cheap, effective and autonomous method of communication.”).

This case, then, is remarkably similar to *Grace*. *Grace* concerned a federal statute that, among other things, made it unlawful on the sidewalk surrounding the Supreme Court “to display . . . any flag, banner, or device designed or adapted to bring into notice any party, organization, or movement.” 461 U.S. at 175. The statute, in other words, created the same situation we have here: a categorical ban on political signs in a traditional public forum. *Id.* at 181-82. The government argued that the statute, which was designed to protect the Supreme Court building and maintain proper order in the vicinity, was a “reasonable ‘place’ restriction having only a minimal impact on expressive activity.” *Id.* at 180-81.

The Court disagreed. There was no suggestion that the activities of the sign-carriers in *Grace* in any way obstructed the sidewalks or access to the building or otherwise interfered with order on the grounds. *Id.* at 181-82. In other words, the restrictions flunked

First Amendment scrutiny because they were not narrowly drawn to the interest they were asserted to serve. The same is true here. The city has made no showing that a blanket prohibition on signs and sign-carriers in and alongside all streets, sidewalks, and thoroughfares in Anoka is necessary to preserve traffic safety and aesthetic beauty. Accordingly, the ban in the right-of-way violates the petitioners' First Amendment rights.

This conclusion is strongly supported by *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). That case arose out of a blanket prohibition on most kinds of signs on residential property. The Court assumed for the sake of argument that the exemptions from the prohibition were not content-based, and went on to determine that the prohibition was invalid because Ladue had "almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious, or personal messages." *Id.* at 54.

That is equally true of this case. As numerous court cases and news reports reveal, abortion protesters in the past two decades have found that graphic signs in public streets are an essential way of communicating their beliefs and opinions. Anoka's ordinance would foreclose that outlet entirely. As the Court explained in *Ladue*, "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent – by eliminating a common means of speaking, such measures can suppress too much speech." *Id.* at 55. For many abortion protesters, signs are just such a "common means of speaking." Petitioners' signs, like the residential signs in *Ladue*, "are an unusually cheap and convenient form of

communication.” *Id.* at 57. Just as in *Ladue*, so too here “adequate substitutes [do not] exist for the important medium of speech that [the city] has closed off,” *id.* at 56.

IV. The Public-Nuisance Statute, Which The Court of Appeals Incorrectly Examined As Applied Rather Than Facially, Is Unconstitutionally Vague

The Court of Appeals relied on squarely inapplicable precedent in rejecting petitioners’ vagueness challenge to the public-nuisance statute. The Court of Appeals believed that “[u]se of general language alone does not support a vagueness challenge. ‘[V]agueness must be judged in light of the conduct that is charged to be violative of the statute.’” 2005 WL 3527236, at *5 (citation omitted) (quoting *City of Mankato v. Fetchenhier*, 363 N.W.2d 76, 78 (Minn. App. 1985)).

The Court of Appeals used the wrong rule. The opinion on which it relied was explicitly addressed to *cases that do not involve First Amendment rights*. The complete passage from *Fetchenhier* reads as follows: “*When, as here, no constitutionally protected conduct is swept up by the statute, the traditional rule applies that vagueness must be judged in light of the conduct that is charged to be violative of the statute.*” *Fetchenhier*, 363 N.W.2d at 78 (emphasis added) (internal quotations omitted). *Fetchenhier* went on to repeat the rule that the Court of Appeals used in this case (“[V]agueness must be judged in light of the conduct that is charged under the statute,” 363 N.W.2d at 79), and it cited as support *United States v. Mazurie*, 419 U.S. 544 (1975), in which the U.S. Supreme Court said: “It is well established that vagueness challenges to statutes *which do not involve First Amendment freedoms* must be examined in the light of the facts of the case at hand.” *Id.* at 550 (emphasis

added). This Court has recognized the same principle. *See, e.g., State v. Christie*, 506 N.W.2d 293, 301 (Minn. 1993); *State v. Becker*, 351 N.W.2d 923, 925 (Minn. 1984).

The vagueness challenge in this case, however, *does* implicate the First Amendment. The state's contention – which the Court of Appeals seemingly accepted – that the First Amendment is not implicated because the public-nuisance statute “only prohibits conduct,” Resp. Br. 21, is belied by the facts of this case and by this Court's precedents. Thus, in *State v. Machholz*, 574 N.W.2d 415 (Minn. 1998), the defendant challenged a statute prohibiting “any . . . harassing conduct that interferes with another person or intrudes on the person's privacy.” *Id.* at 418. The state argued there, as it does here, that the statute did not implicate the First Amendment because the statute was “clearly directed at regulating conduct, not speech.” *Id.* at 419. This Court emphatically disagreed:

It is true, as the state contends, that the language of [the harassment statute] is specifically directed at harassing conduct. However, First Amendment protection is not limited to the written or spoken word; it extends to some expressive activity

There is no question that the harassing conduct proscribed by [the harassment statute] does encompass expressive activity. The broad reach of the statutory language is not limited to nonexpressive conduct. [The harassment statute] criminalizes *any and all* intentional conduct causing a reasonable person to feel oppressed, persecuted, or intimidated, if that conduct interferes with the person's privacy or liberty. We can only conclude that First Amendment protections are implicated by [the harassment statute].

Id. at 420. The same is true here. The public-nuisance statute speaks in terms of conduct, but its “broad reach” is hardly limited to nonexpressive conduct, as the charges below confirm. This is a First Amendment case, and it should have been analyzed as such.

Accordingly, even if the Court of Appeals' conclusion that “ordinary people would

understand that appellants' conduct would endanger the public safety of a considerable number of the public" (2005 WL 3527236, at *5) were correct (and it is not), that would be beside the point. The petitioners' challenge is a facial one triggered by the use of the statute to restrict activities protected by the First Amendment. The Court of Appeals should have analyzed the face of the statute.²⁷

Had it done so, it would have been required either to strike down the statute or to narrow it. The U.S. Supreme Court has explained:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, . . . laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and

²⁷ The Court of Appeals was wrong to suggest (2005 WL 3527236, at *5-6) that its holding was supported by two of this Court's decisions. *State v. Hipp*, 298 Minn. 81, 213 N.W.2d 610, 612, 614-15 (Minn. 1973), upheld a disorderly conduct statute only after giving it a narrowing construction (in contrast to the sweeping construction given Section 609.74(1) by the lower courts). Moreover, *Hipp* squarely refutes the Court of Appeals' erroneous suggestion that vagueness must be evaluated by reference to the defendants' specific conduct. 2005 WL 3527236, at *5. This Court explained in *Hipp* that where, as here, "a statute purports to regulate First Amendment rights of speech," a defendant may "challenge its vagueness or overbreadth as it may hypothetically be applied to others." 213 N.W.2d at 614 (emphasis added). Finally, contrary to the Court of Appeals' suggestion, this Court's decision in *State v. Olson*, 287 Minn. 300, 178 N.W.2d 230 (Minn. 1970), did not even involve a vagueness challenge (and in any event is readily distinguishable on its facts).

subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); *see also State v. Davidson*, 481 N.W.2d 51, 56 (Minn. 1992) (“A statute must offer guidance to law enforcement officials limiting their discretion as to what conduct is allowed and what is prohibited.”).

The Minnesota public-nuisance statute invites arbitrary enforcement, and fails to provide fair notice of what conduct is prohibited. It is sprinkled with indeterminate terms, including “annoys,” “endangers the . . . morals, comfort, or repose,” and “any considerable number of members of the public.”²⁸ As one Minnesota court commented, referring to a St. Paul ordinance that was to be enforced by the City Council and used language identical to that in the public-nuisance statute: “[T]he ordinance in question provides a great deal of discretion in the St. Paul City Council.” *Perkins v. City of St. Paul*, 982 F. Supp. 652, 657 (D. Minn. 1997).

The U.S. Supreme Court has struck down a number of ordinances and prohibitions that contained language similar to that in Minnesota’s public-nuisance statute. In *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), for instance, the Court invalidated an ordinance

²⁸ The fact that the trial court relied on jury instructions (formulated before the parties agreed to a “paper trial” before the judge) that happened not to include some of the problematic language, *see* App. 74, does not save the statute. There is no indication that the petitioners were *arrested* only under the selected language, as opposed to the statute as a whole. The police reports and citations refer only to “public nuisance.” Nor is it clear that the state made any distinction among the different clauses of Section 609.74(1) until the court drafted jury instructions. The issue here has to be the statute as a whole, not just those portions of it that the trial judge chose to focus on. *Cf. Virginia v. Black*, 538 U.S. 343, 377 (2003) (opinion of Scalia, J.) (“[W]here state law is ambiguous, treating jury instructions as binding interpretations would cede an enormous measure of power over state law to trial judges.”).

forbidding “three or more persons to assemble” on city sidewalks “and there conduct themselves in a manner annoying to persons passing by.” *Id.* at 611 & n.1. Because “[c]onduct that annoys some people does not annoy others,” the Court explained, citizens “of common intelligence must necessarily guess at [the ordinance’s] meaning.” *Id.* at 614. Similarly, in *Cox v. Louisiana*, 379 U.S. 536 (1965), the Court held that a “breach of the peace” offense – which made it a crime “to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, [or] to disquiet” – was “unconstitutionally vague in its overly broad scope.” *Id.* at 551. The Minnesota public-nuisance statute uses many of the same terms that troubled the U.S. Supreme Court in *Coates* and *Cox*, and it suffers from the same flaws as the invalidated laws in those cases.

Alternatively, the constitutionality of this statute can be saved through a narrowing construction. This Court has not hesitated to avoid First Amendment problems by clarifying a statute or limiting its reach. *See In re S.L.J.*, 263 N.W.2d 412, 419 (Minn. 1978) (avoiding constitutional issue by construing disorderly conduct statute to refer only to “fighting words”); *Hipp*, 213 N.W.2d at 614 (same for unlawful assembly statute); *State v. Century Camera, Inc.*, 309 N.W.2d 735, 737, 745 (Minn. 1981); *City of Duluth v. Sarette*, 283 N.W.2d 533, 537 (Minn. 1979). Here, the Court could avoid the constitutional issue by confirming that the statute, in referring to maintaining “conditions” and to “intentional[]” violations, means what the Advisory Committee said it means: Section 609.74(1) does not criminalize the holding of a sign by a political protester or a protest activity undertaken in a good-faith belief that it is protected by the United States Constitution.

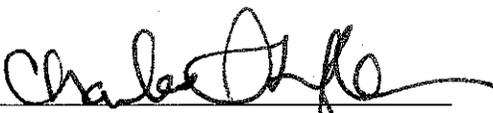
CONCLUSION

The judgment of the Court of Appeals should be reversed. The petitioners' convictions should be reversed.

Respectfully submitted,

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