

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' REPLY BRIEF

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INTRODUCTION

Respondent State of Minnesota fails in every way to come to terms with our arguments for reversal. It persists, without meaningfully addressing our arguments to the contrary, in construing the public-nuisance statute and Anoka sign ordinance in ways that disregard the need for lenity and create constitutional problems rather than avoid them. Beyond that, respondent labors under a fundamental misconception about the First Amendment. The State seems to believe that if only a government's motives are not related to the suppression of a particular idea – say, opposition to abortion – then the restriction is content-neutral and not subject to strict scrutiny. But what respondent has failed to appreciate, from the day petitioners were arrested and continuing right up until the State filed its brief in this Court, is that restrictions on speech adopted *because of concern about viewer reaction to content* are indeed content-based, and asserting the most benign motives in the world will not change that fact. Petitioners' convictions must be reversed.

I. Petitioners Did Not Violate Minnesota's Public-Nuisance Statute¹

The State does not deny that ambiguity about the reach of a criminal statute should be resolved in favor of lenity. *See* Petitioners' Brief ("Pet. Br.") at 13 (citing authorities). That principle alone dooms the State's approach to the public-nuisance statute, which contains several key terms – especially "intentionally" and "condition" – whose applicability

¹ The State's discussion of the standard of review is partly incorrect. The State argues that the convictions under the public nuisance statute should be upheld "if the fact finder . . . could reasonably have found the defendant guilty of the offense charged" beyond a reasonable doubt. Respondent's Brief ("Minn. Br.") at 11. As we explained in our opening brief (at 13 n.6), however, the trial court's determinations are reviewable *de novo* because the trial judge applied statutory language to undisputed facts. The State's citation to *State v. Thomas*, 590 N.W.2d 755 (Minn. 1999) is inapposite because that case involved live testimony and disputed facts.

to petitioners' political protest activities is at best uncertain. Nor did the State carry its high burden of proving the *mens rea* element, properly understood, of Minn. Stat. § 609.74(1).

A. The State Has Pointed To No Evidence Of The Requisite Intent

The State has no answer to the problem that the record lacks any evidence of the requisite intent (much less evidence proving such intent beyond a reasonable doubt). The public-nuisance statute, the State seems to forget, is a criminal prohibition, and that means that to be convicted under it, a defendant must have *intended to cause the prohibited result*. See Pet. Br. 14 (citing Minn. Stat. § 609.02, subd. 9(3)).

An intent to get a message out – which Rudnick and Otterstad clearly did have but which does not suffice for conviction under the statute – is not the same thing as an intent to endanger motorists. Pet. Br. 14-15. The State's only response is to quote the very statement from the opinion below that leapfrogs this critical distinction and equates the two types of intent without analysis or evidentiary support. Minn. Br. 12. Equally unavailing is the State's tepid attempt to explain how its argument can be reconciled with the fact that highway billboards are common in Minnesota, which surely demonstrates that calling a driver's attention to something at the side of the road does not necessarily dangerously distract him. The State simply says that most states regulate billboards to protect the public. Minn. Br. 13. Of course they do, but our point was that merely communicating a message next to a highway does not *ipso facto* entail an intent to endanger motorists.²

² The State suggests (at 14) that petitioners' intent "was not to have drivers glance (as you would at a billboard) but to have drivers distracted into looking at the signs and to have a reaction to what they were posting. Had this not been the intent, there would be no reason for them to protest in the first place." Minn. Br. 14. The first assertion is pure speculation; the

As we previously explained (Pet. Br. 15-16), the Court of Appeals' citation of *City of Edina v. Dreher*, 454 N.W.2d 621, 623 (Minn. App. 1990) for the proposition that “[b]locking traffic . . . may be understood by ordinary people of common intelligence as disturbing the peace” was misplaced because there was no indication that petitioners’ signs caused any blocking of traffic or other hazard. The State responds by mentioning a single anonymous telephone call two days earlier and an accident caused by rubber-necking on the bridge. Minn. Br. 13. But the call is evidence only that on another occasion, one person did not like the signs. And once again, the State completely fails to come to grips with the fact that petitioners cannot have *intended* to distract anyone *on the bridge behind them* with signs facing outward onto the road below.

B. Petitioners Had A Good-Faith Belief That Their Activities Were Protected By The First Amendment

As we previously explained, Otterstad and Rudnick believed in good faith that *even if* their political protest³ fell within the scope of Minn. Stat. § 609.74(1), they had a *federal constitutional right* to protest as they did – that is, to express opposition to abortion and a Congressional candidate on a public sidewalk. Pet. Br. 17-19. This good-faith belief, which

second, a *non sequitur*.

³ Remarkably, the State asserts that petitioners’ opposition to abortion and Patty Wetterling’s candidacy is “wholly unsupported by the record.” Minn. Br. 9. Petitioners’ political motives, however, are plainly apparent from the content of the signs themselves, from the parties’ stipulation that the posters were “temporary *political* signs,” and from other parts of the record, *see, e.g.*, Pet. App. 79 (Rudnick explaining that “[i]t was a First Amendment exercise during the election cycle, about the election cycle”). To the extent the State is disputing the record support for the existence of Wetterling’s candidacy or the precise timing of the election, those facts are not subject to reasonable dispute and thus may be judicially noticed by this Court. *Cf.* Minn. R. Evid. 201(b), (f); Fed. R. Evid. 201(b).

the record clearly supports, prevented the State from proving an “intentional[.]” violation of the public-nuisance statute beyond a reasonable doubt.

The State offers three responses. Minn. Br. 14-16, 34. First, it contends that this argument “is in the nature of an affirmative defense” and was never asserted at trial. The State cites no authority for this characterization, and it is contradicted by the Advisory Committee comments, which make clear that “intentionally” – which certainly establishes an element of the offense – was intended to exclude situations where a defendant has a good-faith claim. *See* Pet. Br. 17. The State is equally mistaken about waiver: the argument was expressly raised and rejected at trial. *See* Pet. App. 71, 74-75.

Second, the State argues that petitioners could not have had a good-faith belief in their First Amendment right to protest because they were arrested for the same activities two days earlier. But the fact that police officers concluded on a prior occasion that petitioners’ conduct violated *state* law in no way diminishes the reasonableness of petitioners’ view that their protest activities were protected by the *federal* Constitution. The State’s argument simply misses the point.

Third, the State suggests that petitioners’ belief that their protests were protected by the First Amendment was mistaken because “the Federal Constitution does not allow anyone to act in any manner at any time and claim that is due to their ‘constitutional rights.’” Minn. Br. 15-16. This broad principle, however – which the State repeats in various forms like a mantra throughout its brief, *see id.* at 22, 28, 40 – is not the basis of petitioners’ claim of right. In any event, even if petitioners’ more nuanced understanding of their First

Amendment rights turned out to be wrong, that would hardly detract from their claim that they had a *good-faith belief at the time of the protests* that their expression was constitutionally protected. A belief can be reasonable even if it turns out (after extended legal analysis of the kind presented to this Court) to be wrong.

C. The State Fails To Establish That Petitioners “Maintain[ed]” Any “Condition”

As we have explained, the framers of the public-nuisance statute recognized that “condition” has a special meaning in nuisance law, one that excludes an isolated, temporary act of political protest. Pet. Br. 19 (citing Minn. Stat. Ann. § 609.74 Advisory Committee cmt. (1963) and Minn. Stat. § 645.08(1)). We further explained that, to our knowledge, Section 609.74(1) has been applied only to situations markedly different from this case, and never before to a protester’s display of a poster by a roadway. Pet. Br. 20. Without disputing that the use of Section 609.74(1) in this case is unprecedented, or that an entirely separate provision of the public-nuisance statute (§ 609.74(2)) that was *not* the basis of petitioners’ conviction specifically targets conduct that affects a highway, the State contends that “the words of the statute are free from ambiguity, and the plain meaning of the statute is immediately evident. Therefore, *there is no need to look to the intention of the legislature.*” Minn. Br. 16 (emphasis added).

Respondent’s position violates the cardinal rule of statutory interpretation in Minnesota, which is that “[t]he object of *all* interpretation and construction of laws is to ascertain and effectuate *the intention of the legislature.*” Minn. Stat. § 645.16 (emphasis added). It is true, as the State points out, 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.” *Id.* (emphasis added). But that principle does not mean that the legislature’s intent can ever be ignored; rather, it means that when the legislature has expressed itself in language whose application to a given situation is absolutely clear, there is no need to look beyond the language because the intent is apparent from the language itself.

This, however, is manifestly *not* a case in which the application of the statute to the factual situation unambiguously supports the State’s position. In ordinary parlance, it would be surpassingly odd to say that holding up a political sign where it can be seen by traffic is “maintaining” or “permitting” a “condition.” That usage is even more strained considering that “condition” is a term of art with a specialized meaning. The State is simply wrong, therefore, in asserting that the statutory text unambiguously supports its reading. “A statute is ambiguous when its language is subject to more than one reasonable interpretation.” *Heine v. Simon*, 702 N.W.2d 752, 764 (Minn. 2005) (citing *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000)). It is certainly reasonable, to say the least, to interpret “maintains or permits a condition” as requiring something more lasting than an isolated display of a political sign on a highway overpass.

Because the language here is at least ambiguous, this Court must look to other sources to ascertain (and not, as respondent is content to do, simply ignore) that intent. The Advisory Committee comments are a vital aid to interpreting this statute, Pet. Br. 17 n.9, 21, and they (and the body of law that informs them) require “more than a single act” and thus exclude

the possibility that a defendant could be convicted under § 609.74(1) merely for holding a sign on a single day. *Id.* at 19.⁴

Respondent contends, as did the Court of Appeals, that even if the statute requires more than a single act, the petitioners meet that requirement because they protested twice. Minn. Br. 16-17. But petitioners were *not convicted* for maintaining a public nuisance on the earlier date.⁵ Even if the September 21 protest might be relevant to petitioners' state of mind two days later, *see* Minn. Br. 17, it cannot be used to show that petitioners maintained a "condition" on September 23. The trial court expressly limited the relevant conduct for the charge under § 609.74(1) to activities on September 23. *See* Pet. App. 20, 73-74, 77.

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

The State fails to come to grips with the issues that bear on the as-applied challenge to the constitutionality of the public-nuisance statute. As we have explained, Pet. Br. 22, the central disputed issue here is whether the removal of the signs and the convictions were

⁴ Respondent finds it significant that the statute begins with the words "[w]hoever by an act" (Minn. Br. 16), but this argument overlooks the fact that the intentional act or omission must still be one that either "maintains" or "permits" a qualifying "condition." Thus, the single act of breaching a dam might create a public nuisance if the result is a lake of fetid water. But it is the "condition" – the existence of the lake – and not the act of the breach that causes the statute to be violated. And the State's contention that the petitioners supposedly "permitted" a "condition" by "ma[king] it possible" to "interfere with, obstruct, or render dangerous for passage, any public highway or right-of-way" (Minn. Br. 17-18), erroneously draws on the language of Section 609.74(2), which was *not* the basis for petitioners' convictions. *See* Pet. App. 20, 73-76; Pet. Br. 20.

⁵ Respondent attempts to make something of the fact that petitioners, contrary to statements in our opening brief, were "prosecuted" for maintaining a condition on the earlier date in the sense that the State did bring charges arising out of that date. Minn. Br. 17. Respondent is quibbling over semantics. The State dropped those charges.

content-based or content-neutral. In its brief, the State presents no persuasive reason not to treat the restrictions at issue as content-based and therefore subject to strict scrutiny, which the State essentially admits they cannot survive. Moreover, even assuming for argument's sake that the restrictions at issue are content-neutral, the State has not shown that they would be constitutional.

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

Respondent essentially ignores the crux of our argument: *a restriction on expression imposed because of concern about the impact of the speech on listeners or viewers is content-based, not content-neutral*. The State's entire discussion of the constitutionality of the public-nuisance statute as applied to petitioners rests on the flatly incorrect premise that if, as respondent insists, the police officers were motivated by concerns for public safety rather than by disagreement with petitioners' anti-abortion message, then the removals and convictions were permissible content-neutral restrictions. That, however, is not the law.

Respondent starts off on the wrong foot by quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) for the proposition 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.” Minn. Br. 18.⁶ As we explained before and as the State fails to

⁶ Respondent also cites *Ward* for the proposition that “a regulation that serves purposes unrelated to the content of expression is deemed [content] neutral, even if it has an incidental effect on some speakers or messages, but not others.” Minn. Br. 18. This principle, formulated in the context of an examination of an entire regulation, may be accurate, but it is entirely inapposite here. Petitioners' position is not and never has been that the public-

acknowledge, that may be the *principal* inquiry, but it is not the *only* inquiry. Pet. Br. 24 n.15. (Moreover, this is not a time, place, or manner case at all. *Id.*) The Supreme Court has since clarified that “while a content-based *purpose*” such as government disagreement with a message “may be sufficient . . . 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). Thus a restriction can be content-based even if not motivated by a desire on the part of government actors to suppress particular views.

This is precisely the kind of case in which it is *not* necessary to show government disagreement to establish that the restrictions are content-based, and yet the State devotes much of its briefing on the as-applied challenge to an attempt to demonstrate the absence of any government disagreement. The effort is wasted. Even in *Ward*, the Court made clear that regulation of expressive activity is content-neutral only “so long as it is ‘*justified* without reference to the content of the regulated speech.’” 491 U.S. at 791. In this case, however, as even respondent seems to acknowledge, the regulation was decidedly justified *with* reference to the content of the posters. Our opening brief illustrates how the police officers, the State below, and the trial court all justified the removal of the signs and petitioners’ convictions with reference to the striking imagery on the posters – and the impact that imagery would allegedly have on viewers. Pet. Br. 24-25. Even now the State continues to betray its motives,

nuisance statute *on its face* is a content-based regulation. Rather, the *application* of the statute to petitioners was a content-based restriction on their speech. Such an application, as even the State agrees, *id.* at 22, is subject to the same scrutiny as a facially content-based regulation.

saying that “[t]he photograph they were holding” – and not its size or location – supposedly “created a condition” that endangered the public. Minn. Br. 29.⁷

The Supreme Court, however, has made it absolutely clear that a restriction 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); *see also* Pet. Br. 26 (citing additional authorities for the same principle).

The State’s *only* response to this fundamental point is not a response at all so much as a tacit admission of the correctness of our position: “The flaw in Petitioners’ argument is that the removal of the signs and the convictions were based on real incidents and real impact, not on ‘unsupported speculation’ and ‘possible impact.’” Minn. Br. 20. But even if the police officers really were reacting to “real incidents and real impact,” that has no

⁷ The State repeatedly points out that the officers were responding to “citizen complaints and traffic accidents,” Minn. Br. 19, but the triggers for the officers’ actions do not change the fact that the officers were concerned, as was the trial court, with the effect of the content of the posters on drivers. Additionally, respondent’s plural references throughout its brief are misleading, as there was only *one* telephone complaint, and, as we explained in our opening brief, apparently only *one* accident, *see* Pet. Br. 16 n.8.

The State also argues that “an officer on duty in the field is entitled to make a reasonable interpretation of the law he is obligated to enforce” and that “officers are entitled to decide that a situation presents danger, even before an accident occurs.” Minn. Br. 19. Although those arguments plainly are relevant to the question whether the individual police officers would be entitled to qualified immunity in a civil suit for damages, *see Anderson v. Creighton*, 483 U.S. 635 (1987), they do not help the State’s actions pass First Amendment muster.

bearing, as a matter of First Amendment law, on the answer to the crucial question whether the burdens on speech here were content-based or content-neutral. What the Court of Appeals failed to grasp and the State refuses to recognize is that if a government regulates speech because it is concerned about citizens' reactions – whether actual or potential – to the content of speech, then the regulation is content-based. True, *Eichman* speaks in terms of “likely communicative impact” rather than actual communicative impact, but *Forsyth County*, a leading case and one in which the objectionable ordinance was adopted in direct response to actual incidents experienced by the government, *see* 505 U.S. at 125-26, is certainly not so limited. *See, e.g., Grove v. City of York*, 342 F. Supp. 2d 291, 303 (M.D. Pa. 2004) (according to *Forsyth*, restrictions on speech “motivated by *anticipated or actual* listener reaction to the content” is not content-neutral (emphasis added)).

The State's discussion of factually analogous cases likewise gives no reason to conclude that the burdens on petitioners' speech were content-neutral. Our opening brief discussed *Ovadal v. City of Madison*, 416 F.3d 531 (7th Cir. 2005), in which police prevented a protester from displaying banners on an overpass above a highway because of traffic problems allegedly resulting from drivers becoming “disturbed” or angry in response to the signs. Pet. Br. 29-30. As our brief recounted, the City of Madison insisted, just as respondent does here, that it “ended the protest only because it created a safety hazard, not because the officers disagreed with the message.” 416 F.3d at 537. The Seventh Circuit was not impressed. Quoting *Forsyth*, it held that if the city selectively banned the protester

because of drivers' reaction to his speech, there was an impermissible content-based restriction. *Id.* at 537-38.

Ovadal, of course, is on all fours with this case, and yet, rather than make any serious effort to distinguish that case, respondent gets hung up on an aside in our brief: "The basis for Petitioners['] argument," respondent says, "is that in *Ovadal*, when the police learned about traffic problems arising from [the] banners . . . , the police sought advice from the city attorney." Minn. Br. 25. Wrong. That the police consulted with a city attorney in *Ovadal* was manifestly *not* our main point. It was instead a minor aside, developed largely in a footnote, within a discussion of a case in which a United States Court of Appeals approached a factual scenario virtually indistinguishable from the present one using precisely the doctrinal framework that we maintain is applicable here and that respondent and the Court of Appeals have ignored. Respondent offers no valid reason why *Ovadal*'s reasoning should not apply here.⁸

The case respondent does discuss at length is *Frye v. Kansas City Mo. Police Department*, 375 F.3d 785 (8th Cir. 2004), but we have already explained why that case – assuming that it was correctly decided, which is doubtful – is readily distinguishable. Pet. Br. 31. In *Frye*, the police officers gave the protesters the option of moving further from where they were standing while continuing to display the same signs for their target audience. Over a sharp dissent, the panel majority held that the officers' actions, which limited only the *place*

⁸ Along similar lines, respondent does not even mention *Grove*, another case discussed in our opening brief in which restrictions motivated by concerns about the reactions of onlookers to speech (in that case, photographs) were recognized as content-based. *See* Pet. Br. 30-31.

of protest, were a reasonable time, place, or manner limitation. Here, by contrast, the police simply informed the defendants that they could not hold their signs and then unceremoniously arrested them, in the process eliminating them and their message from a quintessential public forum. The State's answer is that if petitioners here had "removed their signs[,] they could have taken them elsewhere to protest. They were never told that they could not hold their signs; they were only told that they could not hold them" in their initial location. Minn. Br. 25. This argument borders on the disingenuous. The "elsewhere" in *Frye* was further back from the side of the road, whereas in this case if petitioners had held their signs in any place still visible to the drivers below on Highway 10, they undoubtedly would still have been arrested and convicted for creating a public nuisance. By "elsewhere," the State evidently means out of sight of the target audience. There is thus a world of difference between the responses of the Anoka police and the Kansas City officers. The *Frye* defendants understood what the State here does not, namely, that they were obligated to impose only the least restrictive burdens on the protest.

Respondent also cites *Hill v. Colorado*, 530 U.S. 703 (2000), but that case is easily distinguishable. *Hill* concerned a statute that made it unlawful near the entrance to a health care facility to knowingly approach within eight feet of another person without that person's consent to engage in protest, education, or counseling. The Supreme Court decided that the statute was not content-based, but only because it was satisfied that the statute "places no restrictions on – and clearly does not prohibit – . . . any subject matter that may be discussed by a speaker. Rather, it simply establishes a minor place restriction on an extremely broad

category of communications with unwilling listeners.” *Id.* at 723. Here, by contrast, petitioners were prevented from expressing themselves to their intended audience, were arrested, and were convicted precisely because of the specific content of their speech and its supposed impact on viewers. This was no “minor place restriction on an extremely broad category of communications,” and it *was* a restriction on particular subject matter.⁹

The State has thus failed to offer a single cogent argument that the burdens imposed on petitioners’ speech were content-neutral. Like the Court of Appeals, the State fails to recognize that the most benign motives in the world will not render restrictions content-neutral if the justification for the restrictions is based (as respondent effectively concedes was the case here) on the communicative impact of the speech, and requires reference to its content.

There is, as we explained in our opening brief, no real dispute that if the restrictions on petitioners’ speech were content-based, they are unconstitutional because they fail strict scrutiny, which requires a compelling interest and narrow tailoring, neither of which is present here. *See* Pet. Br. 31-32.¹⁰

⁹ The State (at 27-28) also cites *Fischer v. City of St. Paul*, 894 F. Supp. 1318 (D. Minn. 1995), in which a fence around an abortion clinic and a statute making it a misdemeanor to “intentionally and physically obstruct [] any individual’s access to or egress from a facility” were held to be content-neutral as applied. But those measures were applied even-handedly and justified entirely *without* reference to the content of any speech. *Id.* at 1326-27. *Fischer* is therefore nothing like this case, in which the burdens imposed were a direct response to the content of petitioners’ speech.

¹⁰ Respondent’s brief recites over and over that the officers were motivated by concerns about public safety. *E.g.*, Minn. Br. 21. Whether or not that is true, traffic safety, important as it is, is not considered “compelling” for purposes of First Amendment scrutiny, and the State does not contend otherwise. *See* Pet. Br. 32 & n.19.

B. Even Treated As Content-Neutral, The Restrictions On Petitioners' Speech Were Unconstitutional

Even if this Court concludes – which we insist it should not – that the burdens imposed on petitioners' speech were content-neutral, those burdens would still be unconstitutional because they were not narrowly tailored and did not leave open ample alternative channels of communication. Pet. Br. 32 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

Respondent has not so much as tried to show – as is its burden – that the restrictions at issue here were narrowly tailored. Nor can respondent carry that burden: when the rush-hour traffic on the highway was already bumper-to-bumper, and the only reported disturbance occurred behind the petitioners' display, confiscating the posters and arresting the petitioners were not measures narrowly tailored to any interest in traffic safety.

As for ample alternative channels, respondent argues that Rudnick and Otterstad “can hand out flyers, post signs on the private property of a landowner with permission; they can even fly a banner behind an airplane to convey their message.” Minn. Br. 21. Actually, they cannot. “[T]he issue is not merely whether alternative forums exist, but whether the alternative forums are adequate.” *Goward v. City of Minneapolis*, 456 N.W.2d 460, 467 (Minn. Ct. App. 1990). Flying a banner – this is even more far-fetched than the Court of Appeals' suggestion that petitioners could erect billboards, *see* Pet. Br. 39 – is decidedly *not* an ample alternative channel available to petitioners, or indeed most people. Signs on private property are no answer, either, because they reach a different audience and are always subject to the permission of the property owner. It is precisely because petitioners wish to reach the

public generally that they protested in a traditional public forum. *See* Pet. Br. 22. Nor are flyers – which presumably reach fewer people than petitioners’ large posters – an adequate substitute. *See, e.g., Goward*, 456 N.W.2d at 468 (“The cases recognize that signs are a cheap, effective and autonomous method of communication.”).¹¹

Rudnick and Otterstad, as we explained, insist on communicating what they regard as the full horror of abortion. Pet. Br. 28-29. Their chosen method is to display signs with a graphic image visible from the street. “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).

In an effort to overcome this principle, respondent cites *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998).¹² *Foti* suggested that a restriction on the size and number of signs a picketer could carry was a permissible content-neutral restriction. 146 F.3d at 640-42. Respondent (at 27) finds it significant that protesters, according to *Foti*, have no “right to dictate the *manner* in which they convey their message within their chosen avenue,” 146 F.3d

¹¹ The State’s citation (at 21) of *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 795 (1984) does not help its cause. The content-neutral prohibition in that case on signs affixed to certain types of public property allowed signs to be carried. Here, if petitioners had carried their signs instead of affixing them to the fence, they would still have been arrested for creating a public nuisance because the visual effect would have been identical.

¹² *Foti* is a strange choice on the State’s part. That case held, on a preliminary injunction application, that *every* aspect of a sign ordinance, with only one meaningful exception, was probably unconstitutional, either because (a) content-based and likely to fail strict scrutiny, *see* Pet. Br. 38, or (b) though content-neutral, likely not narrowly tailored. The State chooses to focus on the sole exception.

at 641. The passage from which respondent selectively quotes, however, actually supports *our* position. Here it is in full:

[T]he First Amendment protects [the protesters'] right to choose a particular means or avenue of speech – picketing – to advocate their cause in lieu of other avenues. This is not the same as saying that [the protesters] have a First Amendment right to dictate the manner in which they convey their message within their chosen avenue. Government may regulate the manner of speech in a content-neutral way but may not infringe on an individual's right to select the means of speech.

Id. at 641-42 (emphasis added in part). That is, the First Amendment protects Rudnick and Otterstad's choice to hold signs near a highway, rather than fly a banner or erect a billboard. While content-neutral restrictions on, for example, the precise size and location of the display might be permissible, the basic choice of means or avenue – in this case, the display of graphic signs – is up to the speakers, not the State.¹³

III. The Sign Ordinance Either Does Not Reach Petitioners' Conduct Or Unconstitutionally Prohibits An Important Medium Of Expression In A Traditional Public Forum

There are two ways to read the Anoka sign ordinance. Under the first, the exemption for political signs from the permit requirements of Anoka City Code § 36-82.1(b) extends not just to the general permit requirement applicable to *all* non-exempt signs in all locations – *see id.* § 36-82, reproduced at Pet. Br. viii – but also to the § 36-83(a) special banner permit required for signs in the public right-of-way. Pet. Br. 34-35. That is, temporary political signs can be freely displayed in the right-of-way because no permit is required for them.

¹³ *Fischer v. City of St. Paul, supra*, does not help the State (*see* Minn. Br. 28), either. The restrictions upheld in that case, unlike those at issue here, were narrowly tailored and left open ample alternative channels. The St. Paul police, among other accommodations, blocked off an entire lane of traffic on Ford Highway for anti-abortion protesters. 894 F. Supp. at 1323, 1328-29.

The State gives no reason to reject this reading. Respondent flatly ignores our point that an ambiguous ordinance should be read to avoid constitutional difficulties, and it offers no reason why the construction adopted below is better than petitioners' reading. The State instead gets hung up on the fact that we do not know why the city amended its ordinance, and asserts that "any subsequent amendments to the ordinance are irrelevant to this Court[']s analysis." Minn. Br. 37. Not so. The subsequent amendment removes the relevant ambiguity in a way that directly forecloses our reading, thus rendering our reading of the prior version all the more plausible. It is well-established that "[w]hen the legislature amends a statute, it is usually presumed that it intends some change in the law." *County of Washington v. Am. Fed'n of State, County & Municipal Employees*, 262 N.W.2d 163, 168 (Minn. 1978). Accordingly, it is fair to presume that the City of Anoka intended that the new version of the ordinance do something that the old version did not, which is flatly prohibit temporary political signs in the right-of-way.

Turning to the interpretation adopted below, respondent completely ignores our point that in a traditional public forum, "an absolute prohibition on a particular type of expression" – and here we have a near-absolute prohibition on signs – "will be upheld only if narrowly drawn to accomplish a compelling government interest," which the sign ordinance is not. Pet. Br. 37 (quoting *United States v. Grace*, 461 U.S. 171, 177 (1983)).

The State also fails in its attempt to defend the ordinance as a reasonable time, place, or manner restriction. The State does not counter our point, Pet. Br. 37-38, that the ordinance

is not content-neutral because it explicitly exempts signs based on their content.¹⁴ Nor does the State show, as it must, any narrow tailoring.

What the State does argue is that the city's ban on political signs in the public right-of-way leaves open ample alternative channels. That is not enough to save the ordinance, but even here, the State is mistaken. The parties agree that the public right-of-way includes at a minimum every street, sidewalk, and public easement in the city. *See* Pet. Br. 36. Respondent asserts that it "is not disputing **how** Petitioners want to convey their message but **where** they are conveying it," and that "there are other locations in the city where signs can be placed," Minn. Br. 40-41, but respondent still does not explain where, given *the blanket ban in and alongside the public streets on political signs*, Rudnick and Otterstad are supposed to go to communicate their message.

The State's solution is essentially the same one it offers in connection with the challenge to the public-nuisance convictions: Rudnick and Otterstad should do other things, like distribute handbills and write letters. Minn. Br. 39.¹⁵ Again, however, as we have explained, the First Amendment protects petitioners' choice of medium. Courts recognize

¹⁴ Respondent at one point asserts that "the ordinance prohibits all signs in a public right-of-way, regardless of content," Minn. Br. 40, but that is simply untrue. As we have explained and even the Court of Appeals acknowledged, Pet. Br. 37-38, § 36-82.1(a) exempts four categories of signs, based on their content, from the requirements of the ordinance, including the § 36-83 prohibition on signs in the public right-of-way.

Respondent also cites *Brayton v. City of New Brighton*, 519 N.W.2d 243 (Minn. App. 1994), apparently for the proposition that an ordinance is automatically content-neutral if a municipality offers content-neutral justifications for it. *See* Minn. Br. 40-41. That is not the law, and *Brayton* is wrongly decided to the extent it suggests otherwise. Pet. Br. 38 n.26.

¹⁵ Respondent also mentions "picketing," but that is precisely what petitioners *were* doing in displaying a sign near a highway.

that signs are an especially effective form of communication – much more effective than, for example, distributing handbills and writing individual letters. And that medium is especially crucial here given that petitioners wish to communicate using a striking visual image. Pet. Br. 38-39; page 16, *supra*.

Respondent also fails to come to terms with the import of *United States v. Grace*, *supra*, in which a categorical ban on political signs in a traditional public forum – exactly what we have here, despite respondent’s puzzling assertion to the contrary, Minn. Br. 41 – was held unconstitutional. *See* Pet. Br. 39-40. Respondent attempts to distinguish *Grace* on the grounds that there was no suggestion there that the sign-carriers caused trouble, whereas here petitioners “were in fact causing an interference.” Minn. Br. 41. Rudnick and Otterstad, as we have explained, were doing no such thing, but much more importantly, any concrete effect of their conduct is entirely irrelevant to the constitutionality of their convictions under the *sign ordinance*, as opposed to the public-nuisance statute. The convictions under the sign ordinance, a set of *per se* prohibitions, were not and could not have been based on any such effects. The relevant point, which the State continues to duck, is that there is no showing here that a blanket prohibition on political signs in and alongside all streets, sidewalks, and thoroughfares is necessary for safety and aesthetic beauty.

Finally, respondent ignores *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), in which a blanket prohibition on most kinds of signs on residential property was held unconstitutional because Ladue, like Anoka here, “had almost completely foreclosed a venerable means of

communication that is both unique and important.” Pet. Br. 40-41; *but cf. Taxpayers for Vincent*, 466 U.S. at 812.

IV. The Public-Nuisance Statute Is Unconstitutionally Vague

The Court of Appeals, as we have said, incorrectly analyzed the vagueness challenge to the public-nuisance statute. Because this case implicates First Amendment rights, the court should have considered the face of the statute. Pet. Br. 41-43. Respondent mechanically repeats the assertion that the public-nuisance statute “is directed at regulating conduct, not speech,” Minn. Br. 30, but as we have explained, *State v. Machholz*, 574 N.W.2d 415 (Minn. 1998) dispenses with that argument and (along with petitioners’ conviction in this very case) compels the conclusion that the public-nuisance statute implicates the First Amendment. Pet. Br. 42.

Respondent attempts to distinguish *Machholz* on the grounds that its holding rested on a finding of overbreadth rather than vagueness, Minn. Br. 33, but that is irrelevant. Our point was that in *Machholz*, this Court held – in the face of the State’s familiar argument that an anti-harassment statute was “clearly directed at regulating conduct, not speech” – that the statute *implicated the First Amendment*. The Court’s reasons in that case apply with equal force here. Pet. Br. 42. Given, therefore, that the public-nuisance statute implicates the First Amendment, the vagueness challenge must be treated as a facial one.¹⁶

The statute, as we explained, is sprinkled with indeterminate terms that have troubled the U.S. Supreme Court in the past, invite arbitrary enforcement, and fail, in violation of due

¹⁶ Respondent ultimately seems to be of two minds on this; it argues that the public nuisance statute “*on its face*, is not unconstitutionally vague.” Minn. Br. 29 (emphasis added).

process principles, to provide fair notice of what conduct is prohibited. Pet. Br. 43-45. Rather than deal in any substantive way with these points, the State chooses to focus mainly on *State v. Hipp*, 298 Minn. 81, 213 N.W.2d 610 (1973). Minn. Br. 30-32. That case, however, actually *supports* our side.

In *Hipp*, this Court did precisely what we have been arguing the lower courts could have done here: it upheld a statute, but *only after adopting a narrowing construction to avoid unconstitutional vagueness*. 213 N.W.2d at 614-15; Pet. Br. 43 n.27. This Court was satisfied that “[s]o construed, the [unlawful assembly statute at issue] neither prohibits activity which is merely annoying to others nor invites discriminatory enforcement,” and that “the statute as construed . . . [does not] pose[] the potential of sweeping and improper applications which would infringe upon First Amendment rights.” 213 N.W.2d at 615. By contrast, here the lower courts gave the public-nuisance statute a sweeping construction, one that *does* seem to prohibit “merely annoying” activity, *does* invite arbitrary enforcement, and *does* lend itself to improper applications that would – and indeed did – infringe upon First Amendment rights. The statute should instead be construed not to reach a peaceful political picketer who believes in good faith that his activities are protected by the Constitution. Pet. Br. 45.

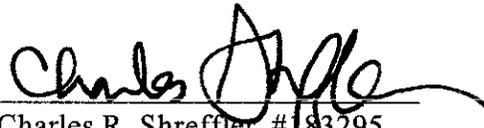
CONCLUSION

For the reasons stated above and in the petitioners’ opening brief, the judgment of the Court of Appeals should be reversed and the petitioners’ convictions should be reversed.

Respectfully submitted,

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