

Nos. A05-178 and A05-179

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**State of Minnesota  
In Supreme Court**

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State of Minnesota,

Respondent,

vs.

Luke A. Otterstad,

Appellant (A05-178),

Robert A. Rudnick,

Appellant (A05-179).

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**PETITIONERS' SUPPLEMENTAL BRIEF**

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# TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
STATEMENT OF FACTS .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	3
CONCLUSION .....	5

## TABLE OF AUTHORITIES

Page(s)

### CASES

<i>State v. Clifton</i> , 10 A.2d 703 (Md. 1940) .....	4
<i>State v. Coolidge</i> , 282 N.W.2d 511 (Minn. 1979) .....	4
<i>State v. Jonason</i> , 292 N.W.2d 730 (Minn. 1980) .....	3
<i>State ex rel. Minn. Amusement Co. v. County Bd. of Ramsey County Comm'rs</i> , 255 Minn. 413, 96 N.W.2d 580 (1959) .....	3
<i>State v. Shifflet</i> , 556 N.W.2d 224 (Minn. App. 1996) .....	1

### STATUTES

Minn. Stat. § 645.39 .....	3
Anoka City Code § 36-83(a) .....	1
Anoka City Code § 36-82.1(b) .....	1

## INTRODUCTION

The Court has requested supplemental briefing on whether appellants were charged and convicted under a version of an ordinance that was no longer in effect on the date of the offense, and if so, whether their convictions must be vacated. Appellants were indeed convicted under a superseded version. Moreover, if this Court agrees with our argument concerning the meaning of the superseded ordinance, then it is clear that “the two provisions are irreconcilable” (*State v. Shifflet*, 556 N.W.2d 224, 227 (Minn. App. 1996)), which would mean that there was an implied repeal of the earlier, irreconcilable version of the ordinance. And that repeal would call for the convictions to be vacated, for convictions based on a repealed law cannot stand. On the other hand, if the Court disagrees with our textual argument concerning the earlier version, then the Court should not vacate the convictions but instead should *reverse* them on constitutional grounds. The later version, in comparison to the earlier one, is even more clearly invalid under the First Amendment.

## STATEMENT OF FACTS

Appellants agree with the State’s explanation of the history of the Anoka ordinance. As the State candidly acknowledges, “[t]he Appellants were charged and convicted under a version of the Anoka City Code that was amended before the date of the charge.” Resp. Supp. Br. 3. The State, the trial court, and appellants all were operating under the mistaken belief that the version in force as of the date of the alleged offense was the pre-amendment version.

Appellants disagree, however, with the State’s submission that the “[t]he Defendants were charged and convicted *only* under the language of the first phrase of both versions.” *Id.*

at 2 (emphasis added). As we demonstrated in our earlier briefs, the meaning of the first phrase of Section 36-83(a) is critically informed by the rest of that section and by other provisions in the ordinance, including language that was amended.

In both versions, the language in Section 36-83(a) that the State calls “applicable,” *id.* at 4 – “[s]igns shall not be permitted within the public right-of-way” – is followed by an immediate qualification that lies at the heart of Appellants’ textual challenge to their convictions. In the version under which appellants were convicted, the qualification reads: “except that the City Manager . . . may allow temporary signs . . . to be erected upon . . . the right-of-way” if a banner permit is obtained. In the later version, the qualifying language reads: “except that the City Manager . . . may allow temporary signs for local community events to be erected upon a site designated by the City” if a banner permit is obtained. The later version further states that banners promoting “religious, political, business or personal causes will not be permitted.”

The State’s implication that only the first clause of Section 36-83(a) was “operative,” *id.* at 4, ignores – or assumes the incorrectness of – our textual argument. But, as appellants have argued at every stage, the exemption in the old ordinance applies to them because it contemplates a permit process for posting signs in the right-of-way – a process from which, according to Section 36-82.1(b), appellants’ temporary political signs are exempt. Thus, under the old ordinance, appellants’ temporary political signs are permitted in the right-of-way.

## SUMMARY OF ARGUMENT

It is undisputed that “[t]he Appellants were charged and convicted under a version of the Anoka City Code that was amended before the date of the charge.” Resp. Supp. Br. 3. If that earlier ordinance was repealed by the new version, then there is no valid legal basis for the convictions, and the convictions should be vacated. If the Court agrees with our textual argument concerning the earlier ordinance, then it should find a repeal by implication because the meaning of the original and amended versions cannot be reconciled: the old version allowed temporary political signs in the public right-of-way; the new version proscribes them outright. Even if the Court concludes that the convictions should not be vacated on textual grounds, it should reverse these convictions on constitutional grounds. The new ordinance is, if anything, more problematic from a First Amendment perspective than the older version on which this case was based.

## ARGUMENT

I. As we explained in our earlier briefs, the older version of the Anoka ordinance, properly interpreted, does not forbid temporary political signs within the public right-of-way. The new ordinance, in contrast, plainly does forbid such signs. Given the obvious irreconcilability of the old and the new ordinances on this point, the new ordinance should be treated as working an implied repeal of the old. *See* Minn. Stat. § 645.39; *State v. Jonason*, 292 N.W.2d 730, 734 (Minn. 1980); *see also State ex rel. Minn. Amusement Co. v. County Bd. of Ramsey County Comm’rs*, 255 Minn. 413, 416, 96 N.W.2d 580, 584 (Minn.

1959) (“When a statute is amended, that portion amended is as much obliterated as if repealed.”).

It is undisputed that the prosecutions in this case were predicated on the older, superseded version of the ordinance. Since that version was impliedly repealed, there is no valid legal basis for the convictions, and they accordingly should be vacated. *See State v. Coolidge*, 282 N.W.2d 511, 514 (Minn. 1979) (“[T]he well-settled principle is that where a criminal law in effect is repealed . . . all prosecutions are barred where not reduced to a final judgment.”); *cf. State v. Clifton*, 10 A.2d 703, 704 (Md. 1940) (“It is a general rule of the common law that after a statute creating a crime has been repealed no punishment can be imposed for any violation of it . . .”).

II. If the Court concludes that the new ordinance was merely amendatory and did not repeal the older ordinance by implication, then the convictions should be reversed. The later version of the ordinance raises constitutional problems at least as great as those raised by the earlier version. Appellants’ constitutional challenge to the earlier version was based on two arguments: first, the City of Anoka had, without satisfying strict scrutiny, effectively prohibited an entire medium of communication; and second, the regulation could not be defended as a content-neutral time, place, or manner restriction. App. Br. 36-41. The new version is even more restrictive than the old. It explicitly limits the banner permit process to signs for local community events, constrains such a sign’s location to a “site designated by the city,” and excludes signs promoting various types of causes. Accordingly, if the first version is unconstitutional for any of the reasons advanced by appellants – it forecloses too