

CASE NOS. A05-178 & A05-179

State of Minnesota
In Supreme Court

STATE OF MINNESOTA,

Respondent,

vs.

LUKE A. OTTERSTAD,

Appellant (A05-178),

ROBERT A. RUDNICK,

Appellant (A05-179).

RESPONDENT'S 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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LEGAL ISSUES

- I. Whether there is sufficient evidence to support the Petitioners' convictions for violating Minnesota Statute § 609.74(1)-Public Nuisance. The Trial Court found the Petitioners guilty of violating Minnesota Statute § 609.74(1), and the Court of Appeals affirmed the convictions.
- II. Whether Minnesota Statute § 609.74(1) is, on its face and as applied to the Petitioners, an unconstitutional restriction on Petitioners' rights to freedom of speech under the First Amendment. The Trial Court determined that Minnesota Statute § 609.74(1) furthers the State's substantial interest in traffic safety, and is therefore a valid exercise of the state's police power. The Court of Appeals agreed.
- III. Whether Minnesota Statute § 609.74(1) is unconstitutionally vague on its face. The Trial Court and the Court of Appeals rejected Petitioners' vagueness challenge.
- IV. Whether the City of Anoka has the authority to prohibit signs from public right-of-way or easements. The Trial Court and the Court of Appeals held that the City of Anoka has the authority to exclude signs from the public right-of-way or easements.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case arises out of two separate incidents in which the Petitioners, Robert Rudnick and Luke Otterstad, were arrested for holding signs against a chain linked fence at the overpass of Ferry Street and U.S. Highway 10 in Anoka, Minnesota during rush hour traffic. On both September 21, 2004, and September 23, 2004, they were holding two large signs, one of which read "Patty Wetterling is Pro-Abortion" and the other

which contained the word "ABORTION" and a color photograph of an aborted fetus.
Pet'r. App. 88-89.

On January 19, 2005, the cases against the Petitioners were jointly tried as a "paper trial" before the Honorable Michael J. Roith, Anoka County District Court Judge. The State initially asserted ten counts against each Petitioner, but in light of judicial economy the State later dismissed eight of the ten counts against each Petitioner.

After hearing the evidence, Judge Roith convicted each Petitioner of violating the City of Anoka's sign ordinance, Section 36-83(a), on September 21, 2004, and of violating Minnesota Statutes § 609.74(1) on September 23, 2004, of maintaining a public nuisance.

Petitioners filed Notices of Appeal on January 28, 2005. They challenged their convictions on multiple grounds. The Court of Appeals, in a decision authored by Chief Judge Toussaint and joined by Judges Willis and Huspeni, affirmed the convictions on December 27, 2005.

Petition was made to the Supreme Court for review of the Court of Appeals' decision on January 26, 2006, and the petition was granted by the order dated March 28, 2006.

STATEMENT OF THE FACTS

A. September 21, 2004

During rush hour "bumper to bumper" traffic on the afternoon of Tuesday, September 21, 2004, Petitioners Robert Rudnick and Luke Otterstad were holding two

signs on the Ferry Street overpass of U.S. Highway 10 in the City of Anoka. One sign contained the word "ABORTION" and a color photograph of an aborted fetus with body parts torn from it. Pet'r. App. 88. Printed in large letters on the other sign was the message, "Patty Wetterling is Pro-Abortion." Pet'r App. 89. Petitioners held the signs in place next to one another, "above the barrier portion of the overpass, positioned up against a chain linked fence," so that to an observer, it would look like one very large sign, approximately four feet high and sixteen feet long. Pet'r App. 55-56.

An anonymous concerned citizen contacted the Anoka Police Department to complain about "an anti-Patty Wetterling poster which showed a graphic picture of an aborted fetus." Pet'r. App. 3 (police report). In response, Officer Anthony Newton was dispatched to the location. While walking towards the Petitioners, Officer Newton told them they needed to "remove the signs." *Id* One of the Petitioners indicated "he would not remove the signs due to the First Amendment." *Id*. Officer Newton then contacted Sergeant Michael Goodwin for assistance. *Id*. According to Sgt. Goodwin's report, Officer Newton "advised them 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." Pet'r. App. 7.

While Officer Newton was waiting for Sgt. Goodwin, Officer Newton observed a "rear end accident" on the bridge "due to onlookers." *Id*. When Sgt. Goodwin arrived, he "explained to [the Petitioners that] as a result of them being [there] they were creating a

public nuisance as an accident had already occurred in front of them and another accident had occurred approximately ten minutes earlier." *Id.*

Petitioners indicate that the record contains no evidence of any traffic problems caused by the signs, and that the accident on Ferry Street could not have been caused by anything on the signs. Pet'r Br. at p. 5.¹ However, the record does show that there were traffic problems caused as a result of a condition that Petitioners maintained or permitted. Pet'r. App. 76-77.

Petitioners were arrested on the afternoon of September 21, 2004, and were charged with violating the Minnesota public nuisance statute, Minnesota Statutes § 609.74(1), and were also charged with refusing to obey a lawful order, in violation of Minnesota Statutes § 169.02, subdivision 2. Pet'r. App. 7. They were later charged with the additional charge of violating Section 36-83(a) of the Anoka City Code, which prohibits signs within the public right-of-way or easements.

B. September 23, 2004

Two days later, at the exact same time and location, the Petitioners were again displaying signs identical to the ones they had displayed two days earlier. Pet'r. App. 60-63. Again the signs were visible to the westbound (homeward bound) traffic. *Id.* According to Sgt. Goodwin's report, the traffic that afternoon "on westbound Highway 10 was backed up to 7th Avenue," approximately one-half mile. Pet'r. App. 7. Again, Sgt. Goodwin approached the Petitioners and asked them to remove their signs and, when

¹ Pet'r Br. at p. from here on after means Petitioners Brief at page.

they refused, he arrested them. *Id.* Officer Goodwin's report states that he then took down "the very graphic, approximately 4'x16', anti-abortion poster." *Id.* Petitioners were again charged with the same offenses they had been charged with only two days earlier. *Id.*

C. Trial Court Proceedings

The initial charges of public nuisance and refusing to obey a lawful order were amended by the State to add the charges of violating two provisions of the City of Anoka ordinances, a sign ordinance and the City's public nuisance ordinance. Pet'r. App. 38-39. The matter was scheduled for a jury trial on January 18, 2005. At trial, each Petitioner was charged with ten misdemeanor counts. Five of those counts (1,3,5,7, and 9) were related to the activities of September 21, 2004. The other five counts (2,4,6,8 and 10) concerned the activities of September 23, 2004.

On January 18, 2005 counsel, and the Judge held extensive discussions in chambers regarding the First Amendment rights implicated by the charges. The Court also prepared jury instructions and verdict forms. Pet'r. App. 10-36. Regarding Anoka City Code § 36-83, the Trial Court ruled that the Petitioners' signs were a "temporary political sign." Pet'r. App. 41-48. Accordingly, the Trial Court ruled that the Petitioners were exempt from the ordinance's permit requirement under Section 36-82.1(b)(1). Pet'r. App. 2. The Trial Court also determined that the Petitioners were still subject to the broader proscription of the city sign ordinance, Section 36-83(a), that "signs shall not be permitted within the public right-of-way or easements." *Id.*

On January 19, 2005, the parties agreed to a "paper trial." Petitioners waived their right to a jury trial. In light of judicial economy and efficiency the State agreed to drop all but two charges: (1) violation on September 21, 2004, of the City of Anoka sign ordinance, and (2) violation on September 23, 2004, of the public-nuisance statute, Minnesota Statutes § 609.74(1). At trial, the State offered the signs and police reports as exhibits, and recited the facts that the State would present through its witnesses.

The Trial Court ruled that temporary political signs are not exempt from the Anoka City ordinance's ban on signs in the public right-of-way or easements. Pet'r. 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 the City of Anoka for their display. Pet'r. App. 42, 63.

The Trial Court also determined that to be convicted under the sign ordinance three elements must be proven:

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

Pet'r. App. 25-26.

On the public nuisance count, the Court determined that a violation of Minnesota Statutes § 609.74(1) required proof of three elements:

1. The defendants acted intentionally.

2. By such an act, the defendants maintained or permitted a condition that unreasonably endangered the safety of any considerable number of members of the public.
3. The defendants' act took place on or about September 23, 2004 in the County of Anoka.

Pet'r. App. 20.

The Court convicted each defendant on both counts. 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." Pet'r. App. 80-81. The Judge stayed the terms of incarceration and \$200 of each of the defendants' fines. *Id.* He stayed payment of the remainder of the fines, but not the probation, for pendency of the appeal. Pet'r. App. 80-82.

D. The Court of Appeals' Decision

The Court of Appeals affirmed the decision of the Trial Court. First, the Court addressed the sufficiency of the evidence supporting the conviction of maintaining a public nuisance under Minnesota Statutes § 609.74(1). The Court concluded that the evidence sufficiently supports the finding that the Petitioners placed the signs above rush hour traffic with the intent to distract the drivers from the act of driving and to redirect their attention to the signs, which in turn endangered the safety of a large number of the public on Highway 10 and Ferry Street. *State v. Otterstad*, 2005 WL 3527236 (Dec. 27, 2005). The Court rejected Petitioners' argument that their actions fell within an exception for a good-faith belief that they were exercising their First Amendment rights. Finally,

the Court of Appeals disagreed that the phrase "maintain []...a condition" in Minnesota Statutes § 609.74(1) requires some measure of "permanence." *Id.*

Regarding 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 signs was to protect citizens' health and safety and were unrelated to the content of the speech. *Id.* at 4.

With regard to the Petitioners' facial challenge to the statute on the void-for-vagueness doctrine, the Court disagreed that the statute was vague and 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.*

The Court also rejected Petitioners' challenge to their convictions under the Anoka sign ordinance. The Court indicated that the ordinance was a valid time, place, or manner regulation, and that the city had "non content-based reasons for regulating signs to protect the public," namely public safety and aesthetics. *Id.* The Court further indicated that the ordinance is sufficiently narrowly tailored and leaves open adequate alternatives of communication. *Id.*

SUMMARY OF ARGUMENT

"Political Picketing" is what the Petitioners claim they were doing by holding a picture of a bloody fetus with body parts torn off of it on a chain link fence visible to

motorists during rush hour traffic. A photograph of a bloody fetus and a sign that was approximately 16' x 4' in size.

Many of the alleged facts upon which Petitioners rely in their brief are wholly unsupported by the record. First, Petitioners claim that their alleged protesting occurred six weeks before a congressional election and they were doing it in opposition of the candidacy of Patty Wetterling who was running for seat in the U.S. House of Representatives at the time. They also indicate that they oppose abortion. Although these may be plausible assumptions, they are not part of the record. Neither Rudnick nor Otterstad indicated why they were protesting nor why they were doing it at that particular time. At trial the prosecutor read a recitation of the facts, and the record is silent with regard to these allegations made in Petitioners' brief.

There is sufficient evidence to support the petitioners' convictions of maintaining a public nuisance. Petitioners argue that they had a "good faith" exception for their actions which negates their intent, and that they did not "maintain a condition" as required by the statute. However, this is not based on the facts or the law. Petitioners not only were arrested on September 21, 2004 but again for the exact same behavior on September 23, 2004. The removal of the signs and Petitioners' subsequent arrests were content-neutral regulations. They were arrested because they were engaging in conduct which unreasonably annoyed or endangered the safety of a considerable number of members of the public.

The Supreme Court makes it clear that a state may enforce regulations on the time, place, and manner of expression as long as they are content-neutral, narrowly tailored to serve significant government interests, and leave open alternative channels of communication. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 74 L.Ed. 2d 794, 103 S.Ct. 948 (1983); *see also Arkansas Educ. Television Comm'n v Forbes*, 523 U.S. 666, 667 (1998). In this case, the public nuisance statute is content-neutral as it is in no way directed at the content of the petitioner's speech; it is narrowly tailored to serve the substantial interest in traffic safety and there are a number of adequate alternative channels of communication.

The Minnesota public nuisance statute is not unconstitutionally vague on its face, nor in its application. Every law is presumed to be constitutionally valid. Minn. Stat. § 645.17(3) (2006). Petitioners contend that the Court of Appeals used the wrong rule when it agreed with the Trial Court that Minnesota Statutes § 609.74(1) is not unconstitutionally vague on its face. The statute does not implicate the First Amendment because it is directed at regulating conduct, not speech. Further, the statute reads in definite terms which would allow a person of ordinary intelligence to understand what it means. Therefore, the Court of Appeals used the correct rule in deciding this case.

The City of Anoka has the authority to regulate the placement of signs within the public-right-way or easements in order to limit hazards and distractions to motorists. The City sign ordinance is content-neutral and does not impede Petitioners' First Amendment rights.

STANDARD OF REVIEW

The issues raised in this appeal are questions of law which this Court reviews *de novo*. 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 reviewed *de novo*. *Id.* The interpretation of a statute is also reviewed *de novo*. *In re Estate of Palmer*, 658 N.W.2d 197, 199 (Minn. 2003). The interpretation of an existing ordinance is a question of law for the Court. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980).

Petitioners raise the issue that their conviction for violating the Minnesota public nuisance statute, Minnesota Statute § 609.74(1), should be reversed because they neither acted intentionally nor did they maintain a condition as required by the statute. This appears to be a claim that there is insufficient evidence to support their convictions. A guilty verdict will be upheld if the fact finder, whether a judge or jury, given due regard to the presumption of innocence and to the state's burden of proof beyond a reasonable doubt, could reasonably have found the defendant guilty of the offense charged. *State v. Thomas*, 590 N.W.2d 755 (Minn. 1999).

ARGUMENT

I. There is sufficient evidence to support the Petitioners convictions of maintaining a public nuisance.

a. The Petitioners had the requisite intent required.

Minnesota Statutes Section 609.74, Public Nuisance, states:

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;

The statute requires an intentional act. "Intentional" is defined in Minnesota

Statutes § 609.02, subdivision, 9(3) as follows:

(3) "Intentionally" means that the actor either has a purpose to do the thing or cause the results specified or believe that the act performed by the actor, if successful, will cause that result. In addition, except as provided in clause (6), the actor must have knowledge of those facts which are necessary to make the actor's conduct criminal and which are set forth after the word "intentionally."

Minn. Stat. § 609.02, subd. 9(3) (2004).

Petitioners argue that there is a flaw in the Court of Appeals' analysis of the intent requirement of the statute because the Court has "equated, with no analysis or evidentiary support, two very separate things: an intent to get a message out, and the intent to deliberately distract motorists from their driving in a way that is likely to endanger their safety." However, the Court of Appeals provides evidentiary support and analysis for its decision. The Court of Appeals found that, "Deliberately distracting drivers from the task of driving and redirecting their attention to the signs would have as a natural and probably consequence endangerment of drivers' safety." *State v. Otterstad*, 2005 WL 3527236 (Dec. 27, 2005). *See, e.g., City of Edina v. Dreher*, 454 N.W.2d 621, 623 (Minn. App. 1990) (stating that "blocking traffic" "may be understood by ordinary people

of common intelligence as disturbing the peace"), *review denied* (Minn. Apr. 24, 1990). Therefore, the state met its burden of proving the requisite intent under the public nuisance statute.

Petitioners contend that *City of Edina*, is not good authority as "there is no indication that Rudnick and Otterstad's signs caused any blocking of traffic or otherwise created a hazard." However, the record clearly indicates the signs affected traffic. Officer Newton's police report states that an anonymous passerby had phoned in concerned about the signs, and also, there was a property damage accident on the Ferry Street Bridge, which he classified as a "rear end accident" **due to onlookers**.

Pet'r. App. 7. *See also, State v. Otterstad*, 2005 WL 3527236, at *5 (Dec. 27, 2005) (stating that "the officers had informed them of a phone call from a concerned citizen and two accidents, and a driver had yelled to them that they had created a traffic hazard").

Further, Petitioners contend that "the entire system of signage in this country is grounded on the premise that drivers can do more than one thing at once." Pet'r. Br. at p. 15. While it is true that our highways are strewn with billboards, there are regulations in nearly every state which govern the aesthetics of billboards and these regulations are necessary to protect the health, welfare and morals of the public as well. In *John Donnelly & Sons, Inc. v. Outdoor Advertising Board & Another*, the Court indicated:

Regardless of the extent which constitutional protection is afforded commercial advertising...we believe that due to the intrusive quality of billboards, passers-by whether willing or not, are compelled to see the advertisements. The advertiser's message is thrust upon them as a captive audience in violation of the "cardinal principle that no person

can be compelled to listen (or hear against his will)." ... Thus, we conclude that the petitioner's minimal free speech interest does not outweigh the interest of the unwilling audience.

339 N.E.2d 709 (Mass 1975).

The intent of Rudnick and Otterstad here 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.

b. Petitioners' conduct was not done in "good faith."

The Petitioners did not act in "good faith" when they placed the signs on the highway overpass. Their claim that they acted in "good faith" does not deny that they intended to place the signs, but only provides them with a reason why they placed the signs and it in no way negates their intent. Further, no good faith claim was presented to the Court at trial. The argument is in the nature of an affirmative defense to excuse or justify the Petitioners' behavior and was neither noted in the Pretrial Order, nor was it asserted or otherwise raised at trial as an affirmative defense to their behavior. Pet'r. App. 1.

Although Petitioners may have believed in "good faith" they had a right to display their signs somewhere, they could not have believed in "good faith" that they could post their signs in this particular spot. "The record contained evidence that, at the time of the September 23, 2004, incident, they were aware that they had distracted the public and car accidents had occurred." *State v. Otterstad*, 2005 WL 3527236, at *3 (Dec. 27, 2005).

Also, the Petitioners had been arrested only two days earlier for the exact same behavior, thereby negating any "good faith" belief they may have had.

Petitioners indicate that their "good faith" belief is comparable to the "claim of right" defense which arises primarily in trespassing cases. '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). Thus, "[a]n act which...might appear to be trespass is not in fact a trespass, if the 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). Petitioners claim that, "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). Pet'r. Br. at 18.

In this case, Rudnick and Otterstad could not have "actually and sincerely" believed that they had the right to post the signs on this highway overpass. Any actual and sincere belief they may have had on September 23, 2004 was negated by their arrests on September 21, 2004 for engaging in the exact same behavior.

Finally, Petitioners argue that, "the defense here is that Petitioners believed in good faith that they had a federal constitutional right to continue protesting- a right that, or course, trumps any prohibition imposed by state law." Pet'r Br. at p. 18. The flaw in their arguments is that while it is true that Federal Constitutional rights are trumped by state laws, the Federal Constitution does not allow anyone to act in any manner at any

time and claim that it is due to their "constitutional rights." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.* 452 U.S. 640, 647, 69 L.Ed. 2d 298, 101 S.Ct. 2559 (1981).

c. Petitioners "maintained or permitted a condition"

Petitioners argue that the evidence is insufficient to support their convictions as they did not "maintain or permit a condition" as is required by the statute. They cite to Minnesota Statutes § 645.16 and indicate that the Court of Appeals reliance on the language of the statute is misplaced. Minnesota Statutes § 645.16 reads:

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.

When 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.

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

(2006). In this case, 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. The statute does not exclude single acts; it begins with the words "whoever by an act" permits or maintains a condition. *State v. Otterstad*, 2005 WL 3527236, at *3 (Dec. 27, 2005).

Even if the statute required more than a single act, the Petitioners acted not only on one occasion but two, September 21, 2004, and again on September 23, 2004 at the

same place and approximately the same time. Petitioners were not convicted of public nuisance acts for their actions on September 21, 2004, only after their repeat performance on September 23, 2004 were they convicted. The Court of Appeals affirmed the finding of a "condition," citing to the fact that the Petitioners were repeating their actions on the date of the offense. In their brief, Petitioners argue that they were not prosecuted for maintaining a public nuisance on September 21, 2004, only on September 23, 2004. This statement is untrue. The Petitioners were charged with maintaining a public nuisance on both dates, the offense as to the September 21, 2004 incident was later dismissed. Pet'r. App. 38-39.

Petitioners argue that their actions from two days earlier are "entirely irrelevant" to whether the state proved the required offense for the later date. However, on September 23, 2004, when the Petitioners were repeating their actions, and at that time they were not aware that the State would later drop certain charges. They knew they had been arrested only two days prior for the same activity. Therefore, the charges later being dropped could not negate the fact that they were maintaining or permitting the same condition they had just been arrested for two days prior.

Even if the Court were to find that the Petitioners did not "maintain" a condition their conduct is still within the statute. The statute requires that one either "maintains **or permits** a condition." (emphasis added). According to the Merriam-Webster Online Dictionary, the word permits means, "to make possible, or to give an opportunity." Merriam-Webster Online Dictionary (2006) at: <http://www.m-w.com/dictionary/permits>.

The Petitioners made it possible, or gave an opportunity on two separate occasions, to interfere with, obstruct, or render dangerous for passage, any public highway or right-of-way, as required by the statute.

The Petitioners acted intentionally and maintained or permitted a condition by placing the signs such that they were visible to a considerable number of members of the public and, as a result, their convictions must be upheld.

II. Minnesota's Public Nuisance Statute, Minnesota Statue § 609.74(1), is not unconstitutional on its face nor as applied to restrict Petitioners' right to freedom of speech.

The Petitioners were arrested because the placement of their signs, on a highway overpass during rush hour, endangered the public. "The 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." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989). In addition, a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others. *Id.* "[A] sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *State v. Otterstad*, 2005 WL 3527236 (Minn. App. Dec. 27, 2005) (quoting *State v. Miner*, 556 N.W.2d 578, 585 (Minn. App. 1996) (quoting *United States v. O'Brien*, 391 U.S. 367, 376-77, 88 S. Ct. 1673, 1678-79 (1968))). A state may enforce regulations on the time, place, and manner of expression

that are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 74 L.Ed. 2d 794, 103 S.Ct. 948 (1983); *see also Arkansas Educ. Television Comm'n v Forbes*, 523 U.S. 666, 667 (1998).

Petitioners argue that in this case, the removal of their signs and their arrests were efforts to regulate the anti-abortion content of their speech. The removal of the signs and the arrests of the Petitioners, however, were not efforts to regulate the content of their speech. The Anoka City police officers came into contact with the Petitioners only after receiving complaints from motorists. The officers responded to the scene and requested that Petitioners remove their signs because the Petitioners' signs were creating a public nuisance, as evidenced by the citizen complaints and traffic accidents. When the Petitioners refused to comply with the police officer's directions, they were arrested. While the officers note in their reports that the signs were very graphic anti-abortion posters, they were merely stating the facts and responding to citizen complaints. Based upon the citizen complaints and viewing the signs, an officer on duty in the field is entitled to make a reasonable interpretation of the law he is obligated to enforce. *Habiger v. City of Fargo*, 80 F.3d 289, 296 (8th Cir. 1966). In addition, police officers are entitled to decide that a situation presents danger, even before an accident occurs. *Acorn v. St. Louis County*, 930 F.2d 591, 596, (8th Cir. 1991).

In this case, the police officers had already received a phone call and observed an accident related to the Petitioners' signs. The officers did not have to wait until anything

further happened to make the determination that the conduct of the Petitioners was endangering the safety of a considerable number of members of the public. Further, the fact that Petitioners' First Amendment rights may have been incidentally affected is a result of their own behavior in endangering the public.

Citing to *United States v. Eichman*, Petitioners argue that "suppression of 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." 496 U.S. 310, 317-18 (1990).² 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."³ Here, a concerned citizen made a phone call to the police; there were traffic accidents and a driver yelled to Petitioners, telling them they had created a traffic hazard. *State v. Otterstad*, 2005 WL 3527236 at *4 (Minn. App. Dec. 27, 2005). In addition, the Petitioners had been warned and arrested only two days prior because their signs caused problems on the highway below. Thus, the restrictions in this case are content neutral and need only be 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 (1983).

² Pet'r Br. at 25. Petitioners further indicate that "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).

³ Pet'r Br. at 26.

In this case, the justification for the removal of the signs and the arrests of Petitioners were related to public safety. Public safety is a fundamental interest of state government. *In re Welfare of C.P.K.*, 615 N.W.2d 832, 835 (Minn. App. 2000), *review denied* (Minn. Aug. 22, 2000); *see also: Frye v. Kansas City, Missouri Police Department*, 375 F.3d 785, 791 (8th cir. 2004) (holding, protection of citizens' health and safety is a well established substantial government interest). Ample alternative means of communication were left open as well. Although Petitioners argue that the restrictions here serve as a blanket bar, and not a limitation on their protests, their argument is unfounded. Minnesota Statutes § 609.74(1) does not in any way prohibit the Petitioners from getting their message out; they remain free to picket in other places. They 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. In *Members of the City Council of the City of Los Angeles, et al. v. Taxpayers for Vincent, et al.*, the district Court suggested many of these same alternatives. 466 U.S. 789, 795 (1984). In *Taxpayers for Vincent*, a political corporation and political sign service company filed an action alleging that appellant city's ordinance prohibiting the posting of signs on public property violated their freedom of speech. The district Court concluded that the "sign prohibition does not prevent taxpayers or COGS 'from exercising their free speech rights in the public streets and in other public places; they remain free to picket and parade, to distribute handbills on their automobiles, and on private property with the permission of the owners thereof.'" In this case, the removal of Petitioners from one location for

creating a public nuisance does not limit or prohibit them from exercising their free speech rights in other places. Nor did the removal of their signs prohibit them from posting the same signs or conveying the same message through alternative channels of communication.

Petitioners next argue 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.⁴ Respondent agrees that this is a correct statement of the law and had the statute in question here been applied in a content-based manner that would be the correct inquiry.⁵ Here, the statute was applied to protect the safety of the public not to thwart the Petitioners' message.

Respondent concedes that Petitioners may have been expressing their political views on a controversial subject. Respondent further concedes that Petitioners were doing so on a public sidewalk, which constitutes a public forum. However, Petitioner's position that they were merely picketing on a sidewalk with a sign that one passerby and two police officers found offensive is incorrect. The Petitioners' here placed a graphic sign in a prominent public place clearly visible to oncoming rush hour traffic. They were not simply expressing their opinions, they were distracting drivers. The Federal Constitution does not render a state powerless to regulate the conduct of demonstrators and picketers. *State v. Hipp*, 213 N.W.2d 610, 615 (1973). Indeed, demonstrating,

⁴ Pet'r Br. at 26. Citing *Terminiello v. City of Chicago*, 337 U.S. 1 (1949)

⁵ In this case, the application of the statute to Petitioners was not content based. The petitioners were arrested because they were "maintaining or permitting a condition, which unreasonably annoys, injures or endangered the safety... [] of the public. Not because they were holding a picture of an aborted fetus.

picketing and parading are "subject to regulation even though intertwined with expression and association." *Cox v. Louisiana*, 379 U.S. 559, 563, 85 S.Ct. 476, 480, 13 L.Ed. 2d 487, 491 (1965). The public nuisance statute neither prohibits picketing nor prohibits speech, but merely prohibits conduct that unreasonably annoys or endangers the safety of a considerable number of members of the public.

The facts of this case are remarkably similar to those contained in *Frye v. Kansas City, Missouri Police Department*, 375 F.3d 785, 791 (8th cir. 2004). In that case, anti-abortion demonstrators placed themselves between the sidewalk and a curb in a Kansas city neighborhood adjacent to the intersection of two heavily trafficked roads, approximately two or three feet from the street. Some of the demonstrators held small signs and others placed large, poster-sized signs of approximately three feet by five feet on the ground, some of which displayed color photographs of aborted fetuses, including a large sign displaying a photograph of the head of a decapitated fetus on one side and a photograph and parts of a dismembered fetus on the other side. In response to complaints about "offensive signs," police officers responded and advised the demonstrators they could continue to demonstrate as long as they did not create a traffic hazard. (In Rudnick and Otterstads case, the police arrived after the traffic hazard had already occurred). The officers later returned, after speaking with a group of motorists who had stopped to complain about the photographs of mutilated fetuses along the side of the road. Kansas City police advised the demonstrators that the "poster-sized photos were offending people passing through the intersection and creating a hazard to public safety." After being

advised to either relocate or stop displaying the large photographs and refusing to leave, the protestors were arrested for violating the city's loitering ordinance which, in relevant part, makes it "unlawful for any person to...stand...either alone or in concert with others is a public place in such a manner so as to obstruct any public street, public highway...by hindering or impeding the free uninterrupted passage of vehicles, traffic or pedestrians." (Kansas City Ordinance § 50-161(g)). Eleven of the demonstrators filed a civil rights action against the city police department and various individual officers. The Court dismissed the protesters' claims. The Court's analysis involved a determination of whether the police officers' conduct in placing restrictions on the display of the large signs displaying photographs of mutilated fetuses was based on the content of the anti-abortion message or on content neutral factors. The principle 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. *Ward v. Rock against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989). In other words, the government's purpose is the controlling consideration.

The Court in *Frye* held, that in taking the facts in a light most favorable to the Appellants, the police did not impose restrictions based on the content of the Appellants' message. Even though the Appellants argued they had a right to display the large, graphic photographs on the side of the road, the Supreme Court "has regularly rejected the assertion that people who wish to propagandize protest or views have a constitutional

right to do so whenever and wherever they please." *United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983).

Petitioners argue that *Frye*, is readily distinguishable from this case because here, 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.⁶ In the case of Rudnick and Otterstad the officers first advised them to remove their signs, and only after they refused, were they arrested. Had the Petitioners 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 the location they were due to the fact they were "maintaining or permitting a condition which unreasonably...injured or endangered the safety...of any considerable number of members of the public." Also, the police are under no obligation to suggest alternative means of protest to picketers, the job of a police officer is to enforce the law.

As a secondary authority Petitioners cite *Ovadal v. City of Madison*, 416 F.3d 531 (7th Cir. 2005). The basis for Petitioners argument is that in *Ovadal*, when the police learned about traffic problems arising from banners displayed reading, "Homosexuality is sin" and "Christ can set you free" on an overpass above a highway, the police sought advice from the city attorney. Moreover, Petitioners indicate that "it is not uncommon for police officers to consult with a city attorney about how to handle a free speech

⁶ In *Frye*, the officers suggested to the protesters that they relocate.

issue."⁷ Petitioners further indicate that "there was no such consultation in this case, despite the Petitioners' invocation of the First Amendment at the time of the arrests."⁸ This bold assumption on the part of the Petitioners could not be further from the truth. On September 21, 2004, Officer Goodwin did in fact contact the City of Anoka Attorney, Michael Scott, inquiring how to handle the situation presented by the Petitioners. It was only after a consultation with the city attorney that the officers decided to approach and remove Petitioners from the overpass. This case presents the same exact facts that Petitioners sought to distinguish themselves from in *Ovadal*.

In the United States Supreme Court decision, *Hill v. Colorado*, abortion protesters argued that a state statute was content based because it was necessary to examine the content of a protester's statement to determine whether it violated the statute. 530 U.S. 703, 721 (2000). The Supreme Court disagreed, explaining that, "it is common in the law to examine the content of a communication to determine the speaker's purpose," and that it had "never held or suggested that it is improper to look at the content of an oral or written statement in order to determine whether the rule of law applies to a course or conduct." *Id.* Furthermore, it is a traditional exercise of the state's police powers to protect the health and safety of their citizens." *Id.* In this case, the police were exercising their police power in a manner which sought to protect the safety of the citizens. They had already received a phone call from a concerned citizen and witnessed a traffic accident. Both which were a result of the Petitioners conduct.

⁷ Pet'r Br. at 30, footnote 18.

⁸ *Id.*

In another similar case, *Foti v. City of Menlo Park*, protesters wanted to display three by five foot posters of aborted fetuses, but a city ordinance regulated the size and number of picket signs. 146 F.3rd 629 (9th Cir. 1998). The Court noted that although the First Amendment protected their right to advocate their cause, it did not give them a "right to dictate the manner in which they chose to convey their message within their chosen avenue." *Id.* The Court held that the restriction on the manner of protest was "permissible in light of the city's substantial interest in requiring drivers to devote greater attention to driving conditions and road signs." *Id.* at 642. Similarly, in this case although Rudnick and Otterstad have a First Amendment right to freedom of speech, this does not in turn give them the right to "dictate the manner" in which they convey their First Amendment right especially when public safety is jeopardized.

A similar discussion of these issues was raised in *Fisher v. City of St. Paul*, where anti-abortion protesters brought a civil rights action seeking declaratory and injunctive relief on the grounds that the City of Saint Paul and its police department violated their First Amendment right to freedom of speech, where the city fenced off a public sidewalk in front of an abortion clinic and banned public access to the sidewalk. 894 F.Supp. 1318 (D.Minn 1995). The Court indicated that as a general matter, peaceful picketing and handing out leaflets are expressive activities involving "speech" protected by the First Amendment, and that streets and sidewalks are traditional public for a and have been used for purposes of assembly, communicating thoughts between citizens and public questions. *Id.* (citing; *Hague v. CIO*, 307 U.S. 496, 515, 83 L. Ed. 1423, 59 S.Ct. 954

(1939). The First Amendment does not, however, guarantee an absolute right to anyone to express their views any, place, any time, and in any way that they want. *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.* 452 U.S. 640, 647, 69 L.Ed. 2d 298, 101 S.Ct. 2559 (1981). Even protected speech in public places may be subject to content-neutral time, place and manner restrictions if they are narrowly tailored to serve significant government interest, and preserve ample alternative channels of communication. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 74 L.Ed. 2d 794, 103 S.Ct. 948 (1983).

In the *Fisher* case, the fence was installed in response to the threat posed by protesters. The principle justification for installing the fence and banning public access to the sidewalk was the city's desire to maintain public safety and order and avoid dangerous confrontations between opposing groups. Further justification was in protecting a woman's freedom to seek lawful medical or counseling services in connection with pregnancies. The Court indicated those justifications had nothing to do with the content of the plaintiff's speech and do not suggest a hidden purpose to regulate speech because of a disagreement with the plaintiff's message. Having determined that significant governmental interests were indeed at stake, the Court ruled that the restriction was narrowly tailored such as to serve significant governmental interests and left open ample alternative channels of communication.

In this case, Minnesota Statutes § 609.74(1) does not regulate constitutionally protected speech. The statute regulates conduct that is unrelated to the content

expression. Therefore, the statute is content neutral even if it has an incidental affect on the message the Petitioners were attempting to convey.

For the reasons discussed above, the restrictions on Petitioners' were content-neutral. The right to freedom of expression is not unlimited. Petitioners were not arrested for violating the public nuisance statute for the size or location of the photograph. Petitioners were arrested because the photograph they were holding created a condition which unreasonably endangered the safety of the public. The statute is narrowly tailored such as to serve significant governmental interests and leaves open ample alternative channels of communication.

III. Minnesota's public nuisance statute, Minnesota Statute § 609.74(1), is neither on its face, nor in its application unconstitutionally vague.

a. Minnesota Statute § 609.74(1), on its face, is not unconstitutionally vague.

Every law is presumed to be constitutionally valid. Minn. Stat. § 645.17(3) (2006). A person challenging a statute as unconstitutionally vague must demonstrate beyond a reasonable doubt that the statute is unconstitutional. *State v. Robinson*, 539 N.W.2d 231, 237 (Minn. 1995). A penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *State v. Kortkamp*, 633 N.W.2d 863 (Minn. App. 2001) (quoting *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985)). Persons of common intelligence must not be left to guess at the

meaning of a statute or its application and a higher standard of certainty of meaning is required where a statute imposes criminal penalties. *Id.*

At the heart of the vagueness doctrine is a philosophy of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. *Id.* ((quoting *State v. Hipp*, 213 N.W.2d 610, 615 (1973) (quoting *Colten v. Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 1957, 32 L.Ed.2d 584 (1972))). All are entitled to be informed as to what the State commands or forbids, *Lanzetta v. State of New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939).

Petitioners contend that the Court of Appeals used the wrong rule when it agreed that Minnesota Statutes § 609.74(1) is not unconstitutionally vague on its face. However, the statute does not implicate the first amendment because it is directed at regulating conduct, not speech. The fact that petitioner's first amendment right to speak may have been affected is incidental to the fact that they were directly violating conduct which is regulated by the statute.

In *State v. Hipp*, the defendants claimed that a Minnesota unlawful assembly statute, Minnesota Statutes § 609.705(3), was unconstitutionally vague as it impermissibly infringed upon protesters' constitutional rights of speech and assembly.⁹

⁹ Petitioners attempt to distinguish *Hipp*, by indicating that "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.*" "*Pet'r Br. at 43* However, in this case the statute does not purport to regulate any First Amendment

213 N.W.2d 610 (Minn. 1973). *Hipp* involved a group of demonstrators protesting the Red Barn Organization over the propriety of erecting a red barn restaurant near the University of Minnesota campus. *Id.* The Court started its analysis with the fundamental that a law which forbids conduct or activities in language so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application" is unconstitutional on its face. *Id.* (quoting, *Connely v. General Construction Company*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)). Such laws violate the Federal Constitution standard of due process of vagueness and over-breadth when the language employed fails to define the conduct or activities clear enough to give fair notice of what is prohibited. *Id.* The Court indicated that while the requirement that the participants "conduct themselves in a disorderly manner" may be, as defendants argue, vague, uncertain or susceptible of application which could infringe on protected First Amendment rights, this argument ignores the context in which the words appear. *Id.* A full and fair reading compels the conclusion that the only misbehavior intended to be prohibited is that which disturbs or threatens the public peace. *Id.* The Court indicated that any law-abiding person would have no difficulty in understanding what conduct was prohibited by the unlawful assembly statute. *Id.* The Court also stated that the Federal Constitution does not render states powerless to regulate the conduct of demonstrators and picketers, even though demonstrating, picketing and parading are "subject to

Conduct and any First Amendment conduct affected is purely incidental to the conduct of the petitioners in holding the signs which "endanger the safety of the public."

regulation even though intertwined with expression and association." *Cox v. Louisiana*, 379 U.S. 559, 563, 85 S.Ct. 476, 480, 13 L.Ed.2d, 487, 491 (1965).

Accordingly, the Court held that the Minnesota unlawful assembly statute, Minnesota Statute § 609.705(3) was not unconstitutionally vague and that since the statute as construed neither purports to regulate protected speech or association nor poses the potential of sweeping and improper applications which would infringe upon First Amendment rights, is not overbroad. *State v. Hipp*, 213 N.W.2d 610 (Minn. 1973).

Applying these general principals to the Minnesota public nuisance statute, and to the facts of this case, the statute clearly prohibits conduct "by an act or failure to perform a legal duty," "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. Petitioners argue that the terms are vague and are left to the discretion of one police officer. In this particular case the decision to remove Petitioners was the decision of two police officers and the city attorney. Petitioners were arrested due to the fact that they had been asked to remove their signs and refused. Law enforcement officers can determine that conduct is creating a public safety hazard simply by observing the flow of traffic and receiving complaints from citizens. Also, they do not have to wait for an accident to happen. Similar to the unlawful assembly statute in *Hipp* the Minnesota public nuisance statute only prohibits conduct and does not regulate speech. Therefore, it is not unconstitutionally vague.

The Minnesota public-nuisance statute reads in definite terms. "whoever by an act...intentionally...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" is guilty of the misdemeanor maintaining a public nuisance. Minn. Stat. 609.74(1). This is unlike the vague terms from the *Machholz* case Petitioners argue are similar. Pet'r. Br. at 42-43. In that case, the defendant challenged a statute prohibiting "any...harassing conduct that interferes with another person or intrudes on the person's privacy." *State v. Machholz*, 574 N.W.2d 415 (Minn. 1998). In *Machholz*, the Court of Appeals held that the statute in question, Minnesota Statutes § 609.749, subdivision 2(7), was **overbroad** on its face and as applied to the defendant. *Id.* The court further indicated that, "because we ultimately conclude that subdivision 2(7) is unconstitutionally overbroad, we do not reach *Machholz's* vagueness challenge." *Id.* at 418.

In this case, the issue is whether the statute in question is unconstitutionally vague on its face or in its application. Petitioners' reliance on the *Machholz* case is misplaced because the issue in that case was one of over breath and not vagueness.

b. Minnesota Statute § 609.74(1) on its face applies to Petitioners conduct.

Petitioners argue that in the alternative the statute can be saved by narrowly construing it. Further, they indicate that Minnesota Statutes § 609.74(1) does not criminalize the holding of a sign by a political protester or a protest activity undertaken in a good-faith believe that it is protected by the United States Constitution. In order for

Petitioners argument to be sound they would have had to have actually had a "good-faith" belief that their actions were protected by the United States Constitution. As previously discussed, Petitioners did not act in good faith. They may have believed in good faith that they had the right to post their signs somewhere. However, they could not possibly have a "good faith" belief that they could post them on that highway overpass at that time. They were fully aware that they had distracted the public and a car accident had occurred as a result. They had even been arrested. Any "good faith" belief they had was negated when they were arrested.

The public nuisance statute does not apply to Petitioner's speech but only to their specific conduct in communicating their message and its resulted danger to public safety. Therefore, the statute is on its face constitutional. Further, Petitioners did not have a "good faith" belief that their activities were protected by the United States Constitution, thus even if the statute is narrowly construed it would still apply to the Petitioners and they would still be in violation.

IV. The City of Anoka has the authority to regulate and prohibit signs in a public right of way or easement.

a. Petitioners are not exempt from the prohibition of signs in a public right-of-way or easement.

Anoka Code Section 36-83 reads:

- (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.

Anoka City Code § 36-83 (1997).

Section 36-83 generally regulates the location, placement and size of signs. *Id.* The Anoka Sign ordinance regulates "signs" which include a "description, display, illustration, or device which is affixed to or represented directly or indirectly upon a building, structure or land in view of the general public and which directs attention to a product, place, activity, person, institution, or business." *State v. Otterstad*, 2005 WL 3527236 (Minn. App. Dec. 27, 2005). (quoting Anoka, Minn., City Code § 36-81.1(jj) (1997)). The ordinance expressly exempts four categories of signs from the requirements of the article governing signs:

- (1) informational signs displayed strictly for the convenience of the public (e.g., restrooms, building entrances);
- (2) memorial or historical plaques;
- (3) wall, window, and awning signs giving a name or profession; and
- (4) public safety signs.

Id. Five more categories of signs, including temporary political signs, do not require a permit or fee, but "the other requirements of [the article governing signs] shall apply [to them]." *Id.* at § 36-82.1(b). One of the requirements, that which is important to this case is that "[s]igns shall not be permitted within the public right-of-way or easement." *Id.* There is however one exception to the general prohibition against signs in the right-of-way. A banner permit may be granted by the city manager or designee but not for longer

than two weeks to allow temporary signs and decorations to be erected upon or strung across the right-of-way. *Id.*

A city may enact sign control ordinances under its general zoning powers which promote "public health, safety, morals, and general welfare." Minn. Stat. § 462.357 (generally). (2006). The City of Anoka adopted a comprehensive sign ordinance regulating the placement of signs in the city. Section 36-81(a) (Resp. App. 1) outlines the purpose of the sign ordinance and states that the ordinance is intended to establish a comprehensive and balanced system of sign control that accommodates the need for a well-maintained, safe, and attractive community and the need for effective communications. It is stated that the intent of the sign ordinance is to promote the health, safety, welfare, aesthetics and image of the community by regulating signs, and permitting signs which meet the city's goals by authorizing, among other things, signs which are designed, constructed, installed and maintained in a manner that does not adversely impact the public safety of unduly distract motorists. (1997).

In this case, the parties stipulated that the signs were "temporary political signs," that the Petitioners did not obtain a permit and that the signs were posted in a public right-of-way. Petitioners argue that "temporary political signs" (like those they posted) are not subject to the permit requirement of the ordinance, and should be permitted in the public right-of-way. Further, they argue that the mistake of the Court of Appeals was that "they 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." Pet'r Br. at 34. "Accordingly, they concluded that even political signs are subject to the presumptive prohibition in § 36-83(a) on signs in the public right-of-way." *Id.*

Petitioners next argue that this must be true as the city itself recently amended the ordinance in a way that is aimed at directly that argument. *Id.* Petitioners appear to be arguing that the new changes are in direct response to this case. However, this argument is unfounded. Even if the new version does not allow any temporary political signs the city has the authority under its general zoning power which promote "public health, safety, morals, and general welfare." The reasons behind the change in the ordinance are not articulated by the Petitioners. They further argue that the current version of the ordinance has the same constitutional problems that the old version would have if the construction put on the old version by the state and Courts below were accepted. Pet'r Br. at 36. Further, any subsequent amendments to the ordinance are irrelevant to this Courts' analysis.

The signs that the Petitioners posted were not the type of signs exempt from the statute, nor were they the types of signs within the banner exception. The signs posted by the Petitioners' were the exact type of signs expressly prohibited from the public right-of-way. Therefore, the Court of Appeals and the District Court were correct in holding Petitioners in violation of the sign ordinance.

b. The Anoka City Sign Ordinance is a content-neutral regulation and is therefore constitutional.

"The 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." *Ward v. Rock against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989). An ordinance restricting expressive activity is content neutral so long as it is "justified without reference in the content of regulated speech." *Id.* "[A] sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *State v. Otterstad*, 2005 WL 3527236 (Minn. App. Dec. 27, 2005) (quoting *State v. Miner*, 556 N.W.2d 578, 585 (Minn. App. 1996) (quoting *United States v. O'Brien*, 391 U.S. 367, 376-77, 88 S. Ct. 1673, 1678-79 (1968))). The Anoka City sign ordinance prohibits the placement of all signs in a public right-of-way, regardless of content.

Ordinarily, ordinances are "afforded a presumption of constitutionality, [but] ordinances restricting First Amendment rights are not so presumed." *Id.* (quoting *State v. Castellano*, 506 N.W.2d 641, 644 (Minn. App. 1993)). If a provision seeks to limit when, where, or how means of expression may be used, it is analyzed to determine if it is a valid "time, place, and manner" regulation. *Hill v. Colorado*, 530 U.S. 703, 725-26, 120 S.Ct. 2480, 2494 (2000). A state may enforce regulations on the time, place, and manner of expression that are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Perry Educ. Ass'n*

v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 74 L.Ed. 2d 794, 103 S.Ct. 948 (1983); see also *Arkansas Educ. Television Comm'n v Forbes*, 523 U.S. 666, 667 (1998). "A regulation that serves purposes unrelated to the context of expression is neutral, even if it has an incidental effect on some speaker's messages but not on others." *Goward v. City of Minneapolis*, 456 N.W.2d 460, 464 (Minn. App. 1990) (citing *Ward*, 491 U.S. at 791, 109 S.Ct. at 2753).

The purpose of Anoka's sign ordinance is in no way related to the content of the petitioner's speech. The justification of the ordinance is to promote the health, safety, welfare and aesthetics of the community. The fact that it implicates any First Amendment rights is purely incidental. Therefore, the proper inquiry is whether the ordinance is narrowly tailored to serve significant governmental interests, and whether it leaves open alternative channels of communication. The government's interest in regulating traffic, particularly during peak use times is significant. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-8, 101 S. Ct. 2882, 2892-93 (1981) (stating it "is far too late to contend" traffic safety is not substantial government interest).

Further, the Anoka ordinance leaves open alternative channels of communication. Petitioners could present their opinions without violating the city's sign ordinance, such as passing out hand pills, picketing and letters. Petitioners argue that, "there is no place in Anoka that Rudnick and Otterstad can go to get their message out." Pet'r Br. at 38. This argument is totally untrue. Rudnick and Otterstad are only prohibited from holding "signs" in a public right-of-way. This is only **one** form of "getting their message out"

which they are prohibited from doing. Respondent is not disputing **how** Petitioners want to convey their message but **where** they are conveying it. Further, Petitioners argue that they seek to express themselves with striking visual images, not through pickets, leaflets, or speeches. *Id.* The First Amendment does not, however, guarantee an absolute right to anyone to express their views any, place, any time, and in any way that they want.

Heffron v. Int'l Soc. for Krishna Consciousness, Inc. 452 U.S. 640, 647, 69 L.Ed. 2d 298, 101 S.Ct. 2559 (1981). Therefore, although Rudnick and Otterstad may want to use striking visual images they cannot always do it when and where they want to.

In this case, the ordinance prohibits all signs in a public right-of-way, regardless of content, and the purpose of Anoka's ordinance is to promote the health, safety, welfare and aesthetics of the community, and that the property is affected by the number, size, location and appearance of signs that unduly divert the attention of drivers. § 36-81(b)(7). This case is similar to *Brayton v. City of New Brighton*, where the Minnesota Court of Appeals held that a New Brighton city ordinance regulating the content and placement of yard signs did not violate constitutional principals of free expression. 519 N.W.2d 243 (Minn. Ct. App. 1994). In its discussion, the Court outlined a two-part test to use in determining whether an ordinance restricting time, place or manner of speech will survive constitutional scrutiny as follows: (1) does the challenged ordinance burden protected speech? (2) If so, does the ordinance contain content based restriction or content neutral restrictions? *Id.* In *Brayton*, the parties agreed the limitation on speech contained in the ordinance was a burden on speech. It is Respondents position in this

case that the ordinance does not constitute a burden on speech as there are other locations in the city where signs can be placed. The Court found that the New Brighton ordinance was based on concerns for public safety, order, cleanliness, aesthetics and administrative convenience. *Id.* The Court indicated that because those concerns were not related to the content, the ordinance was content neutral.

Petitioners argue that "*Brayton*, however, was wrongly decided..."¹⁰ However, the Court of Appeals disagreed as they relied on *Brayton* in their decision in this case. Petitioners argue that this case is similar to *United States v. Grace*, however, in that case unlike here that statute placed a categorical ban on political signs in a traditional public forum. 461 U.S. 171 (1983). In *Grace*, there was no suggestion that the activities of the sign-carriers in any way obstructed the sidewalks or access to the building or otherwise interfered with the grounds. *Id. at 181-82.*¹¹ In this case, there is proof (citizen complaints, and car accidents), that the activities of both Rudnick and Otterstad were in fact causing an interference.

The City of Anoka's sign ordinance is a valid time, place, and manner regulation, is content neutral, constitutionally valid, reaches the conduct of the Petitioners and does not unduly restrict the Petitioners' right to free speech.

¹⁰ Pet'r Br. at 38. The statement made by Petitioners is that *Brayton*, however, was wrongly decided and in any case is difficult to reconcile with the well-reasoned decision of the Eight Circuit a year later in *Whitton v. City of Gladstone*, 54 F.3d 1400 (8th Cir. 1995).

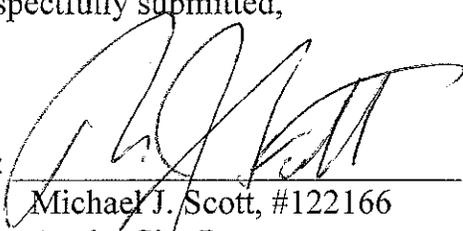
¹¹ This statement is right out of the Petitioners brief on page 39.

CONCLUSION

Respondent respectfully requests that the Petitioners' convictions under the Minnesota Statute, and under the Anoka City sign ordinance be upheld.

Respectfully submitted,

Dated: 7.28.06

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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) (with amendments effective July 1, 2007).