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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

AMERICAN CIVIL LIBERTIES UNION OF ALASKA, DUNLEAVY FOR ALASKA, AND ERIC SIEBELS, Plaintiffs, v. STATE OF ALASKA, and the STATE OF ALASKA DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, Defendants.	)	Case No. 3AN-18-08845 CI

STATE OF ALASKA'S OPPOSITION TO
MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs Dunleavy for Alaska, ACLU, and Eric Siebels ask this Court to enter an overbroad injunction that would undo the ban on paid outdoor advertising overwhelmingly approved by Alaska voters in 1998. Plaintiffs request this relief under the pretext that their ability to communicate using political campaign signs has been hampered by State enforcement; but Dunleavy for Alaska has distributed over 1000 signs throughout the State that are visible on

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seemingly every corner[1] and Eric Siebels claims to be afraid of enforcement despite living on a road that is not subject to the State's Outdoor Advertising Law.[2]

The citizens of Alaska are entitled to have this Court uphold their legal antipathy for outdoor advertising as expressed in the adoption of 1998 Ballot Initiative 5 by over 70% of the voters. Specifically, the State's ban on paid outdoor advertising outside of the right-of-way and its content-neutral ban on all advertising within the right-of-way are constitutional on their face and as applied, and should not be disturbed, even temporarily. Accordingly, the State requests that the Court enter a narrow preliminary injunction limited to allowing the specific form of political speech addressed by the Plaintiffs: small, temporary political campaign signs no larger than 4' x 8' displayed on private property by owners or occupants of the property who have not been paid to display the signs.

If the Court were to enter the unduly broad injunction sought by Plaintiffs, it would not appreciably change the State's enforcement efforts against political campaign signs, which have been directed entirely at signs illegally placed within the State's right of way under DOTPF's authority to regulate encroachments.[3] This enforcement remains essential as political campaigns

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1 Exhibit A – Photographs of larger (generally 4'x8') Dunleavy for Alaska and Alaskans for Dunleavy signs that appear to be on private property and visible from state roads subject to the Outdoor Advertising Law. These photographs were taken on August 25, 26, and 29, 2018; the original photographs are date-stamped and geo-tagged. Exhibit A is not intended to be a comprehensive review of signs supporting Candidate Dunleavy; the 70+ signs shown were photographed after this lawsuit was filed to demonstrate that DFA's intended message of support for Candidate Dunleavy is clearly visible around the State. There are many other campaign signs on private property and visible from the right-of-way, e.g. typical 18"x24" yard signs; indeed DFA's Chair has sworn that they have delivered 1000 signs and that those have only been posted on private property. Aff. of Terre Gales at 2.

2 AS 19.25.075 - .180.

3 AS 19.25.200 *et seq.* Affidavit of Danika Simpson-Golden, filed herewith, at Exh. A (DOTPF Policy and Procedure on Encroachment Control (Dec. 28, 2007)).

persist in placing signs so that they create traffic hazards. Just one recent example is a DFA sign documented blocking a stop sign and driveway/right-of-way sight lines in Soldotna on August 28:[4]

Under the Plaintiffs' proposed injunction, they acknowledge that the State must be able to continue ameliorating these type of safety issues within the right-of-way in the same manner that DOTPF has consistent with existing State policy and practice extending back years and through multiple administrations. Based on that policy and practice, the State has not and will not remove political campaign signs from private property (unless the sign presents a clear safety issue). Instead, the primary impact that enjoining the entire statute will have is that it will allow Dunleavy for Alaska, other political campaigns, businesses, and anyone else to immediately purchase off-premises advertising.

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[4] Simpson-Golden Aff. at 9.

The State agrees, however, that while this case is pending, it must allow small, temporary political signs to be posted on private property. There is no reported incident, and no evidence presented by Plaintiffs, of DOTPF removing a political campaign sign from private property under Alaska Statute 19.25.105. Nevertheless, the citizens of the State are entitled to clarity on their ability to post small, temporary political campaign signs on their private property as long as the signs reflect the political beliefs of the occupant of the property, and the occupant voluntarily posted the sign and was not paid or otherwise compensated to display the sign.

The State's proposed order remedies the Plaintiffs' chief issue as plead while this case is pending, but otherwise preserves the constitutional scheme enacted by the Legislature to comply with the federal Highway Beautification Act and adopted by the citizens of this State to outlaw paid outdoor advertising.

II. FACTS

A. The Federal Highway Beautification Act and Alaska's Outdoor Advertising Law

In 1965, Congress enacted the Federal Highway Beautification Act "to protect the public investment in [the interstate and primary highway system], to promote the safety and recreational value of public travel, and to preserve natural beauty."[5] Congress found that "the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to [such highways] should be controlled" to further those interests.[6] The Act conditions ten percent of a state's federal highway funds on the state's "effective control" of "outdoor advertising signs, displays, and devices" that are located within 660 feet of the nearest edge of the right-of-way of

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5 Pub. L. No. 89-285, § 101, 79 Stat. 1028 (1965) (codified at 23 U.S.C. § 131).

6 23 U.S.C. § 131(a).

interstate or primary highways and visible from the roadway or beyond 660 feet if "erected with the purpose of their message being read from such main traveled way."[7]

To maintain "effective control" within the meaning of the Act, a state generally must limit outdoor advertising within the regulated area to the following kinds of signs: (1) "directional and official signs and notices"; (2) "signs, displays, and devices advertising the sale or lease of property upon which they are located"; (3) "signs, displays, and devices . . . advertising activities conducted on the property on which they are located"; (4) certain "landmark" signs that were lawfully in existence when the Act became effective; and (5) "signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on" covered highways.[8] In areas designated by a State as industrial or commercial, however, the state may also allow "signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary."[9]

All fifty states have enacted laws regulating outdoor advertising that comply with the conditions prescribed by the federal Act.[10] Most, if not all, of these state laws contain exceptions that parallel those found in the federal Act, including exceptions for on-premises signs.[11]

Alaska's Outdoor Advertising Law, like the similar laws of the other 49 states was originally enacted in response to the Highway Beautification Act ("HBA"), establish the required

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7 *Id.* § 131(b); (c).

8 Id. § 131(c).

9 *Id.* § 131(d).3

10 *See* Brief for the United States as Amicus *Curiae* at 2, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), 2014 WL 4726504, at *2.

11 *See, e.g.*, Ky. Rev. Stat. Ann. § 177.841(2); Mich. Comp. Laws § 252.313; Ohio Rev. Code Ann. § 5516.02.

effective control within 660 feet of interstate, primary, and secondary highways.[12] As required by the HBA and the State's agreement with the federal government under the HBA,[13] the State's Outdoor Advertising Law prohibits the placement of any "outdoor advertising" within the State's right-of-way[14], or within 660 feet of or visible from a highway right-of-way.[15] "On-premises signs"—those signs advertising activities taking place on the property on which the signs are located, or advertising the sale or lease of that property—are excepted from the general prohibition on outdoor advertising. The term "outdoor advertising" is broadly defined to include:

> any outdoor sign, display, or device used to advertise, attract attention, or inform and which is visible to a person on the main-traveled way of a highway of the interstate, primary, or secondary systems in this state, whether by printing, writing, painting, picture, light, drawing, or whether by the use of figures or objects, or a combination of these, or any other thing designed, intended, or used to advertise, inform, or attract attention;[16]

In essence, "outdoor advertising" means any sign or display used to advertise, inform, or attract attention, regardless of content, subject matter, or viewpoint. If the purpose of the sign is to advertise, inform, or attract attention, it is "outdoor advertising".

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12 23 U.S.C § 131(a), (b), (c). The State and the Territory of Alaska did, however, tightly regulate outdoor advertising even before the Highway Beautification Act. *See, e.g.* 1949 Alaska Sess. Laws ch. 59 (banning all commercial advertising and exempting political advertising); 1953 Alaska Sess. Laws ch. 86 (removing the political advertising exception).

13 A copy of the State's 1968 agreement with the United States is available online here: http://www.scenic.org/storage/PDFs/FSAs/ak1965.pdf.

14 AS 19.25.105(d) prohibits all signs within the right-of-way of a state highway with a very limited exception for signs on bus shelters or bus benches and adjacent trash receptacles that are located within a right-of-way in a borough of unified municipality, and only under authority of a permit issued by the DOTPF

15 AS 19.25.105(a)(1)-(5).

16 AS 19.25.160(3).

Alaska Statute 19.25.080 declares that the purposes of the Alaska Outdoor Advertising Law include "protect[ing] the public safety and the welfare of persons using the highways of the state by having outdoor advertising signs, displays, and devices along the highways controlled;" preventing unreasonable distraction and confusion of motorists; promoting the "safety, convenience, and enjoyment of travel on, and protection of the public investment in, the highways in this state"; "preserv[ation] and enhance[ment of] the natural scenic beauty or aesthetic features of the highways and adjacent areas"; and to regulate outdoor advertising signs "consistent with the public policy declared by Congress relating to areas within and adjacent to the right-of-way of" interstate, primary, and secondary highways.[17]

In 1998, the voters of Alaska amended the Outdoor Advertising Law via Ballot Measure 5 to prohibit "billboards" in the State.[18] The people's intent was for "Alaska [to] be forever free of billboards" in order to protect "Alaska's uniqueness and its scenic beauty".[19] The ballot measure defined "billboards" as any "signboards, signs, displays, notices or forms of outdoor advertising that do not strictly comply with the provisions of AS 19.25.075-19.25.180" or any permits issued thereunder.[20] The voters approved the measure overwhelmingly, with 72.38% of voters voting in

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17 AS 19.25.080.

18 *See* 1998 Ballot Measure 5, "An Act Prohibiting Billboards". A copy of the Division of Election's official election pamphlet for Ballot Measure 5 is attached as Exhibit B and is available online at http://www.elections.alaska.gov/doc/oep/1998/98bal5.htm (last visited Aug. 31, 2018).

19 *Id.*

20 *See Id.*; *see also* AS 19.25.075(b) ("It is the intent of the people of the State of Alaska that Alaska shall forever remain free of billboards."); AS 19.25.160(1) (definition of "billboards").

favor of the initiative.[21] A primary purpose of Ballot Initiative 5 was to repeal a law passed the previous year that would have "[made] it legal, for the first time, for landowners to rent out advertising space along the highways."[22]

B. DOTPF's Approach to the Outdoor Advertising Law and Road Hazards Generally

Federal highway funding is crucial to DOTPF's mission and the Department has worked since 1970 to ensure that the necessary "effective controls" to meet the standards of the Highway Beautification Act are in place.[23] Without these controls, the State could lose over $50 million per year in highway funds.[24]

To provide for highway safety, there are a variety of important reasons why commercial or non-commercial signs placed within rights-of-way are problematic in Alaska. First and foremost, these signs create serious safety hazards. In the areas surrounding busy intersections – which are a particularly popular place for placing commercial or non-commercial signs – signs can block traffic signs and signals, block views of oncoming vehicles, and create distraction for motorists whose attention is diverted at a point where particular focus is required. Away from intersections, signs can impair sight lines in a manner that prevents motorists from seeing vehicles, bicyclists, pedestrians, or animals located on or near a highway. During periods of high winds, signs placed within a highway right-of-way can be blown into

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21 *See* State of Alaska Division of Elections Initiative History, Initiative ID 97BILL, available at http://www.elections.alaska.gov/doc/forms/H26.pdf#page=1 (last visited Aug. 31, 2018).

22 Ballot Initiative 5 1998, Official Election Pamphlet Introduction Page, available online at http://www.elections.alaska.gov/doc/oep/1998/98bal5.htm.

23 Aff. of Heather Fair, filed herewith, at ¶3.

24 Fair Aff. at ¶4.

traffic lanes or worse yet, into passing vehicles. These issues are often difficult for members of the general public to recognize, or appreciate.[25]

Directly relevant to the State's implementation of the HBA's required effective controls, roadside signs also create aesthetic problems that are the source of frequent citizen complaints. From the perspective of many Alaska citizens, signs within highway rights-of-way detract from Alaska's scenic beauty and are contrary to Alaska's longstanding policy of minimizing signs and billboards to the maximum extent possible. Since signs placed within highway rights-of-way are typically constructed from cheap materials (usually a combination of plywood and cardboard), they can become a source of roadside clutter as they deteriorate in Alaska's highly variable climate.[26]

In an effort to encourage political campaigns to comply with the laws governing roadside signs, prior to the start of election season DOTPF has traditionally sent letters or emails to campaigns advising them of the restrictions imposed by Alaska law.[27] This has definitely occurred every year since 2014 and DOTPF's files indicate that similar information has been distributed to campaigns and candidates going back to at least the late 1990s.[28]

Through the years, different sections of DOTPF have been assigned responsibility for issuing these notices. In some election seasons this notice was made through a general letter to candidates and campaigns issued by the Department's Deputy Commissioner. In other years, these notices have been issued by DOTPF's regional offices. While the wording of these

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25 Fair Aff. at ¶6.

26 Fair Aff. at ¶7.

27 Fair Aff. at ¶10.

28 Fair Aff. at ¶10.

communications has varied through the years, they have all emphasized that signs should not be placed within rights-of-way for highways managed by DOTPF.[29]

The email or mailing addresses to which these notices are sent are obtained from a database maintained by the Alaska Public Offices Commission ("APOC"). This database covers all candidates for elected executive branch or legislative offices, political parties, and independent political action groups that are required to register with APOC on account of their activities in Alaska. Additional efforts are made to gather contact information for candidates running in local races from the municipal official responsible for managing those elections.[30]

DOTPF also maintains a web page that summarizes the requirements of AS 19.25.105, and that details the history of highway beautification efforts in Alaska since statehood. The specific address for that web page has changed over time, but it currently is http://dot.alaska.gov/stwddes/dcsrow/campaignsigns.shtml.[31] DOTPF has maintained a version of this web page since at least 2008.[32] A link to this page is included on web sites that are maintained by the Division of Elections, and the Alaska Public Offices Commission ("APOC").[33]

Unfortunately, DOTPF's education efforts have not kept campaigns from placing signs in state rights-of-way, creating significant traffic hazards.[34] Accordingly, DOT has undertaken

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29 Fair Aff. at ¶11.

30 Fair Aff. at ¶12.

31 Fair Aff. at ¶13.

32 Fair Aff. at ¶14.

33 Fair Aff. at ¶14. *See* APOC webpage at http://doa.alaska.gov/apoc/ and Division of Elections candidate information webpage at http://www.elections.alaska.gov/Core/candidatefiling.php.

34 *See, e.g.*, Simpson-Golden Aff. at ¶¶6-10.

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enforcement actions throughout the years to alleviate these hazards and clear right-of-way encroachments.[35] These efforts typically consist of DOTPF contacting campaigns with a request for signs to be removed from the right-of-way, followed up by DOTPF removing signs if the campaign is unresponsive; signs that pose immediate safety hazards may be removed before the campaign is contacted. This is the same practice DOTPF follows with other types of encroachments.[36]

While AS 19.25.105 makes reference to signs or billboards placed within 660 feet of federal-aid highways, DOTPF is not aware any incident of employees entering private property to remove a non-commercial sign located within that 660-foot buffer zone. Similarly, DOTPF does not appear to have ever pursued a civil lawsuit or criminal case against a landowner who has a non-commercial sign placed on his or her private property outside the right-of-way but within that buffer zone.[37]

C. The 2017-2018 Campaign Seasons and July-August 2018 Sign Enforcement

In August 2017, DOTPF began work to provide information to candidates and campaigns regarding the limits on roadside political signs. This was motivated in part by complaints stemming from Mat-Su Borough local elections candidates placing signs within highway rights-of-way.[38]

On September 7, 2017, DOTPF sent a letter to a list of candidates and campaigns compiled from the APOC database addressing political campaign signs in and near state highways. Among the intended recipients of this email/letter was Terre Gales, who is identified

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35 Fair Aff. at ¶21; Simpson-Golden Aff. at ¶¶5-6, 11-12.

36 Fair Aff. at ¶21; Simpson-Golden Aff. at ¶¶5-6, 11-12.

37 Fair Aff. at ¶9.

38 Fair Aff. at ¶15.

in APOC filings as an official with AMEA/AFSCME Local 16. For any candidates/groups that lacked an email address, or for which the email address provided by APOC proved nonfunctional, a copy of the letter was sent via regular U.S. Mail. This notice would not have been sent to the "Dunleavy for Alaska" independent expenditure group since it was not formed until early 2018. At about the same time, DOTPF used content similar to the September 7, 2017 letter to issue a press release, update its website, and post to the DOTPF facebook page.[39]

After the primary candidate deadline passed on June 1, 2018, DOTPF again compiled a list of emails and addresses for candidates and campaigns from the APOC database. On July 9, 2018, DOTPF sent a press release and copy of the September 7, 2017 letter regarding political signs and State rights-of-way to the list compiled from APOC.[40] Neither the DOTPF personnel responsible for making these communications to candidates and campaigns nor any of the regional right-of-way personnel had any contact with the Governor's Office or the Governor's re-election campaign regarding the timing or content of the communications or any subsequent enforcement efforts.[41] The July 2018 communications to candidates and campaigns about posting political signs on and near State rights-of-way is consistent with DOTPF's practice for at least the last 20 years.[42]

While political signs are a longstanding source of complaints that ROW agents must address during election seasons, in the weeks leading up to the recent primary election, it was my opinion – shared by other ROW agents – that there was an increasing proliferation of political signs within highway rights-of-way. For example, at the Raspberry and Jewel Lake

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39 Fair Aff. at ¶¶14-18.

40 Fair Aff. at ¶¶19-20.

41 Fair Aff. at ¶¶21-22.

42 Fair Aff. at ¶¶21-22.

intersection, there were eleven different 4' x 8' signs adjacent to the road, and twenty-two signs at an Abbott Road intersection that screened opposing traffic from view.[43] There were many other examples of signs posted in the right-of-way that posed traffic hazards.[44] In other areas, some political signs or banners had been attached to fences, retaining walls or sound barriers owned by DOTPF. In one location a sign was bolted to two healthy birch trees within the right-of-way, with brush cut down in front of the sign to make it more visible to passing motorists.[45]

Consistent with the DOPTF's encroachment policy, a broad enforcement effort was not undertaken within the Central Region until a notice regarding the applicable laws was sent to candidates and political parties in the first week of July. In conjunction with that notice, a press release was issued in a further effort to educate candidates and their campaign volunteers. Prior to that notice and press release being issued, the only political signs removed or relocated by Central Region maintenance personnel were those that posed an immediate safety concern. This approach is consistent with the policy directive that ROW Agents first send a letter to the owner (or presumed owner) of an encroachment that does not pose a safety concern prior to removing it.[46]

Following that notice and press release, it appeared that a number of political signs within rights-of-way were either moved to new locations, or relocated further from the roadside. However, numerous signs clearly within rights-of-way were not moved; in some

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43 Simpson-Golden Aff. at ¶¶6-7.

44 Simpson-Golden Aff. at ¶¶8-9.

45 Simpson-Golden Aff. at ¶ 10.

46 Simpson-Golden Aff. at ¶ 11.

right-of-way locations, ROW agents noted that additional signs were going up despite DOTPF's educational efforts.[47]

13. After giving candidates and their campaign volunteers over two weeks to remove their signs from highway rights-of-way, on July 25 DOTPF sent three teams of ROW agents to flag signs located within the rights-of-way of the most heavily traveled state highways in the Anchorage and Eagle River area. These teams did not drive every mile of DOTPF right-of-way; instead, enforcement efforts were focused on intersections and roadside areas with high traffic volumes, or that had been the source of citizen complaints.[48]

The ROW agents performing this enforcement work were instructed to flag all political signs with surveyor's tape as an indication to maintenance personnel that the signs should be removed if they remained in that location. This approach was premised on the understanding that advance notice had been given to candidates, political parties, and other groups registered with the Alaska Public Offices Commission before this enforcement activity began.[49]

Additionally, these ROW agents were instructed to make note of all commercial signs or other encroachments that they encountered, and to deal with them in accordance with DOTPF's encroachment policy. Thus, commercial signs where notice had not been provided to the presumed owner were not flagged. Commercial signs for which a prior notice had been provided were flagged for removal.[50] In the event ROW agents encountered signs – regardless of whether political or commercial in nature – creating a safety concern they were instructed to

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47 Simpson-Golden Aff. at ¶ 12.

48 Simpson-Golden Aff. at ¶ 13.

49 Simpson-Golden Aff. at ¶ 14.

50 Simpson-Golden Aff. at ¶ 15.

either remove them on the spot (if small enough) or contact Central Region maintenance personnel to request immediate removal.[51]

As noted in the Complaint, application of DOTPF's encroachment policy meant there were instances where political signs were flagged for removal, while a nearby commercial sign was not flagged. As one example, the photo of a sign for "Alaska View Veggies" shown on page 12 of the Complaint was not at that intersection at the time DOTPF crews flagged the other signs shown in that photo. Following a citizen complaint, the owner of the Alaska View Veggies sign had received a prior warning not to place any advertising at that location. If that commercial sign had been present when ROW agents were in the area, it would have been noted in their logs and flagged for removal.[52]

DOTPF's initial flagging efforts began on Wednesday and Thursday, July 25-26 with an understanding that Central Region maintenance personnel would not remove any signs until the following Monday (except for signs that posed an immediate hazard). This was a deliberate effort by DOTPF to give candidates and volunteers a weekend in which to move signs off the right-of-way, reducing expenses for both DOTPF and campaigns. While DOTPF never issued a formal notice or press release as to the meaning of the surveyor's tape affixed to roadside signs, the Central Region office received numerous phone calls asking that question. Word quickly spread that removal efforts were about to begin in earnest, with the result that most signs flagged by ROW agents were voluntarily moved. This substantially reduced the amount of signs Central Region maintenance personnel removed the following week.[53]

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51 Simpson-Golden Aff. at ¶ 16.

52 Simpson-Golden Aff. at ¶¶ 17-18.

53 Simpson-Golden Aff. at ¶¶ 19-21.

Similar enforcement efforts were extended in a like manner to highways in the Mat-Su Borough beginning on August 7, with ROW agents returning to the Anchorage and Eagle River areas on August 17. Enforcement efforts then shifted to the Kenai Peninsula on August 27 and 28. The pattern with these follow-up efforts was the same, in that signs would be flagged several days before maintenance personnel were scheduled to begin removing them. The overriding objective of this approach was to minimize the number of signs removed by DOTPF, and to give candidates and campaigns every possible opportunity to avoid the loss of signs that represented an investment of money and volunteer effort.[54]

Due to these enforcement and education efforts, of the 525 signs flagged for removal in Anchorage, Eagle River and the Mat-Su Valley, only 39 signs were actually removed by DOTPF personnel (a figure which includes signs removed due to immediate safety concerns).[55]

At no point during these enforcement efforts did the DOTPF ROW agents flag or remove any signs – political or otherwise – located outside highway rights-of-way. This is consistent with the longstanding policy within DOTPF's Central Region to take no enforcement action with regard to small temporary political signs located on private property outside identified highway rights-of-way.[56] Indeed, DOTPF is unaware of any situation where employees entered private property to remove a non-commercial sign located within the 660-foot buffer zone. Similarly, DOTPF has never pursued a civil lawsuit or criminal case against a landowner who has a non-commercial sign placed on his or her private property outside the right-of-way but within the 660-foot buffer zone.[57]

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54 Simpson-Golden Aff. at ¶¶ 19-21.

55 Simpson-Golden Aff. at ¶¶ 21-22.

56 Simpson-Golden Aff. at ¶¶ 23.

57 Fair Aff. at ¶9.

D. Dunleavy For Alaska and its 1000 Signs

The Dunleavy for Alaska campaign, through its chair Terre Gales, contends that it was surprised by the State's enforcement efforts, alleges that its signs were removed from private property,[58] and argues that its speech has been chilled. These claims are baseless. The DFA campaign has distributed over 1000 signs to 100 Alaska communities, presumably all before DOT&PF's July 10 email.[59] From the facts presented here, this is a rough accounting of DFA's more than 1000 distributed signs:

- Two DFA signs appeared to be in DOT&PF's possession on August 12.[60]
- 62 DFA signs documented on private property in view of State highways.[61]
- One DFA sign on Mr. Siebels' property that is not subject to the statute.[62]
- One DFA sign presenting a hazard in the public right-of-way in Soldotna.[63]

This leaves 900 or more DFA signs that are likely posted on private property with a great many of them visible from state highways. DFA knows to whom and where it distributed signs, yet in the three-plus weeks since DOT&PF's enforcement actions Plaintiffs have not identified a single person from that limited universe alleging that a DFA sign was removed from their private property. And while DFA's chair asserts that organization is refraining from distributing signs

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58 Gales Aff. at ¶¶ 5-8; Complaint at ¶¶ 16, 22.

59 Gales Aff. at ¶¶4, 7. If any signs were distributed by DFA after the July 10 DOT&PF email, that would even more clearly contradict the Plaintiffs' assertions

60 Complaint at ¶23.

61 Exh. A.

62 Siebels Aff.

63 Simpson Aff. This sign is on Smiths' Way, which is under City of Soldotna maintenance authority. As viewed on August 28, this sign was blocking a stop sign and sight lines between an active driveway, the sidewalk, and the lane of travel.

because of DOTPF's July 10 letter, a search for DFA activity on various social media platforms indicates that DFA continues to distribute signs to supporters in Alaska.[64]

Mr. Gales' "surprise" at DOTPF's July 10 notice and DFA's current fears and urgency are not credible as both Mr. Gales and the organization have received identical or similar communications before and have had similar information before them the entire time that DFA has existed, while the State has not removed a single campaign sign from private property. As president of a union organization, Anchorage Municipal Employee Association, Local 16 of AFSCME, Mr. Gales received an identical copy of the letter attached to the Plaintiffs' Complaint and Motion in September 2017.[65] Mr. Gales also would have received similar letters in 2016 and 2012 when he was a candidate for Anchorage Assembly and Congress.[66]

Language largely identical to the July 2018 email and September 2017 letter is posted on DOTPF's website; there is a link to that website on the Alaska Public Offices Commission webpage labeled "Posting Political Signs (DOT)" and on the Division of Elections candidate filing page labeled "Road signs."[67] The links and language visible today are the same as they were when DFA was formed (under a previous name) in January 2018.[68]

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64 The State is not concerned that DFA is distributing signs (so long as they are not placed in highway rights-of-way); this information is only provided for context regarding DFA's assertions.

65 Fair Aff.

66 Fair Aff.

67 Fair Aff. http://dot.alaska.gov/stwddes/dcsrow/campaignsigns.shtml; http://www.elections.alaska.gov/Core/candidatefiling.php; http://doa.alaska.gov/apoc/

68 APOC Group Registration form at http://aws.state.ak.us/ApocReports/Registration/GroupRegistration/View.aspx?ID=3877

III. STANDARD OF REVIEW

Alaska courts employ a "balance of hardships approach when considering a motion for a preliminary injunction."[69] In order for an injunction to issue, "the plaintiff must be faced with irreparable harm," "the opposing party must be adequately protected," and "the plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'"[70] But if the plaintiff's harm is less than irreparable or the opposing party cannot be adequately protected, the plaintiff must make a "clear showing of probable success on the merits" before an injunction may issue.[71] That heightened showing is required here.

In *State, Div. of Elections v. Metcalfe*,[72] the Alaska Supreme Court held that, in the context of an election, the issuance of a preliminary injunction "is a zero-sum event, where one party will invariably see unmitigated harm to its interests."[73] The court thus required the plaintiff to meet the heightened standard of "a clear showing of probable success on the merits" before an injunction could issue.[74] While this case is not directly about the conduct of this fall's elections, the broad injunction sought by Plaintiffs will upend First Amendment communications that are specifically about that election. This Court should take special care in examining the Plaintiffs' claims and requested injunctive relief because of the potential for causing unmitigated harm to the electorate and average citizens' First Amendment rights related to the election.

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69 *N. Kenai Peninsula Rd. Maint. Serv. Area v. Kenai Peninsula Borough*, 850 P.2d 636, 639 (Alaska 1993).

70 *Id.* (quoting *State v. Kluti Kaah Native Vill.*, 831 P.2d 1270, 1273 (Alaska 1992)).

71 *Kluti Kaah*, 831 P.2d at 1273.

72 110 P.3d 976 (Alaska 2005).

73 Id. at 979.

74 *Id.*

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IV. ANALYSIS

A. The Balance of Hardships Test Demonstrates the Court Must Require the Plaintiff to Make A Clear Showing of Probable Success on the Merits

The Plaintiffs spend little time analyzing the balance of hardships and appear to concede that they must make a clear showing of probable success on the merits.[75] Nevertheless, the appropriate analysis requires the Court to first analyze the balance of hardships, which will provide context and demonstrate that the citizens of Alaska are at risk of irreparable harm if the entire Outdoor Advertising Law is enjoined.

On the first two factors in balancing the hardships, the State acknowledges that if the Plaintiffs ultimately prevailed in this case, the harm to them would be irreparable. But, the harm to the State and its citizens if an injunction is issued could not be indemnified by a bond nor would it be slight relative to the harm suffered by Plaintiffs if an injunction is not issued. Indeed, the upcoming election would be indelibly marred by a cloud on the citizenry's pure political speech.

Because the Outdoor Advertising Law bars all paid off-premises advertising, the temporary campaign signs currently seen on private property seemingly everywhere in Alaska are reliable indicia that the resident or business owner displaying such a sign is expressing their own sincere political views. If the Court grants Plaintiffs' request to enjoin the entire law, the pure political speech of citizens attempting to communicate through campaign signs will be diluted. "[S]igns are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute."[76] The spectre of paid outdoor advertising will raise the question of whether any given sign represents the

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75 *See* Motion for Prelim. Injunction at 11-14, 26; Plaintiff's Proposed Order.

76 *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994).

beliefs of a campaign supporter or paid advertising displayed by someone willing to rent space and be a shill.

This harm that would befall the State and its citizens is not slight, it is irreparable, and the Plaintiffs' proposed injunction of the entire statute does not protect Alaska citizens: if the State's ban on paid outdoor advertising is ultimately vindicated, it will likely be after this election is over and already influenced by paid outdoor advertising. And that would be true under the Plaintiffs' requested injunction whether or not any campaign actually pays for outdoor advertising while the statute is enjoined.

The State may also be subject to significant financial harm if enforcement of the Outdoor Advertising Law. The State is required to have "effective control" to prohibit the display of illegal signs under 23 U.S.C. 131, the federal Highway Beautification Act. Effective control means that the State has promulgated appropriate laws and that those laws are actually being enforced.[77] If the State does not have effective control, it is subject to a 10 percent reduction in its Federal-aid highway funds. For Fiscal Year 2017, a 10 percent reduction would have cost the State roughly $51.6 million, and in Fiscal Year 2016, the figure would have been close to $54 million.[78] The State anticipates that federal support for Alaska highways will continue to be over $500 million per year and a 10 percent reduction will amount to more than $50 million in lost funds.[79] The Federal Highway Administration confirms that the State's interpretation of its own laws and the Highway Beautification Act, allowing temporary unpaid political campaign signs on private

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77 23 U.S.C. 131 (c).

78 Fair Aff. at ¶4.

79 *Id.*

property, is effective control. FHWA also confirms that allowing paid off-premises advertising would violate the effective control requirement.

The third factor under balancing of hardships requires the Plaintiffs to show that their issues are not "frivolous or obviously without merit." Beyond the specific constitutional infirmity that would bar small, temporary political campaign signs on private property, Plaintiffs' facial challenge does not have a clear probability of success on the merits as to the entire Outdoor Advertising Law. The State recognizes, however, that this area of law is evolving, particularly in the wake of *Reed v. Town of Gilbert.*

Plaintiffs' as-applied challenge, however, is frivolous and without merit. The only evidence presented that the State is favoring commercial over non-commercial speech within the right-of-way is an undated photo that provides no context to show that the State did anything improper. This "evidence" is provided by Plaintiff Eric Siebels, whose property is not adjacent to a road subject to the Outdoor Advertising Law. He is attempting to drag the State into court over an incredible fear based on his own failure (and that of his attorneys) to review the list of affected roads attached to Plaintiffs' Motion. The State's Property Management and Database Supervisor responsible for the area documented by Mr. Siebels is familiar with the Alaska View Veggies sign, whose owner has been previously warned about advertising in the right-of-way.[80] If that sign had been there on the day DOTPF was flagging that intersection, the Alaska View Veggies sign would have been flagged for removal.[81]

The Alaska View Veggies sign and the ADN photo of DOT&PF's sign storage area are the entire basis of Plaintiffs' as-applied challenge. The reason far more political signs than

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80 Simpson-Golden Aff. at ¶18.

81 Simpson-Golden Aff. at ¶18.

business signs have been impacted in the last six weeks is because there are far more political signs in the right-of-way during campaign season. Even with this surge, DOTPF addresses far more commercial than political encroachments in the right-of-way.[82]

The August 10 ADN photo was taken 10 days after DOTPF began to impound flagged signs and 14-15 days after signs were flagged in the right-of-way in DOTPF's Central Region.[83] Many campaigns removed signs that had been illegally placed in the right-of-way before they were flagged; more still were removed after flagging: of 525 flagged signs, only 39 were eventually removed by DOTPF personnel.[84] Similarly, because Mr. Siebels' photo is undated, there is no way to tell if the Alaska View Veggies sign was in the right-of-way on the day the nearby signs were flagged; and the State's evidence indicates that it was not there. The State agrees that the Alaska View Veggies sign appears to be illegally placed in the right-of-way and should be removed. But specious evidence that one sign was missed at the height of campaign season when hundreds of much larger (and therefore more hazardous) signs are present is not sufficient to demonstrate a valid claim let alone give this Court cause to enjoin the State's enforcement of its statutes.

Similarly lacking merit in Plaintiffs' arguments is the supposed surprise of the July letter from Heather Fair and its alleged chilling impact. More than a month after that letter went out and with no evidence that any signs had been flagged on or removed from solely private property,[85] Plaintiffs sought emergency ex parte relief from this Court. But July was not the first time that this

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82 Simpson-Golden Aff. at ¶4.

83 Simpson-Golden Aff. at ¶20.

84 Simpson-Golden Aff at ¶21.

85 DOT&PF has taken enforcement action against signs that are partially in the right-of-way.

language would have been seen by the Dunleavy for Alaska campaign or its chair. The July letter is substantially similar to DOT&PF's webpage providing guidance to candidates regarding campaign signs; a link to that page is on the front page of the APOC website and on the Division of Elections' candidate information page.[86] The lack of chilling effect from the website or letter is evident from the numerous Dunleavy signs shown in Exhibit A or a glance at properties adjacent to State roads in virtually any populated area of the State.[87]

Accordingly, this Court must determine whether Plaintiffs have made a clear showing of probable success on the merits in order to enter the broad injunction they seek stopping enforcement of the entire Outdoor Advertising Law.

B. Plaintiffs are not likely to succeed on the merits of their claims because Alaska's Outdoor Advertising Law is constitutional on its face and as applied, and because the law allows small temporary political signs.

The plaintiffs ask this Court to enjoin the State's entire Outdoor Advertising Law, including the State's ban on placing signs within highway rights-of-way. The plaintiffs also seek to enjoin removal of political signs outside of the right-of-way, even though the State has not removed a single political sign from private property. Plaintiffs have not and will not suffer the harms alleged, and plaintiffs are not likely to prevail on their claims. The Outdoor Advertising Law, both on its face, and as applied, is a constitutional regulation of speech.

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86 Also, similar letters have gone out to candidates and the heads of APOC registered political action committees in years past. Mr. Gales, the DFA Chair, ran for Anchorage Assembly in 2016 and for Congress in 2012. And as the president of AFSCME Local 16, Mr. Gales received a letter identical to the July 10 letter in September 2017. Fair Aff. at ¶¶10-12, 17; Mr. Gales candidate history is available online at https://ballotpedia.org/Terre_Gales.

87 And presumably all 100 communities where Dunleavy for Alaska has distributed their 1000 signs.

1. **The State's prohibition on signs in the right-of-way is a constitutional content-neutral time, place, and manner regulation of speech, to which intermediate scrutiny applies.**

The State's prohibition in AS 19.25.105(d) on outdoor advertising signs in the public right-of-way is a classic example of a valid content-neutral "time, place, manner" regulation on speech. The statute prohibits the posting of any signs within the right-of-way, without regard to the content, purpose, or message the sign conveys, with limited exceptions not at issue in this case.

Content-neutral laws prohibiting speech on public property have been upheld as valid regulations of speech. The U.S. Supreme Court in *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, held that a law banning the posting of signs and handbills on public property was content neutral.[88] "The text of the [law] is neutral—indeed it is silent—concerning any speaker's point of view", justifying intermediate scrutiny review.[89] The Court found that the "accumulation of signs on public property [] constitutes a significant substantive evil within the City's power to prohibit."[90] The Court determined that the ban on signs on public property was narrowly tailored precisely to the problem of visual clutter caused by the medium of expression itself, the ordinance did not restrict any more speech than necessary to accomplish its purpose, and left other significant channels of communication open.[91]

Here, like the ordinance in *Taxpayers for Vincent*, AS 19.25.105(d) is constitutional. First, AS 19.25.105(d) is silent as to the content of the signs it regulates. All signs are

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88 *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984),

89 *Id.* at 805.

90 *Id.* at 807.

91 *Id.* at 810, 811-12.

prohibited in the State's right-of-way. The law does not call for or require an examination of the sign's content to determine whether or not it is prohibited from the right-of-way. Next, the State has a significant and substantial interest in promoting traffic safety and protecting the esthetic beauty of its roadways.[92] Alaska's prohibition on outdoor advertising signs within the right-of-way furthers its substantial interests in protecting the safety of the traveling public by ensuring the State's highways are free of obstructions and safety hazards, and by preserving the esthetics of the State's natural and scenic beauty.[93]

Finally, the prohibition on signs within the right-of-way is narrowly tailored to further these important State interests. The ban on signs in the right-of-way is narrowly tailored to solve exactly the problems created by placement of signs in the right-of-way—serious traffic safety issues, visual clutter, and distraction from Alaska's scenic beauty.[94] Moreover, the law applies only to the state's interstate, primary, and secondary highways, not all local roads. As the U.S. Supreme Court recognized in *Metromedia, Inc. v. City of San Diego*, if a government has a sufficient basis for believing that signs in or adjacent to the right-of-way are traffic hazards or unattractive, "then obviously the most direct and perhaps most effective approach to solving the problems they create is to prohibit them."[95] The State's prohibition on outdoor advertising in the right-of-way is the most effective means of furthering its important traffic

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92 *See Metromedia, Inc, v. City of San Diego*, 453 U.S. 490, 507 (plurality opinion) (preserving esthetics is a significant government interest); *Taxpayers for Vincent*, 466 U.S. at 817 (esthetic interests of city "are sufficiently substantial to justify ... prohibition against the posting of appellees' temporary signs on public property."); *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) (traffic safety and esthetics are significant government interests).

93 *See* AS 19.25.080.

94 Aff. of Heather Fair, ¶¶ 6, 7.

95 *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981).

safety and esthetic interests, and it does not unduly restrict free expression because it leaves ample alternative avenues of free expression open to the public.

2. **The State's prohibition on signs within the right-of-way is constitutional as applied.**

As recognized by the majority opinion in *Reed*, "on public property, [the government] may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner."[96] And, a government's interests in promoting esthetics "are sufficiently substantial to justify this content-neutral, impartially administered prohibition against the posting of [] temporary signs on public property and that such an application of the [law] does not create an unacceptable threat to the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[97]

The DOTPF's enforcement of AS 19.25.105(d) is constitutional as applied to Plaintiffs and the public. The DOTPF carries out its duties to keep the right-of-way free of all signs without regard to the content of the signs and is consistent in flagging or removing all signs from within the right-of-way. Any signs in the right-of-way are subject to summary removal by DOTPF.[98] Nevertheless, unless a sign in the right-of-way presents an immediate safety concern, DOTPF will flag the sign for removal or make efforts to communicate with owners before removing signs, so that the sign owner has the opportunity to remove the sign.[99] DOTPF

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96 *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. at 2232 (Thomas, J., majority op.) (citing *Taxpayers for Vincent*, 466 U.S. at 817 (upholding content-neutral ban against posting signs on public property))

97 *Taxpayers for Vincent*, 486 U.S. at 817 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

98 17 AAC 20.012(a).

99 Aff. of Danika Simpson-Golden, ¶¶ 5, 11, 13-16, 19-20.

has not targeted political signs for removal over other signs.[100] As the attached affidavits of Heather Fair and Danika Simpson-Golden show, DOTPF has been evenhanded and impartial in flagging or removing signs illegally placed in the right-of-way or notifying sign owners that their signs must be removed.[101]

Moreover, as the photos submitted in the attachments to this opposition show, the debate on political issues in Alaska is "uninhibited, robust, and wide-open" on private property beyond the right-of-way.[102] A plethora of temporary political signs are visible from the State's highways. There is simply no evidence that the DOTPF's enforcement of AS 19.25.105(d) is restricting Plaintiffs' or the public's ability to speak freely and openly regarding political issues.

3. **The State's distinction between on-premises and off-premises outdoor advertising outside of the right-of way in AS 19.25.105(a) and (c) is constitutional on its face and as applied.**

Alaska Statute 19.25.105(a) and (c) generally prohibits paid off-premises outdoor advertising signs in the 660 feet outside of the State's highway rights-of-way or visible from the State's highways. The statute excepts from regulation certain on-premises signs "advertising the sale or lease of property upon which they are located or advertising activities conducted on the property".[103] This law reflects the intent of Alaska's voters to prohibit "signs outside of the right-of-way, visible from highways, off-site from where businesses are located"

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100 Aff. of Danika Simpson-Golden, ¶¶ 15-18

101 *See*, generally, Aff. of Heather Fair; Aff. of Danika Simpson-Golden.

102 *Taxpayers for Vincent*, 466 U.S. at 817 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

103 AS 19.25.105(a)(2).

when they overwhelmingly approved Ballot Measure 5 in 1998.[104] This distinction between on-premises and off-premises signs in AS 19.25.105 does not render the statute, much less the entire Outdoor Advertising Law, unconstitutional.

Statutes distinguishing between on-premises and off-premises signs are consistently held to be content neutral. This is still the case after the Supreme Court's decision in *Reed v. Town of Gilbert, Arizona.*[105] The *Reed* Court invalidated a town's sign code as a "paradigmatic example of content-based discrimination."[106] The code generally prohibited the outdoor display of signs anywhere in the town without a permit, but exempted 23 categories of signs from the permit requirement, and then subjected those categories to different rules based solely on what the sign said. Because the restrictions in the town's code "depend entirely on the communicative content of the sign," the Supreme Court held that the code was clearly content based.[107]

The law at issue in *Reed* is very different from the one at issue here. The exception for on-premises signs in AS 19.25.105(a)(2) and (c) does not turn on what a sign says, but rather on where it is *located.*[108] The statute looks only to whether the sign is placed on or off the

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104 Exhibit B, Alaska 1998 Official Election Pamphlet, Ballot Measure 5. Available online at http://www.elections.alaska.gov/doc/oep/1998/98bal5.htm (last visited Aug. 27, 2018). The ballot measure was approved by more than 72% of voters.

105 135 S.Ct. 2218 (2015). *Reed* did not purport to upset settled doctrine regarding on-premises exceptions. Three of the six Justices in the *Reed* majority joined Justice Alito's concurring opinion confirming that "[r]ules distinguishing between on-premises and off-premises signs" are content-neutral regulations not subject to strict scrutiny.

106 *Id.* at 2230.

107 *Id.* at 2227.

108 *Barber v. Municipality of Anchorage*, 776 P.2d 1035, 1037 (Alaska 1989) (holding that Anchorage's sign code "is content-neutral in that it classifies signs on the basis of physical characteristics, and not on the basis of the viewpoints they present.").

premises where the activity is taking place. This on-premises/off-premises distinction was looked upon favorably as "content-neutral" by Justice Alito in *Reed*, when he confirmed that "[r]ules distinguishing between on-premises and off-premises signs" should continue to be viewed as content neutral after the Court's decision.[109]

The Alaska Supreme Court has upheld the constitutionality of such sign laws. In *Barber v. Municipality of Anchorage*, the court upheld a municipal ordinance prohibiting off-premises advertising signs, portable signs, and roof signs.[110] First, the court found that Anchorage's ordinance was viewpoint neutral because "it classifies signs on the basis of physical characteristics, and not on the basis of the viewpoints they present."[111] The court explained that the test for determining whether such a content-neutral law passed constitutional muster under the First Amendment it furthers a significant and legitimate government interest.[112] The court concluded that the city's interest in controlling outdoor advertising met that test, finding that the "city's aesthetic interests were sufficiently substantial to provide justification for a content-neutral prohibition against the use of billboards."[113]

In *Wheeler v. Comm'r of Highways, Com. of Ky.*, the Sixth Circuit Court of Appeals upheld a Kentucky statute substantially similar to Alaska's Outdoor Advertising Law. [114] The Kentucky Billboard Act generally prohibited signs within 660 feet of a highway, but made an

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109 *Reed*, 135 S.Ct. at 2233 (Alito, J., concurring).

110 776 P.2d 1035 (Alaska 1989)

111 *Barber*, 776 P.2d at 1037.

112 *Barber*, 776 P.2d at 1037 (finding that "A state may curtail speech when necessary to establish a significant and legitimate government interest.").

113 *Barber*, 776 P.2d at 1037 n. 11 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981).

114 822 F.2d 586 (6th Cir. 1987).

exception for signs identifying activities conducted on-site.[115] After finding that the law was "not directed at the content of the messages" on the signs, but instead required a nexus to the property on which the sign was located, the Sixth Circuit held that the Kentucky law was content neutral.[116]

Like the Sixth Circuit in *Wheeler*, the Third Circuit, in *Rappa v. New Castle County*, concluded an exception for signs advertising activities conducted on the premises "is not a content-based exception at all. ... it merely establishes the appropriate relationship between the location and the use of an outdoor sign to convey a particular message."[117]

Alaska's Outdoor Advertising Law is similarly content neutral. The exceptions for outdoor advertising in AS 19.25.105(a)(2) and (c) look only to whether the sign relates to an on-premises activity. Either commercial or non-commercial messages may be posted at an allowable location along state highways as long as such signs are placed on property where the signs advertise activities being conducted on the property. The law is neutral as to content, while "recogniz[ing] that the right to advertise an activity conducted on-site is inherent in the ownership or lease of the property."[118]

Importantly, although DOTPF employees may need to consider a sign's message to determine whether it is related to the property, that does not make the exception content based. Courts and officials often examine the content of a communication to determine the speaker's purpose, and a "law is not considered content based simply because [one] must look at the

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115 *Wheeler v. Comm'r of Highways, Com. of Ky.*, 822 F.2d 586, 587-88.

116 *Id.* at 590, 594-95.

117 *Rappa v. New Castle Cty.*, 18 F.3d 1043, 1067 (3d Cir. 1994).

118 *Wheeler*, 822 F.2d at 591.

content of an oral or written statement in order to determine whether a rule of law applies."[119] *Reed* did not alter this basic principle. Since *Reed*, courts of appeals have continued to hold that the fact an official may need to consult a sign's message is not determinative of whether the law is content based.[120] The on-premises exceptions in AS 19.25.105(a)(2) and (c) distinguish among signs based on their connection to the property on which they are located, not the message they convey. Therefore, the statute is content neutral.

Because AS 19.25.105 is content neutral, it is subject to intermediate scrutiny. Content neutral restrictions must "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of the information."[121] Exceptions for signs identifying on-premises activities are already recognized as being narrowly tailored to further substantial government interests. [122] It is well established that traffic safety and esthetics are substantial government interests, and that the state may legitimately exercise its police powers to advance and protect its interests in aesthetic values and traffic safety.[123]

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119 *ACLU v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012) (quotation marks omitted).

120 *See Recycle for Change v. City of Oakland*, 856 F.3d 666, 671 (9th Cir.), *cert. denied*, 138 S. Ct. 557 (2017) ("an officer's inspection of a speaker's message is not dispositive on the question of content neutrality"); *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 846 F.3d 391, 404 (D.C. Cir.), *cert. denied*, 138 S. Ct. 334 (2017) ("the fact that [government] officials may look at what a [sign] says to determine whether it" is subject to regulation "does not render the . . . rule content-based"). *See also*, prior to *Reed*, *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 613 (9th Cir. 1993) (finding the fact that "government officials have to place a particular message into one or the other category for purposes of regulation … does not render the regulations unconstitutional." (citing *Major Media of the S.E., Inc. v. City of Raleigh*, 792 F.2d 1269, 1272-73 (4th Cir. 1986)).

121 *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

122 *See, e.g., Wheeler*, 822 F.2d at 595.

123 *See Taxpayers for Vincent*, 466 U.S. at 805 (holding that cities have a legitimate government interest in promoting aesthetics); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511-12 (1981) (concluding that the city's interest in traffic safety and its esthetic interest in preventing visual clutter could justify a prohibition of off-site commercial billboards even when similar on-site signs were allowed); *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994)

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The exception for on-premises signs and the ban on off-premises signs in AS 19.25.105 are narrowly tailored to further the State's safety and esthetic interests without unduly limiting speech. The law carefully balances the right of speech with the rights of property owners, allowing signs on premises that relate to activities conducted on the premises. The exception for on-premises signs provides ample channels for communicating information about activities on one's own property.[124] The State recognizes that signs identifying on-premises activity are a uniquely important means of expression for property owners, and the exception in AS 19.25.105(a)(2) and (c) does not unduly restrict the speech of those owners or occupants whose property happens to be adjacent to or visible from a state highway.[125] By prohibiting off-premises outdoor advertising and excepting authorized on-premises outdoor advertising, the State furthers its interests in traffic safety and esthetics by preventing the visual clutter and potential hazards that would be caused by the proliferation of off-site signage, while allowing property owners and occupants to communicate information to the public relevant to the property on which the sign is located.

Even if the on-premises/off-premises distinction in AS 19.25.105(a) and (c) was subject to strict scrutiny, it could withstand review under that standard. The *Reed* Court observed that "[a] sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs

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(recognizing that "signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.").

124 *See Taxpayers for Vincent*, 466 U.S. at 815.

125 *See Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (invalidating ordinance that entirely prohibited "for sale" signs because it foreclosed property owners from conveying important information about their property and alternative channels for communicating the information were unsatisfactory).

directing traffic, or street numbers associated with private houses—well might survive strict scrutiny."[126] Indeed, a state's interest in preserving the safety of its highways has been recognized as a compelling government interest that may withstand strict scrutiny.[127] The State's Outdoor Advertising Law furthers the State's interests in protecting the safety of pedestrians, drivers, and passengers in the same ways that the *Reed* court recognized it may do under strict scrutiny. In addition to allowing on-premises signage, AS 19.25.105 allows directional signs and notices pertaining to schools, natural wonders, scenic and historic attractions, and landmarks (AS 19.25.105(a)(1), (a)(6)), to assist travelers with identifying their surroundings. The on-premises exception, therefore, is the least restrictive means of making necessary information available to motorists about property adjacent to the State's highways while furthering the State's interests in safety and esthetics. It is also narrowly tailored to provide travelers with essential information without allowing a proliferation of paid off-premises signs that would undercut the State's interests to "protect the public safety and welfare of persons using the highways of the state", "prevent unreasonable distraction" of drivers, and to "promote the safety, convenience, and enjoyment of travel" on the State's highways.[128]

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126 *Reed*, 135 S.Ct. at 2232 (Thomas, J., majority opinion).

127 *See Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989) (a state has a "compelling interest … in public safety"); *Mackey v. Montrym*, 443 U.S. 1, 17-19 (1979) (a state has a "paramount interest … in preserving the safety of its public highways" and a "compelling interest in highway safety").

128 AS 19.25.080.

4. The Outdoor Advertising Law is not unconstitutionally vague and overbroad.

Finally, plaintiffs allege that AS 19.25.105 is unconstitutionally vague and overbroad because it "prohibits thousands of Alaskan citizens from displaying anything on their private property that might 'attract attention' from an adjacent roadway."[129] This misstates the statute. Alaska Statute 19.25.105 allows on-premises signs advertising activities conducted on private property adjacent to State rights-of-way, while prohibiting paid off-premises outdoor advertising signs adjacent to State rights-of-way. As discussed above, this on-premises/off-premises distinction is a constitutionally valid content-neutral regulation of speech.

Plaintiffs also allege that AS 19.25.105 invites "selective enforcement" and that the "dangers of suppression of particular speech ... may well be too significant to be accepted."[130] This allegation does not hold up. Within the right-of-way, the DOTPF has removed all types of signs, not just political signs.[131] Outside the right-of-way, the State has not removed a single temporary political sign from private property.[132] The DOTPF's enforcement of AS 19.25.105 has been applied to *all* signs in the right-of-way, and to *zero* temporary political signs outside of the right-of-way.

The mere fact that one can conceive of some impermissible application of a statute is not sufficient to render it susceptible to an overbreadth challenge.[133] There must be a "realistic

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129 Pls.' Mem. at 15.

130 Pl.'s Mem. at 14-15 (citing *Nevada Com'n on Ethics v. Carrigan*, 564 U.S. 117, 131 (Kennedy, J., concurring)).

131 Aff. of Danika Simpson-Golden, ¶¶ 15-18.

132 Aff. of Danika Simpson-Golden, ¶ 23.

133 *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."[134] Plaintiffs have not met this burden here. Neither Plaintiffs' Complaint nor their request for preliminary injunction show a "realistic danger" that AS 19.25.105 will significantly compromise the First Amendment protections of the public with respect to the specific issue of small, temporary political signs raised therein. As such, there is no basis to enjoin AS 19.25.105 or its enforcement on the ground that it is unconstitutionally overbroad or vague.

V. CONCLUSION

Completely enjoining the State's Outdoor Advertising Law would disturb the balance of communications around the upcoming election and thwart the will of Alaska voters who determined to ban paid outdoor off-premises advertising. A narrow injunction limited to the issue of temporary political campaign signs will protect the Plaintiffs and other campaigns in their efforts to seek volunteers to display campaign signs on private property. And such an injunction will also ensure that the State's roads are not inundated with paid outdoor off-premises advertising in direct conflict with the voters' will expressed in support of 1998 Ballot Initiative No. 5.

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134 *Id.* at 801 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 462, n. 20 (1978); *Parker v. Levy*, 417 U.S. 733, 760–761 (1974)).

DATED August 31, 2018.

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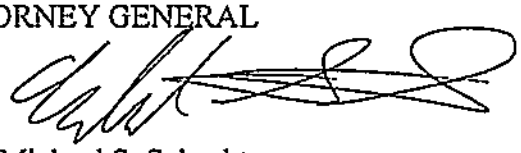
By: 

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