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

SUR-REPLY IN RESPONSE TO COURT'S ORDER RE: SUPPLEMENTAL BRIEFING

I. INTRODUCTION

The ACLU, Dunleavy for Alaska, and Mr. Siebels do not dispute that the State has a legitimate interest in maintaining road safety. But the argument that *every* sign within a state right-of-way categorically presents a safety hazard to the travelling public does not withstand scrutiny. Both in practice and before this Court, the State has distinguished between signs that pose safety hazards and those that do not. The State is clearly capable of making that determination on the ground because it has been doing so as an integral part of its crackdown on political signs this election season. Thus, the State can further its stated safety interests without blanket restrictions on the rights of Alaskan citizens to engage in political speech on their own property. Before summarily removing political signs from private property, the State should have an articulable safety concern beyond the tenuous

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claim that "all signs are dangerous." As currently written and enforced by the Department of Transportation & Public Facilities, AS 19.25.105(d)'s ban on all signage within a State right-of-way is overbroad and is not narrowly tailored to further the State's purported safety interests.

II. THE BLANKET PROHIBITION OF SPEECH WITHIN THE STATE'S RIGHT-OF-WAY EASEMENT IS NOT NARROWLY TAILORED

The State contends that AS 19.25.105(d)'s prohibition on all outdoor "advertising" within its rights-of-way (including unpaid political speech on private property) is a content-neutral "time, place and manner" regulation.[1] Setting aside the fact that the State's targeted enforcement of AS 19.25.105, complete with threats of criminal and civil penalties issued only to political campaigns, has not been content-neutral,[2] this blanket prohibition sweeps too broadly to pass constitutional muster. The United States Supreme Court has set forth the following framework for reviewing a purportedly content-neutral "time, place and manner" regulation:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; **and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.**[3]

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1 State's Opp. Re: Political Signs in Rights-of-Way at p. 17.

2 *See* Plaintiff's Motion for TRO and Preliminary Injunction at pp. 7–10.

3 *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804–05 (1984) (emphasis added) (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

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"The incidental restriction on expression which results from the [Government's] attempt to accomplish such a purpose is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest."[4]

Here, the State's purported interest in banning all signs from highway right-of-ways, including signs on private property, is maintaining public safety. The State now takes the position that *every* sign within a public right-of-way constitutes a safety hazard. This argument does not withstand scrutiny, and the incidental restrictions on Alaskan's free speech rights are therefore far greater than is necessary to further that interest.

As a preliminary matter, the State's own enforcement history and representations to this Court belie the contention that a strict prohibition of all signs within the right-of-way, including signs on private property, is "necessary" or "essential" to protect public safety. The State has long distinguished between signs that present safety risks and those that do not. For example, prior to this election season, the State expressly tolerated campaign signs in the right-of-way as long as they did not pose a safety hazard. As the State explains on its own FAQ website:

> ***Why isn't political signage a violation [of the prohibition against right-of-way encroachments]?***
>
> All encroachments are subject to similar rules, however, because political signage is of a short-term nature and may enjoy constitutional free speech protection, as a standard, DOT does not employ the same

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[4] *Taxpayers for Vincent*, 466 U.S. at 808.

> level of enforcement as to the removal of political signage, unless it is a danger to the traveling public.[5]

And it is not disputed that the State has been distinguishing between hazardous and non-hazardous signs even in its recent crackdown. As the State has explained to this Court, its crackdown on political signs began with notice to campaigns. Prior to that time, "the only political signs removed or relocated by Central Region maintenance personnel were those that posed an immediate safety concern."[6] According to the State, it then gave campaigns "two weeks to remove their signs from highway rights-of-way," at which point "ROW agents...were instructed to flag all political signs located within rights-of-way with surveyor's tape as an indication that the signs would be removed if they remained at that location."[7] Only signs that created a "safety concern" were subject to immediate removal: "In the event ROW agents encountered signs—regardless of whether political or commercial in nature—creating a safety concern they were instructed to either remove them on the spot (if small enough) or contact Central Region maintenance personnel to request immediate removal."[8] And the State confirms that the vast majority of signs it targeted for enforcement *did not* create a safety concern: "DOT workers placed orange tags on 200 to 250 sings placed illegally in the state right-of-way across Anchorage, [DOT

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5 *See* Alaska Department of Transportation & Public Facilities, Central Region Right-of-Way FAQs, *available at* http://alaskarow.org/faq.

6 State's Opp. at 13.

7 State's Opp. at 14.

8 State's Opp. at 14–15.

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spokeswoman Shannon] McCarthy said. Of those, about 50 posed 'immediate safety concerns.' McCarthy said."[9] Given all of the foregoing, the State cannot credibly contend that *all* signs placed within a right-of-way create a safety concern, regardless of where placed and regardless of the nature of the sign. To the contrary, the State has previously conceded that most signs do not raise such concerns. And the State's own conduct demonstrates that it has less restrictive means at its disposal to deal with any legitimate safety concerns that do arise.

The State's disparate treatment of *all other right-of-way encroachments* also belies its contention that political signs must be summarily confiscated to further public safety goals. As noted in Plaintiffs' reply brief, the legislature has prescribed a specific procedure for addressing right-of-way encroachments that affords due process to those affected. Pursuant to AS 19.25.240, the State can summarily remove any unauthorized encroachment that creates a safety hazard. But the legislature also recognized that not all encroachments pose a threat to the traveling public. In such instances, the legislature has directed that the State must provide notice before removing right-of-way encroachments that do not endanger the public.[10] The State's current position that *all* signs pose an

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[9] Devin Kelly, *DOT Crackdown on Political Campaign Signs Stirs Up Complaints, Fury*, ANCHORAGE DAILY NEWS, Aug. 10, 2018, *available at* https://www.adn.com/politics/2018/08/09/dot-crackdown-on-political-campaign-signs-stirs-up-complaints-fury/.

[10] *See* AS 19.25.230.

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intolerable safety risk flies in the face of this legislative directive, and threatens to deprive property owners of due process without any compelling justification.

Again, Plaintiffs do not dispute that poorly placed signs can create legitimate hazards within the right-of-way. But the State's overblown assertion that *every* sign is a potential deathtrap for motorists is simply not credible. For one thing, the State's threat assessment treats every road subject to the sign ban as if it were a multi-lane highway with a 65 m.p.h. speed limit and 50 to 100 foot "clear zone."[11] But the vast majority of roads subject to the right-of-way ban do not have these characteristics. In Anchorage, for example, the "primary and secondary highway system" subject to the sign ban consists of roads like Muldoon Road, Lake Otis Parkway, Tudor Road, Spenard Road, Rabbit Creek Road, De Armoun Road, Benson Boulevard and Northern Lights Boulevard.[12] These roads have speed limits of 35–40 mph and traffic control devices every few hundred yards. Most of these roads have no "clear zones" at all. They are instead lined by sidewalks, curbs,

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[11] *See* State's Opp. Re: Political Signs in Rights-of-Way at p. 7 ("The design of clear zones incorporates many factors. One of these is the distance motor vehicles can cover in one second. For example, a car traveling at 65 m.p.h. moves 95 feet per second; meaning that a car leaving the roadway at that speed would cross a 50-foot clear zone in less than one second."); *Id.* at 7 ("Under AASHTO standards for perception-reaction time, a typical vehicle leaving the roadway at 65 m.p.h. will travel nearly 250 feet before the driver recognizes what is happening."); *Id* at 12 ("[T]he State's Traffic & Safety Engineer is familiar with a 1992 crash test performed by the widely respected Texas Traffic Safety Institute where a compact car going at 64 m.p.h. was driven by means of remote control) into a wooden traffic barrier held down with sandbags."); *Id.* at 13 ("While the risk associated with a large wood frame sign is greatest when placed close to the roadway edge, a vehicle traveling at 65 m.p.h. moves at 95 feet per second. Accordingly, a mini-billboard can create a collision hazard even if it is placed 50 – 100 feet away from the highway's edge....").

[12] *See* Exhibit 1 to Plaintiffs' Motion for TRO and Preliminary Injunction.

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parking lots, buildings and onsite-advertising. The State's opposition paints a picture of cars barreling full steam off the Glenn Highway, careening into campaign signs 150 to 200 feet off the road and impaling occupants with shards of lumber. This is not a realistic characterization for the majority of roads covered by the sign ban, and it does not demonstrate narrow tailoring to serve the State's legitimate safety interests.

In addition, the State mischaracterizes the signs it contends are primarily at issue — the "mini-billboard":

> While many sign types strewn on state highway rights-of-way create hazards, the most germane for this discussion is the larger "mini-billboard" specifically identified by Plaintiffs as what they believe should be allowed in highway rights-of-way. These are sizeable signs that require two or more posts and are likely to be constructed using a 4' x 8' sheet of plywood supported by vertical and horizontal 2" x 4" or 4" x 4" lumber framing which is held in place by multiple 50-pound sandbags.[13]

In actual fact, the "mini-billboards" the State is referring to are constructed out of lightweight Correx corrugated plastic, screwed directly into a 2" x 4" timber frame. Correx is essentially waterproof cardboard, and a fully constructed and mounted sign is light enough that it can be moved by one person.[14] These signs are not 4' x 8' sheets of plywood, as the State suggests.[15] But even if "mini-billboards" were made of plywood and inherently dangerous, the blanket prohibition of *all* signs within the right-of-way (including small

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13 State's Opp. Re: Political Signs in Rights-of-Way at p. 11.

14 Aff. of Terre Gales, ¶¶ 2–3.

15 *Id.*

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signs on private property) would still be "greater than is essential" to further the State's purported public safety interest.

The State primarily relies on *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) for the proposition that content-neutral regulations prohibiting political signs on public property do not infringe First Amendment rights. But *Taxpayers for Vincent* is distinguishable in two critical respects. First, as the State notes, the sign ban in that case applied exclusively to public property. In holding the ban constitutional, the Supreme Court noted the importance of the trial court's determination that the regulation did not prevent campaigns from displaying signs on private property: "[Appellees] remain free...to post their signs and handbills on their automobiles and on private property with the permission of the owners thereof."[16] But in this case, the opposite is true. AS 19.25.105(d) infringes the First Amendment rights of private property owners who happen to have a right-of-way easement crossing their property. And the Supreme Court has expressly recognized that First Amendment rights are heightened when coupled with private property rights.[17]

Second, the Court in *Taxpayers for Vincent* found it significant that the sign ban was being applied evenhandedly in a content-neutral manner. It noted that:

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16 *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 794–95 (1984).

17 *See City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (recognizing "[a] special respect for individual liberty in the home" because "[d]isplaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else....").

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> [T]here is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance. There is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express.[18]

Again, the opposite is true here. The State has invoked AS 19.25.105(d) specifically to target political speech within the right-of-way. *Taxpayers for Vincent* therefore does not control the outcome of this case.

III. PLAINTIFFS HAVE STANDING TO CHALLENGE AS 19.25.105(d) AS FACIALLY OVERBROAD

The State contends that Plaintiffs lack standing to challenge the scope of AS 19.25.105(d) application to private property because they have not identified a specific property owner whose rights are infringed.[19] The State is incorrect. As the Supreme Court explained in *Taxpayers for Vincent*, a plaintiff has standing to challenge a statute as facially overbroad if there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court[.]"[20] This is because "the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected [by the First Amendment]."[21] "This exception from the general rule [of standing] is predicated on 'a judicial prediction or assumption that the

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18 *Taxpayers for Vincent*, 466 U.S. at 804.

19 State's Opp. Re: Political Signs in Rights-of-Way at p. 20.

20 *Taxpayers for Vincent*, 466 U.S. at 801.

21 *Id.* at 798–99.

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statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'"[22] Accordingly, Plaintiffs need not demonstrate that they are subject to the specific prohibition against "advertising" on private property to challenge that prohibition on overbreadth grounds.

IV. THE STATE'S "RIGHT TO CONTROL" HIGHWAY EASEMENTS DOES NOT EXPAND THE SCOPE OF THE SERVITUDE

Finally, the State contends that its highway rights-of-way are not like other easements. Rather, according to the State, they are a form of "super" easement that essentially extinguishes the underlying fee owner's right to make any use of the easement whatsoever.[23] The State views a highway easement as a linear fiefdom controlled by DOT. This overreaching view is plainly inconsistent with established case law dealing specifically with highway right-of-way easements. In *Andersen v. Edwards*, 625 P.2d 282 (1981), the Supreme Court held that an ambiguous highway easement allowed use of the designated right-of-way only to the extent reasonably necessary to serve the easement's intended purpose. The Court adopted this standard specifically recognizing that it would invite litigation about what constitutes a "reasonable use" of State rights-of-way:

> Although the result we reach today may generate litigation because of disputes over what constitutes reasonable use, the "result will avoid a construction of the grant of a right of way on and over [a] parcel of land that would unduly restrict its use."[24]

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22 *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798–99 (1984) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

23 State's Opp. Re: Political Signs in Rights-of-Way at p. 21–22.

24 *Andersen v. Edwards*, 625 P.2d 282, 287 (1981).

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The Supreme Court was specifically concerned with overreaching easement claims that would unduly restrict the fee owner's use of his or her property.

And the Supreme Court reaffirmed *Andersen* in *Simon v. State*, 996 P.2d 1211 (Alaska 2000), which concerned State improvements to the Glenn Highway. The plaintiff sought damages against the State for exceeding its easement rights over his property. The trial court started by recognizing that "[c]ourts consistently find that an easement gives the holder the right to use the land to the extent necessary to serve the purpose of the easement."[25] It then found the State's particular use in that case was necessary to serve the purposes of the easement, and denied the plaintiff's claim for damages.[26] Superior Court Judge Guidi recently affirmed the same legal principles in *Ahtna, Inc. v. State* when he rejected the DOT's claim to a "super" highway easement over Klutina road and instead held that a highway easement allowed for public transit and did not allow the State to turn private property within the highway right-of-way into a public recreation area.[27] All of these cases demonstrate the same principle: contrary to the State's argument, the State's rights in a right-of-way easement are limited to those uses necessary for the purposes of

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25 *Simon v. State*, 996 P.2d 1211, 1215 (Alaska 2000).

26 *Id.* at 1216 ("I find that lower the elevation of the road and using or disposing of excavated materials [is] necessary for the purposes of the easement, in this case, constructing a highway over and across the easement.").

27 *See* Exhibit 3 to Plaintiff's Reply in Support of Motion for TRO and Preliminary Injunction.

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the easement, and, conversely, the underlying fee owner retains such use rights as will not interfere with that purpose.

Citing the Restatement, the State contends that it has heightened authority over highway easements because they entail both a "right of use" and a "right to control."[28] But the "right to control" a public easement is merely a right to "manage the servitude."[29] That is, to manage the easement to serve the purposes for which it was created. The "right to control" a public easement cannot be used expand to the scope State's servitude beyond what is "necessary to serve the purpose of the easement" in contravention of Alaska Supreme Court precedent.[30] Ultimately, the underlying fee owner retains right to dedicate his or her property to uses that do not interfere with the State's right-of-way, including by placing a small, temporary political sign in his or her yard.

The State similarly argues that "the respective rights of the fee owner and easement holder are matters determined by state law, and in this context state law could not be more clear; AS 19.25.105(d) prohibits all signs within the right-of-way."[31] This circular argument is nonsensical. The State is essentially arguing that the property rights of fee owners are subject to legislative amendment without compensation. That is quite clearly

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28 State's Opp. Re: Political Signs in Rights-of-Way at p. 22.

29 Restatement (Third) of Property (Servitudes) § 2.18 (2000).

30 *Simon v. State*, 996 P.2d 1211, 1215 (Alaska 2000).

31 State's Opp. Re: Political Signs in Rights-of-Way at p. 21.

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not the law. As specifically stated in both *Andersen* and *Simon*, it is the purpose for which an easement is dedicated that controls the scope of its use.

V. CONCLUSION

For all of the foregoing reasons, the State's ban on all "advertising" within highway right-of-ways is overbroad and is not narrowly tailored to serve the State's legitimate public safety interests. AS 19.25.105(d) should therefore be enjoined to the extent it allows summary removal of campaign signs within a right-of-way that are located on private property and do not create an articulable safety concern.

DATED at Anchorage, Alaska this 18th day of September, 2018.

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