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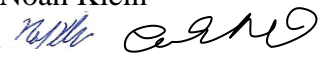
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MEMORANDUM

April 15, 2024

SUBJECT: Constitutional review of HB 386
(HB 386; Work Order No. 33-GH2378\A)

TO: Representative Andrew Gray
Attn: David Song

FROM: Claire Radford and Noah Klein
Legislative Counsel 

You requested a legal opinion on whether HB 386 raises any constitutional issues, specifically the exercise of civil liberties, and whether the bill would impinge on a person's constitutional rights of free speech and assembly. You also asked whether a person could be held liable for sharing information about a protest that engages in methods prohibited by HB 386.

HB 386 proposes to do the following: (1) create criminal penalties for obstructing airports and runways; (2) create a new strict-liability civil provision (sec. 09.65.360) for obstruction of access in violation of AS 02.20.050, AS 11.61.150, 11.61.155, or AS 38.05.128; (3) amend criminal trespass statutes (AS 11.46.320 and 11.46.330) and the crime of obstruction of highways (AS 11.61.150); and (4) enact a new crime, sec. 11.61.155, obstruction of free passage in public places. This new crime prohibits "knowingly render[ing] a public place impassable or passable only with unreasonable inconvenience or hazard." Section 11.61.155(b) states that obstruction of free passage in public places does not apply when authorized "by a permit issued by a state agency or municipality" or "by law or the person in charge of the premises." Note that "public place" is already broadly defined for Title 11 as "a place to which the public or a substantial group of persons has access and includes highways, transportation facilities, schools, places of amusement or business, parks, playgrounds, prisons, and hallways, lobbies, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence[.]"¹

I. Constitutional Issues: Obstruction of Free Passage in Public Places

The bill raises issues under the First Amendment of the United States Constitution and art. I, secs. 5 and 6, of the Alaska Constitution.² In particular, if challenged, there is a risk

¹ AS 11.81.900(b)(54).

² Those sections state:

that the new crime of obstruction of free passage in public places could be found unconstitutional both facially or if applied to the protected speech of protests or demonstrations.

A. Free Speech

When analyzing whether a government restriction of protected speech has violated the First Amendment, a court will determine what type of forum is at issue.³ In the case of sec. 11.61.155, many "public places" such as highways and sidewalks are traditional public forums. Under the public forum doctrine, government restrictions on the time, place, and manner of protest "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."⁴ A time, place, or manner speech restriction is narrowly tailored if "the means chosen are not substantially broader than necessary to achieve the government's interest."⁵ "But the government still 'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'"⁶

Section 11.61.155 does not regulate the content of speech, but it is unclear whether the criminalization of unpermitted or unauthorized obstruction of free passage in any public place (1) serves a significant government interest; or (2) creates a burden on speech that is substantially broader than necessary. The governor's transmittal letter explains that the state's interest is to "protect the right to freedom of movement." Courts have recognized significant government interests "in preserving freedom of movement on public streets and sidewalks"⁷ and "in protecting the 'safety and convenience' of persons using a public

SECTION 5. Freedom of Speech. Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

SECTION 6. Assembly; Petition. The right of the people peaceably to assemble, and to petition the government shall never be abridged.

³ *McGraw v. City of Oklahoma*, 973 F.3d 1057, 1067 (10th Cir. 2020) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

⁴ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

⁵ *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

⁶ *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quoting *Ward*, 491 U.S. at 799).

⁷ *Ross v. Early*, 758 F.Supp.2d 313, 322 (D. Md. 2010) (citing *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981)).

forum."⁸ Section 11.61.155, however, applies to all public places and does not require that the person charged actually prevent another person from passing through the public space, i.e., as long as it would be *unreasonably inconvenient* for another person to pass, blocking public space even when no one else is around is criminalized. It is not clear whether the state has a significant interest in ensuring freedom of movement in every place the public may access.

Assuming freedom of movement is a significant state interest, to protect the interest, sec. 11.61.155 criminalizes "knowingly render[ing] a public place impassible or passable only with unreasonable inconvenience or hazard." A court considering a challenge to this crime will evaluate whether criminalizing the unpermitted or unauthorized obstruction of public places is substantially more burdensome than necessary to protect the right to freedom of movement. When conducting such an inquiry, a court might reasonably ask whether criminalizing obstruction of *all* public places, no matter how remote and regardless of whether another person is actually prevented from passage, is substantially more burdensome than necessary to protect freedom of movement.

Additionally, the state's application of sec. 11.61.155(b) may raise First Amendment issues. The section provides that the crime of obstruction of free passage in public places does not apply to a person organizing with a permit or other authorization. This exception may require a person or group who wishes to express their ideas in a way that would obstruct a public place to first present their ideas to the government for consideration and approval. Yet the permitting provision lacks standards to guide state and municipal permitting decisions. In practice, this appears to allow the government discretion to determine which ideas may be disseminated, making the new provision vulnerable to selective or arbitrary enforcement. The lack of guidance or limits on the permitting authority also compromises effective judicial review of permitting decisions.⁹

In *Cox v. State of Louisiana*, a civil rights demonstration leader was arrested and charged with obstructing public passages, as well as criminal conspiracy, disturbing the peace, and picketing before a courthouse.¹⁰ On appeal, the United States Supreme Court held that the "rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a

⁸ *Berger v. Seattle*, 569 F.3d 1029, 1041 (9th Cir. 2009) (quoting *Heffron*, 452 U.S. at 650).

⁹ *S. Oregon Barter Fair v. Jackson Cnty., Oregon*, 372 F.3d 1128, 1138 (9th Cir. 2004) ("Time, place, and manner restrictions must 'contain adequate standards to guide the official's discretion and render it subject to effective judicial review.' In other words, the regulation must provide objective standards that remove the permitting decision from the whim of the official; the absence of such standards enables the official to favor some speakers and suppress others.").

¹⁰ 379 U.S. 536 (1965).

group at any public place and at any time"¹¹ and that "governmental authorities have the duty and responsibility to keep their streets open and available for movement."¹² However, when evaluating the Louisiana statute, the court stated, "[t]he statute itself provides no standards for the determination of local officials as to which assemblies to permit or which to prohibit."¹³ Applying prior precedent, the court explained, "[a] long line of cases in this Court makes it clear that a State or municipality cannot 'require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be disseminated.'"¹⁴ The court warned that danger to a person's right of equal protection of the laws is inherent in a system that allows police to determine which views may be expressed. "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power, or as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute."¹⁵

B. Overbreadth

Section 11.61.155 could be challenged on overbreadth grounds. The United States Supreme Court has explained "the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep."¹⁶ "A statute regulating speech is overbroad, and thus unconstitutional, 'when constitutionally protected conduct as well as conduct which the state can legitimately regulate are included within the ambit of [a] statute's prohibition.'"¹⁷ The United States Supreme Court has described application of the overbreadth doctrine as "strong medicine . . . employed by the Court sparingly and only as a last resort."¹⁸

¹¹ *Id.* at 554.

¹² *Id.* at 554 - 555.

¹³ *Id.* at 556.

¹⁴ *Id.* at 557 (quoting *Schneider v. State of New Jersey*, 308 U.S. 147, 164 (1939)).

¹⁵ *Id.* at 558 - 559.

¹⁶ *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (internal citations and quotations omitted).

¹⁷ *Turney v. State*, 936 P.2d 533, 539 (Alaska 1997) (quoting *Marks v. City of Anchorage*, 500 P.2d 644, 646 (Alaska 1972)).

¹⁸ *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

A challenge to a statute for overbreadth has a high bar to meet. "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."¹⁹ A court evaluating an overbreadth challenge to sec. 11.61.155 must identify exactly what conduct is and is not prohibited by the section.²⁰ Thus, for example, after federal district courts enjoined statutes from Florida²¹ and Oklahoma²² on overbreadth grounds, the Tenth and Eleventh Circuit Courts of Appeals requested that Florida and Oklahoma Courts first interpret the challenged statutes to determine the bounds of conduct prohibited under each statute.²³

The prohibition in sec. 11.61.155 on rendering "a public place impassable or passable only with unreasonable inconvenience or hazard" potentially criminalizes generally allowed expressive activity. AS 11.61.150 already prohibits rendering "a highway impassable or passable only with unreasonable inconvenience or hazard." Highway is broadly defined as "a public road, road right-of-way, street, alley, bridge, walk, trail, tunnel, path, or similar or related facility, as well as ferries and similar or related facilities."²⁴ Because the definition of highway already includes public places normally traversed by people, sec. 11.61.155 presumably criminalizes obstructing an even broader swath of places.

While it is easier to discern how a person makes a highway, a place people normally move, impassable, what does it mean to knowingly to make a "public place," which is defined to include a park or playground, and hallway, impassable? Is one person standing amongst a group in a hallway a criminal act if the person knows that the hallway is impassable?

¹⁹ *Virginia v. Hicks*, 539 U.S. 113, 124 (2003).

²⁰ *See, e.g., Dream Defenders v. Governor of Florida*, 57 F.4th 879, 891 (11th Cir. 2023) (explaining that "the plaintiffs' overbreadth claim turns on what conduct is prohibited by the [challenged statute]").

²¹ *Dream Defenders v. DeSantis*, 559 F.Supp.3d 1238, 1282 - 84 (N.D. Fla. 2021) (evaluating exactly what is prohibited by challenged statute before finding the statute overbroad because it criminalizes protected activity including "mere presence" at a protest).

²² *Oklahoma State Conf. of NAAACP v. O'Connor*, 569 F.Supp.3d 1145, 1153 (W.D. Okla. 2021).

²³ *Dream Defenders v. Governor of Florida*, 57 F.4th at 893 - 94; *Oklahoma State Conf. of NAAACP v. O'Connor*, 2022 WL 1210088 at *1 - 2 (10th Cir. Apr. 21, 2022).

²⁴ AS 11.81.900(b)(31).

Grappling with similar questions, a federal district court, in *Langford v. City of St. Louis, Missouri*, enjoined an ordinance similar to sec. 11.61.155 that prohibited a person standing "in any public place in such a manner as to obstruct, impeded, interfere, hinder or delay the reasonable movement of vehicular or pedestrian traffic."²⁵ Langford had participated in a rally and had refused to vacate the street and move onto the sidewalk following the rally when instructed to do so by the police. The court found the ordinance

applies to and would allow punishment of two neighbors who stand and converse in a residential street, or to persons gathering for a neighborhood block party. It applies to a single person or group of persons standing on a sidewalk waiting for an Uber to arrive. It applies to any spontaneous gathering of persons on sidewalks or in the streets in response to a dramatic political or news event, or a concert or sporting event. It applies to members of a group of sightseers, sports fans, tourists, or school children who might innocently gather and assemble on a public street or sidewalk in such a manner as to impede or interfere with traffic.²⁶

On appeal, the Eighth Circuit held that the ordinance was not facially overbroad. The court stated, "[t]he text of the ordinance says nothing about speech" and "on its face regulates conduct" and but to conduct, and "furthers the City's legitimate interest in 'ensuring the free and orderly flow of traffic on streets and sidewalks.'"²⁷ Additionally, the court found, "[t]he record does not suggest that the ordinance operates in practice as a substantial bar on protected speech when judged in relation to its plainly legitimate sweep."²⁸

If a court reviewing sec. 11.61.155 focuses on the many examples of expressive activity seemingly criminalized as unlawful obstruction of a public place, then the court may conclude that the new crime is overbroad. If, however, the court characterizes the crime as a conduct restriction and focuses on whether expressive activity is restricted in practice, it may conclude that sec. 11.61.155 is not overbroad.

C. Vagueness

"A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process."²⁹ "A statute can be impermissibly vague for either of two independent

²⁵ *Langford v. City of St. Louis, Missouri*, 443 F. Supp. 3d 962, 994 (E.D. Mo. 2020), *rev'd and remanded*, 3 F.4th 1054 (8th Cir. 2021).

²⁶ *Id.* at 978.

²⁷ *Langford v. City of St. Louis, Missouri*, 3 F.4th 1054, 1058 (8th Cir. 2021).

²⁸ *Id.*

²⁹ *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 497 (1982).

reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement."³⁰ In *Coates v. Cincinnati*, a Cincinnati ordinance made it a criminal offense for "three or more persons to assemble" on city sidewalks and "conduct themselves in a manner annoying to persons passing by."³¹ The United States Supreme Court stated that "conduct that annoys some people does not annoy others" and that the ordinance gave no direction at all as to what conduct was prohibited by the law.³² The Court therefore struck down the ordinance as unconstitutional on vagueness grounds.

Because the new crime of obstruction of free passage in public places under HB 386 does not define "unreasonable inconvenience," identify a specific period of time required before obstruction is criminal, or require that the obstruction actually prevent another person from passing, the statute could be found to violate due process by being impermissibly vague. The lack of guidelines for what constitutes an "unreasonable" inconvenience or the necessary time period for an obstruction and the lack of a requirement that another person be affected could encourage inconsistent or arbitrary enforcement.

However, the Eighth Circuit in *Langford* held that an ordinance similar to sec. 11.61.155 was not unconstitutionally vague because, using widely understood terms, the ordinance prohibited "positioning oneself 'in such a manner as to obstruct, impede, interfere, hinder or delay the reasonable movement of vehicular or pedestrian traffic.'"³³ A court reviewing sec. 11.61.155 may similarly conclude that "a citizen who desires to obey this [prohibition] should have little difficulty understanding it."³⁴

II. Liability for Sharing Information About a Protest

You also asked whether a person sharing information about a protest that may engage in prohibited methods under HB 386 could be held legally liable for doing so. While a person would not be subject to criminal liability for sharing such information, a person could be civilly liable under HB 386.

³⁰ *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

³¹ 402 U.S. 611 (1971).

³² *Id.* at 614.

³³ 3 F.4th at 1059.

³⁴ *Id.* (citing *Colten v. Kentucky*, 407 U.S. 104, 110 (1972)).

A. Criminal Liability

In order for a person sharing information to be held criminally liable under sec. 11.61.155(a), the person would have to knowingly render a public place impassable or passable only with unreasonable inconvenience or hazard. It is unlikely that a person could be charged with this crime for sharing information about a protest because the act of sharing information is not the action that makes the public place impassable or passable only with unreasonable inconvenience or hazard. The act of sharing information alone does not itself satisfy the elements of the offense.

B. Civil Liability: Constitutional Concerns

Section 4 of the bill adds a new statute, AS 09.65.360 which, in part, imposes strict civil liability with minimum damages awards for obstruction of free passage in public places.³⁵ Additionally, subsection (b) of that section states:

- (b) A person is jointly and severally liable for conduct under (a) of this section if the person directly or indirectly, by words or action, aids, encourages, or authorizes the conduct, including by
- (1) participating in the conduct;
 - (2) directing, advising, encouraging, or soliciting another person to engage in or participate in the conduct; or
 - (3) conspiring to engage in the conduct.

Without any requirement that the person know that an obstruction is a likely or even possible result, this subsection could expose a person to liability for sharing information about a protest that results in obstruction of free passage in a public place. By imposing strict liability, damages untethered to actual harm, and joint and several liability based on no more than indirect encouragement, sec. 09.65.360 raises First Amendment concerns. The United States Supreme Court has recognized a state's ability to impose damages for unlawful conduct, but the Court has cautioned that, in the First Amendment context, a damage recovery is limited to "those losses proximately caused by unlawful conduct" and that a state may not "impose liability on an individual solely because of his association with another."³⁶

Please let me know if you have any additional questions.

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³⁵ In addition to actual damages, and regardless of extent of actual damage suffered, sec. 09.65.360(a) establishes minimum damages awards for different types of injury.

³⁶ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918 - 19 (1982) (citing *Scales v. United States*, 367 U.S. 203, 229 (1961)).