ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672
11366 SENATE STATE AFFAIRS

by the Oregon Travel Information Council pursuant to authority granted by the Oregon Motorist Information Act of 1971. *ORS 377.700* to 377.840 and 377.992. That Act was enacted in [***3] response to the 1965 federal Highway Beautification Act. 23 USC § 131.

The federal Act is designed to persuade the states, by means of financial incentives, to use their police power to control the erection and maintenance of outdoor advertising structures adjacent to the Interstate and primary highway systems. Its purpose is "to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural [*402] beauty." *23 USC § 131*(a). The Act provides for the reduction of federal aid highway funds by an amount equal to 10 percent of the sum which would otherwise be apportioned on or after January 1, 1968, to any state which the Secretary of Transportation determines has not made provision for "effective control" of the erection and maintenance of outdoor advertising structures. *23 USC § 131*(b). n4 "Effective control" means that signs, displays, or devices within the prescribed area shall be limited to

"(1) *** directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which [***4] are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be [**1220] changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution of nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term 'free coffee' [***5] shall include coffee for which a donation may be made but is not required." *23 USC § 131*(c), as amended.

n4 Originally, each state was to provide for "effective control" of advertising structures which were within 660 feet of the nearest edge of the right-of-way and visible from the main traveled portion of the Interstate and primary highway systems. In 1975, the area to be controlled was expanded to include signs beyond 660 feet and visible from the highway. *23 USC § 131*(b), as amended.

The Act further provides that, pursuant to an agreement between a state and the Secretary of Transportation, advertising structures may be erected and maintained within the proscribed distance in areas which are zoned industrial or commercial under authority of state law [*403] or within unzoned commercial or industrial areas. States retain the full authority to zone areas for commercial or industrial purposes, and the actions of the states in this regard are to be accepted for purposes of the Act. Advertising [***6] structures erected pursuant to this section are subject to certain size, lighting and spacing requirements, which are to be determined by agreement between the states and the Secretary. *23 USC § 131*(d), as amended.

The Act also provides for payment of just compensation to owners of outdoor advertising signs along the Interstate and primary system upon the removal of certain kinds of advertising structures, with the federal government providing 75 percent of the compensation. *23 USC § 131*(g). There is a grace period of 5 years for the removal of structures previously lawfully erected. *23 USC § 131*(e).

In compliance with the federal Act, the Oregon Motorist Information Act provides:

"A person may not erect or maintain an outdoor advertising, direction or on-premises sign visible to the traveling public from a state highway, except where permitted outside the right-of-way of a state highway, * * *." *ORS 377.715*.

In order to erect, maintain or replace an outdoor advertising sign, an annual permit must first be obtained. *ORS 377.725(1)*. An annual fee, dependent upon the size of the sign, must accompany each application for a permit. *ORS 377.725(5)*. The Oregon [***7] Act, as mandated by the federal statutes, is designed to phase out outdoor advertising structures. Thus, no permit for the erection of any new outdoor advertising sign could be issued after June 12, 1975. *ORS 377.725(4)*. All signs must comply with certain size, spacing, lighting, form, and other like requirements. *See ORS 377.720*, 377.727, 377.745, 377.750, 377.755. Signs must not interfere with a driver's view of official traffic signs or his or her view of traffic. *ORS 377.720(b)*. The express purposes

of the Oregon Act, insofar as relevant, are "to promote the public safety, to preserve the recreational value of public travel on state's highways, and to preserve the natural beauty and aesthetic features of such highways and adjacent areas * * *." *ORS 377.705.*

[*404] Certain signs are exempted by statute from the Oregon Act's permit and location requirements. These include signs permitted by the federal Act, such as directional and official traffic signs and signs advertising the sale or lease of property upon which they are located. Certain other temporary signs are also allowed, e.g., temporary signs providing directions to places of business offering for [***8] sale agricultural products produced on the premises in question, signs maintained for not more than two weeks announcing an auction or a campaign, drive or event of a civic, philanthropic or educational organization; signs maintained for not more than six weeks by state and county fairs, rodeos, roundups and expositions; and temporary political signs erected or maintained by candidates or political committees on private property if the sign is removed within 30 days after the date of the election for which erected. The full [**1221] text of the exemptions, *ORS 377.735(1)*, is set out in the margin. n5

[*405] "(2) The signs referred to in paragraphs (b), (c), (e), (g) to (L), (n) and (o) of subsection (1) of this section shall be subject to regulations adopted by the council as to the size, number and general location and as to time and procedure for erection and removal of temporary signs."

n5 *ORS 377.735(1)* provides:

"(1) If applicable federal regulations are met, the permit requirements of *ORS 377.700* to 377.840 do not apply to:

"(a) Signs with an area of not more than 260 square inches identifying motor bus stops or fare zone limits of common carriers.

"(b) Signs erected and maintained by a city showing the place and time of services or meetings of churches and civic organizations in the city; however, not more than two such signs may be erected and maintained that are readable by the traveling public proceeding in any one direction on any one highway.

"(c) Residential directional signs along highways other than fully controlled access highways; however, this paragraph does not apply if a professional, commercial or business activity is maintained at the location and the sign indicates its existence.

"(d) Official traffic control signs.

"(e) Signs of a governmental unit including but not limited to regulatory devices, legal notices or warnings.

"(f) Small signs displayed for the direction, instruction or convenience of the public, including signs which identify restrooms, freight entrances, posted areas or the like, with total surface area not exceeding four square feet.

"(g) Signs maintained for not more than two weeks announcing an auction or a campaign, drive or event of a civic, philanthropic or educational organization.

"(h) Memorial signs or tablets.

"(i) Signs maintained for not more than six weeks by state and county fairs, rodeos, roundups and expositions.

"(j) Directional signs maintained temporarily to provide directions to places of business offering for sale agricultural products harvested or produced on the premises where the sale is taking place.

"(k) A sign advertising the sale of real estate by the owner or his agent and erected on the advertisied premises.

"(L) Signs warning of hazards or danger on the property upon which they are located, or warning against hunting, fishing or treaspassing upon such property.

"(m) Signs approved by the engineer and erected by a utility or common carrier for the purpose of notices necessary for the information, safety or direction of the public.

"(n) Church directional signs not to exceed six square feet in size, installed on private property.

"(o) Temporary political signs erected or maintained by candidates or political committees on private property, if the sign area does not exceed 32 square feet and if the sign is removed within 30 days after the date of the election for which erected."

[***9]

ORS 377.735(2) permits the Travel Information Council to adopt regulations as to the size, number and general location and as to the time and procedure for erection and removal of temporary signs. n6 Signs

erected or maintained within a city more than 660 feet from the nearest edge of the right-of-way of a state highway are also exempt signs unless the sign is designed to be viewed primarily from the state highway. *ORS 377.735(3)*. All exempted signs must still comply with any applicable federal regulations. *ORS 377.735(1)*.

n6 *ORS 371.735(2)* provides:

Pursuant to *ORS 377.735(2)*, the Council has adopted regulations, including the one before us, relating to the erection and maintenance of exempt signs. These regulations vary according to the type of sign and pertain to location, size, form and, in some instances, number and time limit. *See* OAR 733-20-040 to 733-20-050. The following signs have no durational limits: church and civic organization signs, residential directional signs, signs of a governmental [***10] unit, memorial signs and tablets and church [*406] directional signs. Signs advertising the sale of property on which they are located and temporary directional signs advertising the sale of agricultural products are not limited as to time of erection but must be removed upon completion of the sale of the product. Other signs have more specific limitations: temporary civic signs must be removed within two weeks of installation, but not later than 24 hours after completion of the advertised event; exposition, fair and rodeo signs must be removed six weeks after erected but, not later than 24 hours after closing of the event; and temporary political signs may not be erected prior to 60 days preceding the date of the election to which they pertain and must [**1222] be removed within 30 days after the election.

Petitioners challenge the 60 day limitation on temporary political signs as set forth in OAR 733-20-050(3)(a). n7 arguing that it violates their right to freedom of speech. n8 In this regard, petitioners argue that, because political speech is involved, erection of signs of this type is entitled to absolute protection, *i.e.*, it cannot be regulated at all. Secondly [***11] they argue that, assuming some regulation is permissible, the regulatory limit in question here does not qualify as a valid "time, place and manner" restriction. Alternatively, they argue that, even if the rule is construed as a valid time, place and manner regulation, it cannot be sustained because the state has failed to demonstrate a sufficiently compelling state interest to justify it. Petitioners also claim that the rule in question violates equal protection principles, because it impermissibly discriminates between temporary political signs and other types of temporary signs with respect to time limitations.

n7 OAR 733-20-045 provides, in pertinent part:

"***

"(3) Erection and Removal: Signs erected under this rule are subject to the following conditions:

"(a) Signs may not be erected prior to 60 days preceding the election date;

"(b) Signs must be removed within 30 days after election date;

"* * *"

n8 Contrary to the state's suggestion, petitioners do not also challenge the requirement that signs must be removed 30 days after the election.

[***12]

[*407] The Council argues that its rule is not a prior restraint on speech which must be justified by a compelling state interest but is, rather, a reasonable regulation on the time, place and manner of speech. It argues that the governmental interest, along with other factors, can be weighed against the individual interest. It points to the state's interest in promoting highway safety and beauty and in receiving its full share of federal aid for highways. It notes that the rule is limited in application and argues that there are ample alternatives for communication by political candidates; thus, it argues, the rule does not impose an undue burden on First Amendment rights. It contends that petitioners' equal protection claim is unfounded because the time limits on political signs are reasonably calculated to further the general purposes of state and federal sign legislation and the difference in time restrictions for the different types of signs is a reasonable response to the practical requirements of the various forms of communications.

1. Petitioners' Claim of Absolute Protection for Political Speech

Initially, we reject petitioners' claim that political [***13] speech enjoys absolute protection and cannot be regulated. It is true that political speech, as opposed to other types of speech, is afforded maximum protection under the First Amendment. *See New York Times Co. v. Sullivan, 376 U.S. 254, 270, 845 S Ct 710, 11 L Ed 2d 686 (1964); Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S Ct 209, 13 L Ed 2d 125 (1964); Monitor Patriot Co. v. Roy, 401 U.S. 265, 91 S Ct 621, 28 L Ed 2d 35 (1971); John Donnelly & Sons v. Campbell, 639 F2d 6 (1st Cir*

1980); Baldwin v. Redwood City, 540 F2d 1360 (9th Cir 1976), cert den 431 U.S. 913 (1977). However, not even the right of political expression is completely unfettered. The Supreme court has repeatedly recognized the constitutionality of reasonable "time, place and manner" restrictions on the exercise of free speech rights. *See e.g., Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S Ct 2286, 33 L Ed 2d 212 (1972); Grayned v. City of Rockford, 408 U.S. 104, 92 S Ct 2294, 33 L Ed 2d 222 (1972); Cox v. Louisiana, 379 U.S. 536, 85 S Ct 453, 13 L Ed 2d 471 (1965); Kovacs v. Cooper, 336 U.S. 77, 69 S Ct 448, 93 L Ed 513 (1949); Cox v. New Hampshire, 312* [***14] *U.S. 569, 61 S Ct* [*408] *762, 85 L Ed 1049 (1941).* The statutory and regulatory scheme before us does not absolutely prohibit the erection and maintenance of political campaign signs; it regulates the time, place and manner of their erection and maintenance. Therefore, we examine the regulation in [**1223] question not as an absolute ban but as a time, place and manner restriction.

2. Time, Place and Manner Restriction

"Laws regulating time, place or manner of speech stand on a different footing from laws prohibiting speech altogether." *Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 97 S Ct 1614, 52 L Ed 2d 155 (1977).* Reasonable restrictions relating to the time, place and manner in which the right to free speech is exercised are permissible if

"*** they are justified without reference to the content of the regulated speech, they serve a significant governmental interest, and *** in so doing, they leave open ample alternative channels for communication of information." *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748, 771, 96 S Ct 1817, 48 L Ed 2d 346 (1976).*

In measuring the effect of the statute [***15] or regulation on free expression, "careful consideration must also be given to whether the challenged regulation is more inclusive or more burdensome than necessary to further the legitimate governmental purposes [it is designed to foster]." *Baldwin v. Redwood City, supra, 540 F2d at 1367; see also United States v. O'Brien, 391 U.S. 367, 377, 88 S Ct 1673, 20 L Ed 2d 672 (1968).* First Amendment freedoms must be kept in a preferred position; a regulation can be no more restrictive than reasonably necessary to serve the governmental interest involved. *Brown v. Glines, 444 U.S. 348, 355, 100 S Ct 594, 62 L Ed 2d 540 (1980); John Donnelly & Sons v. Campbell, supra, 639 F2d at 8.* Where First Amendment rights are involved, restrictions must be "narrowly drawn." *Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 100 S Ct 2343, 65 L Ed 2d 341, 350 (1980); Baldwin v. Redwood City, supra, 540 F2d at 1567.*

With these constitutional principles in mind, we turn to the regulation before us. We note first that the Oregon statute as a whole is not directed to content. Billboards are regulated, and in some cases banned altogether, [*409] not because of the [***16] messages they convey but because the medium of communication is itself objectionable. *See John Donnelly & Sons v. Campbell, supra, 639 F2d at 8; Metromedia, Inc. v. City of San Diego, 26 C3d 848, 164 Cal Rptr 510, 610 P2d 407 (1980), prob juris noted, 449 U.S. 897, 101 S Ct 265 (1980).* On the other hand, the exemptions from the erection, location and permit requirements are based on *content*, and political campaign signs are treated as exemptions. To the extent that such signs are treated better than other signs, however, the statute cannot be faulted on this ground. n9 Moreover, as one court has noted in its examination of a similar state statute, each of these exceptions reflects "an appropriate governmental interest." *John Donnelly & Sons v. Campbell, supra, 539 F2d at 9.*

n9 The fact is, however, that temporary political signs do not enjoy a preferred position. *See* the equal protection discussion, *post.*

Like the exemptions, the regulations which implement the exemptions appear [***17] to be based upon content: how long an exempt sign may be maintained depends upon the message that sign seeks to convey. However, we need not decide if this distinction in the regulations based upon content is impermissible. Even if we assume that the regulation before us is a valid time, place and manner regulation and not an improper restriction on content, it cannot stand. Although the regulation seeks to further legitimate state interests, we conclude that these interests are insufficient to justify the significant restriction on political speech it imposes. Before outlining the reasons for our conclusion, we think an examination of the case law in this area and a closer look at the effect of the Oregon Act is helpful.

There are innumerable decisions examining state statutes and city ordinances regulating the erection and maintenance of billboards. A number of court decisions [**1224] have upheld local and state regulations which prohibit the posting of off-premise signs and which have limited exceptions such as those in the statute before us. The stated interests justifying such broad bans on outdoor advertising structures are most often identified as traffic safety [***18] and aesthetics. Some courts

have found aesthetics alone to be a sufficient basis for the restrictions. *See e.g., Metromedia, Inc. v. City of San Diego, supra, 26 Cal 3d 848; State v. Lotze, 92 Wash 2d 52, 593 P2d 811 (1979), appeal dismissed 444 U.S. 921 (1979); Markham Advertising Co. v. State, 73 Wash 2d 405, 439 P2d 248 (1968), appeal dismissed 393 U.S. 316 (1979); Stuckey's Stores, Inc. v. O'Cheskey, 93 NM 312, 600 P2d 258 (1979), appeal dismissed 446 U.S. 930, 100 S Ct 2145 (1980); Newman Signs, Inc. v. Hjelle, 268 NW2d 741 (N.D. 1978), appeal dismissed 440 U.S. 901 (1979); Veterans of For. Wars, Etc. v. Steamboat Springs, 575 P2d 835 (Colo 1978), dismissed for want of substantial federal question, 439 U.S. 809 (1978); Suffolk Outdoor Advertising Co., Inc. v. Hulse, 43 NY2d 483, 402 NYS2d 368, 373 NE2d 263 (1977), appeal dismissed 439 U.S. 808 (1978); Donnelly Advertising Corp. v. City of Baltimore, 279 Md 660, 370 A2d 1127 (1977); John Donnelly & Sons, Inc. v. Outdoor Advertising Bd., 369 Mass 206, 339 NE2d 709 (1975); E.B. Elliott Adv. Co. v. Metropolitan Dade County, 425 F2d 1141 (5th Cir 1970); [***19] United Advertising Corp. v. Borough of Raritan, 11 NJ 144, 93 A2d 362 (1952); see generally 81 ALR3d 480-556 (1977).* n10

n10 Petitioners have failed to cite any billboard cases. The Council relies on *State v. Lotze, 92 Wash 2d 52, 593 P2d 811 (1979)*, cert den *453 U.S. 922 (1980)*, discussed *infra*, and *State ex rel Dept. of Transp. v. Pile, 603 P2d 337 (Okla 1979). The Council's reliance on the decision in Pile* is misplaced. In that case the court held that a statute prohibiting all billboards on rural byways did not include billboards used for purposes of non-commercial speech. The court reasoned that to read the act as including all billboards would raise serious First Amendment problems.

In most of these cases the petitioner's interest and the court's opinion are limited to the challenged regulation's effect on purely commercial speech. The major exception to this focus is the decision by the Washington Supreme Court in *State v. Lotze, supra*. In that case, the court specifically [***20] considered the prohibition against off-site advertising as it related to political speech. The court found that the state law, which sets out the requirements and exceptions of the federal Act and in effect prohibits political and public issue signs, did not violate the First Amendment to the federal Constitution. *State v. Lotze, supra, 92 Wash 2d 52; see also Donnelly Advertising Corp. v. City of Baltimore, supra, 279 Md 660.*

However, the majority of the court decisions on this latter, specific issue of interference with political [*411] speech are contrary to *Lotze*. Regulations which prohibit all political and ideological signs in a given location, *e.g.*, in a city or on the state's highways, have been repeatedly found to be unconstitutional. *See, e.g., John Donnelly & Sons v. Campbell, supra; State v. Miller, 83 NJ 402, 416 A2d 821 (1980); Martin v. Wray, 413 F Supp 1131 (E.D. Wis 1979); Aiona v. Pai, 516 F 2d 892 (9th Cir 1975); Ross v. Goshi, 351 F Supp 949 (D Hawaii 1972); Peltz v. City of South Euclid, 11 Ohio St 2d 128, 228 NE2d 320 (1967); Norate Corporation v. Zoning Board of Adjustment, 417 Pa 397, 207 A2d 890 (1965);* [***21] *People v. Middlemark, 100 Misc 2d 760, 420 NYS2d 151 (1979).*

Like the federal Act and the state statutes and ordinances examined in the cases noted above, the Oregon Act attempts to eliminate outdoor advertising from a particular area, *viz.*, the state and federal highway system. Commercial signs are banned unless they involve the sale of the property on which they are located or are temporary directional signs relating to the sale of agricultural products on the property on which they were produced. These are so called "on-premises" signs. The Act, as noted, also exempts official and motorist informational [**1225] signs and certain temporary signs advertising civic functions, state and county events and political signs. The political sign exemption is limited. It applies only to political signs erected or maintained by candidates or political committees and only to signs related to current political campaigns. There is no provision allowing persons other than candidates or committees to erect campaign signs in support of the candidate of their choice. Further, the exemption does not apply to other political issues or ideological speech which is not the subject [***22] of an election. Messages such as "Support E.R.A.," "No Nukes" or "Guns don't kill people -- people kill people" are banned altogether from the highways.

The regulation in question here narrows the political sign exemption even further than does the statute. By its provisions, such campaign signs as are permitted can only be erected for 60 days preceding an election. This regulation is, in the context of the larger statutory scheme, a significant restriction on political speech.

Unlike many of the cases discussed above, we are not here asked to decide the constitutionality of the Oregon [*412] Motorist Information Act as a whole. Petitioners challenge only the 60 day limitation on the erection of political signs. They do not take issue with the banning of ideological signs altogether, or the fact that only candidates and committees can erect political campaign signs. But *see John Donnelly & Sons v.*

Campbell, supra, 639 F2d 6. We turn now to the limited inquiry before us.

The stated purposes of the Oregon Act are three: highway safety, aesthetics and preservation of the state's recreational value. n11 We have no doubt that these are legitimate state interests. We [***23] find it difficult, however, to find a relationship between the 60 day limitation on the erection of political signs and public safety. Once political signs are allowed on a temporary basis, it is difficult to imagine how prohibiting political signs at other times significantly promotes highway safety. It is apparent that other restrictions on outdoor advertising structures such as spacing, size and lighting requirements are more closely related to the promotion of safe driving conditions. Limiting the time period during which political signs may be maintained is more closely related to considerations of aesthetics and preservation of the recreational value of Oregon's highways. These are, standing alone, valid state interests justifying the exercise of the state's police power. *See Oregon City v. Hartke, 240 Or 35, 400 P2d 255 (1965).* n12 Although we recognize the relationship between aesthetic and recreational considerations and restricting the period of time during which signs will be visible from the highways, as we have already stated, we do not think that these interests are sufficient to justify the significant restriction on political speech imposed by the regulation. [***24] *See John Donnelly & Sons v. Campbell, supra, 639 F2d at 12.*

n11 The Council also contends that the state has an interest in receiving its full share of federal aid for the state's highways and that this interest is advanced by the questioned regulation. We have no doubt that the state has such an interest. However, the state's financial interest does not outweigh the constitutional interests asserted by the petitioners here.

n12 In *Oregon City v. Hartke, supra,* the court upheld an ordinance excluding automobile wrecking yards from the city on aesthetic grounds alone. Many of the decisions noted above have relied on the court's decision in *Hartke* finding aesthetics to be a sufficient basis for the regulation and/or prohibition of off-premise billboards.

[*413] The bases for our conclusion are threefold. Initially, we find the 60 day limitation unnecessarily restrictive in light of the important First Amendment interests involved and the state's interest sought to be advanced. We agree [***25] with the analysis of the court in *John Donnelly & Sons v. Campbell, supra,* where the First Circuit held a Maine statute which prohibited most off-premises billboards unconstitutional because of its significant impact on ideological speech. The court noted that signs erected for an election, primary or referendum within three weeks of the event were exempted from the Act's operation. The court held, however, that the exception did not go far enough -- it not only failed to provide for other types of public issue signs [**1226] but also limited the period of time during which the election signs could be maintained. As the court stated, "*** we doubt that three weeks is enough time to publicize a campaign, particularly for the little known or unpopular candidate, or cause, with the greatest need for exposure." *Id.*, at 15.

It is true that the time limitation before us is more than twice as long as the one involved in the *Donnelly* case. However, the same reasoning applies. The process of acquainting the public with new candidates is a slow one. Two months is simply not enough time to allow a relatively unknown person to achieve household name familiarity. When [***26] Oregon's particular election scheme is considered, the unreasonable nature of the 60 day limitation becomes even more apparent: In Oregon, while primary elections are held in May, the general election is held the following November -- almost six months later. *See ORS 254.056.*

Secondly, although we recognize that alternative means of communication, *i.e.*, means other than billboards along the state's highways, are available to political candidates, we find these to be inadequate. A persuasive decision in this area is that of the Ninth Circuit in *Baldwin v. Redwood City, supra, 540 F2d 1360.* The city ordinance under scrutiny in that case provided for a permit system and contained detailed regulations governing the erection and maintenance of all types of outdoor signs within the city. Included were temporary signs which were limited to a period of 60 days before and 10 days after the event they [*414] addressed. While exempted from various design and structural controls, temporary signs were subject to certain other regulations. Political campaign signs were included in the category of temporary signs. The court held that the ordinance's limit on the aggregate [***27] area of political signs on behalf of a single candidate or issue, its requirement that an application be filed before displaying temporary political signs and that a nonrefundable inspection fee be paid before displaying signs, its provision requiring payment of $ 5 refundable deposit before displaying signs, its ban on display of signs in residential areas of the city and its provision permitting summary removal of any temporary political campaign sign under certain conditions were all unconstitutional on First Amendment grounds. n13 In

considering the availability of alternative channels of communication, the court stated:

"The existence of such alternatives is not alone enough to justify any regulation the city may decide to impose upon this means of expression. It is, however, a factor to be considered in striking the appropriate accommodation between free speech and legitimate governmental interests.

"Its significance depends upon the nature of the First Amendment interest involved in the particular case, the purpose and the extent of the restriction imposed, and the availability of less restrictive means of accomplishing the legitimate governmental objective. As we have [***28] said, the First Amendment interests involved in the display of political posters adjacent to public thoroughfares are substantial. Moreover, means of political communication are not entirely fungible, political posters have unique advantages. Their use may be localized to a degree that radio and newspaper advertising may not. With exception of handbills, they are the least expensive means by which a candidate may achieve name recognition among voters in a local elections." *Id., at 1368.*

n13 The Redwood City ordinance's 60 day limit on the maintenance of political signs was not challenged or considered by the court in *Baldwin.*

This view was reiterated by the court in *John Donnelly & Sons v. Campbell, supra.* In that case the court noted that outdoor advertising is a "far less expensive means of communication than radio, television, newspaper or magazines" and that ideological and political speech [*415] significantly depends upon outdoor advertising. *639 F2d at 16.* As the court stated, [***29] "Signs which can be cheaply erected particularly permit advancing poorly financed causes of little people." *Ibid.*, quoting from *Martin v.* [***1227] *Struthers, 319 U.S. 141, 146, 63 S Ct 862, 87 L Ed 1313 (1943).*

Finally, we note that, although political signs are treated by the statute and regulation in question here better than many other types of signs, they are, by virtue of the regulation before us, treated worse than some. In addition to official and informational signs, certain on-premise commercial signs, identified above, are not limited as to duration; the only limitation is that they must be removed after the sale they are advertising. Thus, the law may impact more heavily on the sale of ideas than on the sale of squash. Faced with a similar provision in the Maine statute, the court in *John Donnelly & Sons v. Campbell, supra,* concluded, and we agree, that such a result is "a peculiar inversion of First Amendment values." *Id.*, at 15-16.

On the basis of the foregoing analysis, we conclude that OAR 733-20-050(3)(a) infringes upon First Amendment rights by impermissibly restricting the scope of political speech through its limitations on the time [***30] for erection of political signs.

3. Equal Protection Considerations

Although not necessary to our decision in this case, we wish to add one further observation concerning the regulation we are reviewing. The distinction in the regulation between political and commerical speech raises Equal Protection as well as First Amendment issues. In *Orazio v. Town of N. Hempstead, 426 F Supp 1144 (ED NY 1977),* the court was faced with a town ordinance that limited the erection of political wall signs to six weeks preceding an election. The ordinance placed no time limits on nonpolitical wall signs which advertised the nature of the business conducted on the premises. The court found that the ordinance violated both the First Amendment and the Equal Protection Clause. While recognizing the town's concern for aesthetic values, the court found the distinction between types of signs was not justified as political wall signs, in the court's view, were not inherently more obnoxious or ugly than other wall signs. In response to the [*416] defendant's claim that political signs are by nature temporary the court stated:

"Whether temporary or not, politics is important business, [***31] and it is difficult to perceive what governmental interest is served by placing time limits on the public's opportunity to be informed about candidates who are seeking public office or organizations which support them." *Id., at 1149.*

We agree. n14

n14 Another decision which specifically discussed a time limit on the maintenance of political signs is *Ross v. Goshi, supra.* In that case, political campaign signs were exempted from certain erection and maintenance requirements for the 60 day period preceding an election. The court found the time limit reasonable. However, the court noted that political signs were permitted at any time before the 60 day period as long as they conformed to the restrictions placed on other outdoor signs.

The court in *Orazio* distinguished the case before it from *Ross* on this basis.

We conclude that the 60 day limitation on the maintenance of political campaign signs prior to an election is unconstitutional. It violates both the First Amendment and the [***32] Equal Protection clause of the United States Constitution. The regulation is unduly restrictive and burdensome when the significant First Amendment interests involved are balanced against interests of the state it seeks to advance. Although alternative modes of communication are available, they are inadequate when compared to the manner of expression (billboards), and the location (the state highway system). Finally, the regulation treats certain commerical signs more favorably than political signs, a distinction not reasonably related to any appropriate governmental interest. n15

n15 Normally, we would consider Oregon constitutional issues first. Here, however, the Council argues in part that it is compelled to the enactment of OAR 733-20-050(3)(a) by provision of the Federal Highway Beautification Act. Because we consider analysis under the federal Constitution dispositive, and in order to avoid a needless analysis of the applicability of the Supremacy Clause in this context, we have confined our discussion and holding to questions raised under it.

[***33]

[**1228] We are not unmindful of this state's interest in maintaining the beauty and recreational attractiveness of all of our resources, including the state highways. We recognize that billboards are viewed by many as a blight upon the land. However, this is a case involving significant First Amendment rights. As the court in *Baldwin v. Redwood City, supra*, stated:

[*417] "Communication by signs and posters is virtually pure speech. The element of conduct in a sign posted on behalf of an issue or candidate during a campaign is minimal. Baldwin and Cannon seek to use posters in political campaigning, and 'the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.' *Monitor Patriot Co. v. Roy, 401 U.S. 265, 272, 91 S Ct 621, 28 L Ed 2d 35 (1971).* Posters and signs are erected adjacent to 'traditional first amendment forums, such as public sidewalks and other thoroughfares,' *Aiona v. Pai, 516 F2d 892, 893 (9th Cir 1975)* where 'expressive activity may be restricted only for weighty reasons.' *Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S Ct 1194, 2303, 33 L Ed 2d 222 (1972).* [***34] *** The regulations *** directly infringe the First Amendment rights of individuals who want to express political opinion in a traditional First Amendment forum." *540 F2d at 1366.*

For the reasons stated above, we hold that OAR 733-20-050(3)(a) is unconstitutional and therefore invalid.

LEXSEE 557 f supp 52

CITY OF ANTIOCH, a municipal corporation, Plaintiff, v. CANDIDATES' OUTDOOR GRAPHIC SERVICE, a California corporation, et al., Defendants; AND RELATED COUNTER ACTION CYNTHIA J. FULTON and CANDIDATES' OUTDOOR GRAPHIC SERVICE, et al., Plaintiffs, v. MEMBERS OF THE CITY COUNCIL OF THE CITY OF ANTIOCH, et al., Defendants

Nos. C-82-0731-WWS, C-82-0832-WWS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

557 F. Supp. 52; 1982 U.S. Dist. LEXIS 17228

October 15, 1982

COUNSEL:
[1]**

Wayne S. Canterbury, David W. Greenthal, Canterbury, Raub & Greenthal, San Francisco, California, for Plaintiff Cynthia J. Fulton; Defendant & Counterclaimant Candidates' Outdoor Service.

William R. Galstan, City Attorney, City of Antioch, Antioch, California, Dwight B. Bishop, Inc., A Professional Corporation, Walnut Creek, California, for Plaintiff and Counterdefendant City of Antioch.

JUDGES:
Schwarzer

OPINIONBY:
SCHWARZER

OPINION:

[*53] MEMORANDUM OF OPINION AND ORDER

These consolidated actions bring before the Court the question of the constitutionality of the City of Antioch's ordinance limiting to the 60 day period before an election the posting of political signs that promote candidates for public office or advocate a position on upcoming ballot propositions.

The city, which bears the burden of showing that its ordinance comports with the First Amendment, seeks a declaration affirming the constitutionality of Section 9-5.1115(b)(4)(ii) of its Municipal Code and an injunction requiring defendants Candidates' Outdoor Graphics Service (COGS) and Cynthia Fulton n1 to obey the local law. By counter **[*54]** motion in a related suit, COGS and Fulton seek a declaratory judgment **[**2]** holding the Antioch ordinance violative of the First and Fourteenth Amendments and a permanent injunction against its enforcement.

n1 Although the City of Antioch did not raise the issue, there is a question whether these defendants have standing to challenge the ordinance. As a jurisdictional doctrine determining whether a controversy is justiciable, the issue of standing is properly raised by the court *sua sponte*. Problems of standing to litigate comprise both constitutional limitations on the judicial power under Article III of the federal Constitution and self-imposed prudential restraints. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752, 757-59, 70 L. Ed. 2d 700 (1982).* The bedrock requirement for standing in the constitutional sense is a showing that the claimant has suffered cognizable injury; he may not be merely a concerned bystander who presents a generalized grievance about government. *Id.* at 758-59.

Both defendants in this case meet this showing of injury in fact. COGS prints and posts political signs for candidates in local, State, and national elections. The firm was engaged by a

candidate seeking statewide office to poster in preparation for the June 1982 primary. Posting was begun well in advance of the 60-day period. Although this candidate was defeated in the June primary, COGS, which has a Northern California office in the City of Belmont, is likely to again be hired to perform its services in Antioch and other Bay Area cities. *Taxpayers for Vincent v. Members of City Council, 682 F.2d 847, 849 n.1 (9th Cir. 1982).* The fact that COGS is paid to advertise candidates does not impose a barrier to standing, nor does it mean that the speech in question is unprotected or deemed commercial because COGS has an economic interest in its promotion. *See Metromedia, Inc. v. San Diego, 453 U.S. 490, 504, 69 L. Ed. 2d 800, 101 S. Ct. 2882 n.11 (1981).*

Cynthia Fulton, the other defendant in this suit, lives in Antioch and intends to campaign by posting political signs in her community. The ordinance has the kind of direct and tangible effect on her legal interests which is requisite to her standing to participate in this suit.

[**3]

These suits testing the constitutionality of the Antioch law were brought in the early part of 1982. The city voluntarily agreed to suspend enforcement of its ordinance pending a determination by this Court of the ordinance's validity. With the general election of November 2nd now only weeks away, postering will be permitted under the ordinance's 60 day rule until after the election. Although the issue thus appears temporarily mooted, it may properly be considered as raising a case and controversy within the meaning of Article III since it is one of those issues which is "capable of repetition, yet evading review." *Sosna v. Iowa, 419 U.S. 393, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975); Taxpayers for Vincent v. Members of City Council, 682 F.2d 847, 849 n.1 (9th Cir. 1982).*

I. *The Local Ordinance*

The Antioch ordinance n2 limits the posting of outdoor political signs publicizing [*55] ballot propositions or promoting candidates for public office to a period of 60 days prior to the election to which they relate. The term "political sign" is defined as "any sign which is designed to influence the action of the voters for the passage or defeat of a measure appearing [**4] on the ballot at any national, State, or local election." Antioch, California Municipal Code § 9-5.1115(b)(2)(1979).

n2 Antioch, California Municipal Code § 9-5.1115(b) (1979) (amended 1981). The portion of the sign ordinance dealing with special restrictions placed on political signs reads as follows:

(b) *Political signs.*

(1) *Permission to use.* Notwithstanding anything to the contrary contained in this article, political signs shall be permitted in the City subject to the terms and conditions set forth in this subsection, which terms and conditions shall apply only to outdoor political signs.

(2) *Political sign defined.* "Political sign" shall mean any sign which is designed to influence the action of the voters for the passage or defeat of a measure appearing on the ballot at any national, State, or local election or which is designed to influence the voters for the election or defeat of a candidate for nomination or election to any public office at any national, State, or local election.

(3) *Registration of responsible parties for signs.* Any political campaign committee or candidate who utilizes political signs shall register the name of a person within the political committee or the candidate himself who shall be responsible for the political signs erected on behalf of and by such committee or candidate, their placement, and their maintenance within the City, and such person shall be considered the "responsible party." Such responsible party shall complete a registration form provided by the City, ₒ ving his name and address and where he can be contacted, and shall agree to become responsible for such political signs.

(4) *Location, time of erection, and type.* Political signs are hereby permitted in any zone without the prior approval of the Commission or Council. However, any such sign shall not:

(i) Be permanent or lighted;

(ii) Be erected earlier than sixty (60) days before the election to which they relate;

(iii) Be attached to any utility pole, fence, tree, or other vegetation or upon any public right-of-way;

(iv) Be so situated that the face thereof is specifically oriented for viewing toward any freeway right-of-way;

(v) Be erected in such a manner that it will or reasonably may be expected to interfere with, obstruct, confuse, or mislead traffic or be so situated as to endanger the health, safety, or welfare of people or endanger property;

(vi) Be erected or place at the intersection of any street, or within the segment created by drawing an imaginary line between points fifty (50') feet back from where the curb lines of the intersection quadrant intersect;

(vii) Signs used in primary elections shall not remain for general election purposes on behalf of a successful primary campaign candidate but shall be removed pursuant to the provision of subsection (5) of this subsection.

(viii) Be erected without the permission of the owner of property on which it is located;

(ix) Be placed upon any other sign, unless specifically authorized by the owner or person in possession of such other sign; and

(x) Be erected by a political campaign committee or candidate without first having registered the responsible party.

(5) *Removal.* A political sign shall:

(i) Be removed within fourteen (14) days after the election to which it relates;

***(7) *Exemptions.* The provisions of this subsection shall not apply to the following:

(i) A sign political in nature which is inside a building though visible from the exterior; and

(ii) Billboards posted by a person or corporation duly licensed to erect and maintain billboards, provided they are posted in a location in the manner authorized or permitted under other provisions of this article. "Billboard" is defined in paragraph (c) of this article.

[**5]

In effect, the local law imposes a year-round ban on political sign postering which is temporarily suspended 60 days before an election and reinstated after the election has taken place. Candidates and advocates have a sixty day window within which to reach Antioch voters via the medium of the temporary political sign, a medium whose unique advantages have been recognized by other courts. *Baldwin v. Redwood City, 540 F.2d 1360, 1368 (9th Cir. 1976), cert. denied, 431 U.S. 913, 97 S. Ct. 2173, 53 L. Ed. 2d 223 (1977); John Donnelly & Sons v. Campbell, 639 F.2d 6, 16 (1st Cir. 1980), aff'd, 453 U.S. 916, 69 L. Ed. 2d 999, 101 S. Ct. 3151 (1981); Van v. Travel Information Council, 52 Or. App. 399, 628 P.2d 1217, 1226 (1981).*

Only Section 9-5.1115(b) (4) (ii) of Antioch's Municipal Code is challenged by defendants; the Court is not asked to decide the constitutionality of the entire portion of the Antioch ordinance dealing with political signs. The Court notes in passing, however, that Section 9-5.1115(b)(4)(v) which purports to prohibit the posting of political signs in any manner that may interfere with, obstruct, confuse, or mislead traffic, or endanger the [**6] health, safety, or welfare of people, raises serious questions of vagueness and overbreadth.

II. *Standard of Review in First Amendment Cases*

The Ninth Circuit has outlined certain general principles which this Court must apply in analyzing legislative enactments, such as Antioch's, which regulate First Amendment rights. *Taxpayers for Vincent v. Members of City Council, 682 F.2d 847, 849 (9th Cir. 1982)* (quoting *Rosen v. Port of Portland, 641 F.2d 1243, 1246 (9th Cir. 1981)*) (citations omitted).

First, the law is presumptively unconstitutional and the state bears the burden of justification .... *Second*, the law must bear a "substantial relation" to a "weighty" governmental interest .... The law cannot be justified merely by the showing of some legitimate governmental interest .... *Third*, the law must be the least drastic means of protecting the governmental interest involved; its restrictions may be "no greater than necessary or essential to the protection of the governmental interest."

The city argues that this rigorous standard of review should not be applied to its ordinance because it is merely a "time, place, and manner" restriction [**7] which only incidentally burdens those seeking to inform the public about issues and candidates in upcoming elections. It is true that "laws regulating time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether." *Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 93, 52 L. Ed. 2d 155, 97 S. Ct. 1614 (1977).* Such restrictions are permissible "provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information." *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748, 771, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976).*

The Antioch ordinance is clearly a regulation with respect to time; but it is unlike other regulations traditionally cast as "time, place, and manner"

restrictions. *See, e.g., Brown v. Louisiana, 383 U.S. 131, 15 L. Ed. 2d 637, 86 S. Ct. 719 (1966)* (silent vigil would not interfere with tranquility of [*56] public library, but noisy protest could be banned); *Adderley v. Florida, 385 U.S. 39, 17 L. Ed. 2d 149,* [**8] *87 S. Ct. 242 (1966)* (jail grounds not an appropriate forum for civil rights demonstration, but state capitol grounds could not be closed to public protest); *Grayned v. Rockford, 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972)* (state could ban noisy protests near school since disruptive of classwork); *Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 69 L. Ed. 2d 298, 101 S. Ct. 2559 (1981)* (state could confine persons soliciting donations for Krishna religion to one location on state fairgrounds).

The 60 day rule, unlike the typical "time, place, and manner" restriction, does not attempt to determine whether and at what times the exercise of First Amendment rights is compatible or incompatible with the normal uses of a particular forum or place. *Grayned v. Rockford, 408 U.S. 104, 116, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972); Taxpayers, supra, at 850.* Rather, it imposes a general ban on the posting of signs promoting the candidacy of certain individuals or advocating a certain viewpoint on an upcoming ballot proposition. This ban is in effect everywhere in the city -- on sidewalks, parks, and streets, as well as, apparently, on [**9] all private property -- throughout the year. The ban is temporarily lifted for only a two-month period prior to an election and is reimposed in its wake. Such a pervasive restriction, which singles out political signs for special treatment, is properly analyzed under the test outlined in *Rosen, supra,* and reaffirmed by the Ninth Circuit in the *Taxpayers* case.

One must begin, therefore, with the proposition that the Antioch ordinance, which explicitly restricts and regulates a form of political speech, is presumptively unconstitutional. A heavy burden falls on the city to justify its regulation. Its regulatory goal must not only be a "weighty" governmental interest, but the city must show that no less restrictive alternative can be crafted which will promote that interest in a less onerous fashion.

With these governing principles in mind, the Court turns to the regulation before it. Two specific challenges are made to the Antioch law. First, the ordinance, by creating a classification based on the content or message of the communication conveyed on signs to be posted in the city, is attacked as violating the Fourteenth Amendment's guarantee of equal protection. Second, [**10] the local law is challenged as incompatible with the First Amendment's guarantee of freedom of speech because it imposes restrictions on one important medium which candidates and advocates use to inform the public about elections for political office and about state referenda and initiatives -- the temporary political sign. Each of these issues will be considered in turn.

III. *Equal Protection*

The Supreme Court recently gave extensive consideration to the question whether a law which accords disparate treatment to commercial and to noncommercial speech impermissibly discriminates on the basis of content. *Metromedia, Inc. v. San Diego, 453 U.S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981).* The Court reviewed an ordinance of the City of San Diego which permitted a business to erect an on-site billboard identifying its goods and services, but prohibited all off-site billboards. The local law contained a number of exceptions to the general ban on off-site billboards, including one exempting "temporary political campaign signs" erected no earlier than 90 days before an election. Although the San Diego ordinance spoke of temporary campaign "signs," the California Supreme [**11] Court provided a narrowing definition which limited the terms of the ordinance to permanent, fixed structures displaying advertisements, *i.e.,* to billboards. *Metromedia, Inc. v. San Diego, 26 Cal. 3d 848, 164 Cal. Rptr. 510, 513 n.2, 610 P.2d 407 (1980).*

The San Diego law was invalidated in a 6-3 decision which generated five separate opinions. A plurality of Justices found that the ordinance impermissibly discriminated by classifying signs with respect to the content of the message conveyed and inverted [*57] the First Amendment "by affording a greater degree of protection to commercial than to noncommercial speech." *Metromedia, Inc. v. San Diego, 453 U.S. 490, 513, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981).* n3 The plurality, in remanding the case to the California Supreme Court for a possible limiting and saving construction of the ordinance, explained that the San Diego law could only be saved by limiting its reach to commercial speech; it was fatally defective as applied to political or ideological speech. n4 On remand, the California Supreme Court declined to provide a narrowing construction on grounds that to do so would judicially rewrite the local law. The [**12] California Court noted that the political sign exception would be unnecessary in an ordinance limited to commercial speech. *Metromedia, Inc. v. San Diego, 32 Cal. 3d 180, 649 P.2d 902, 185 Cal. Rptr. 260,* slip op. at 16 (Cal. Sup. Ct., 1982).

n3 Chief Justice Burger, dissenting separately in *Metromedia*, argued vigorously against using the equal protection rationale to invalidate the ordinance. He found the law to be

"essentially neutral" because San Diego had not attempted to censor or suppress any particular viewpoint or ideological message. *Metromedia, supra, 453 U.S. at 561-69.*

n4 Two other Justices, concurring in the judgment invalidating the San Diego ordinance, would have done so on broader First Amendment grounds. Justices Blackmun and Brennan would have simply reversed the California Supreme Court's decision upholding the ordinance on grounds that the city had failed to justify the substantial restrictions imposed on First Amendment rights. *Metromedia, Inc. v. San Diego, 453 U.S. 490, 521-40, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981).*

[**13]

The standard for analyzing equal protection in the First Amendment area was stated by the Court in *Police Department v. Mosley, 408 U.S. 92, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972),* a case striking down an ordinance which generally banned picketing at a school but created a special exception for labor picketing.

Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or controversial views .... Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Id. at 96.

Laws aimed at controlling the non-communicative aspects of speech must regulate evenhandedly; those which selectively discriminate on the basis of content or subject matter offend the Equal Protection Clause. *Linmark Associates v. Willingboro, 431 U.S. 85, 52 L. Ed. 2d 155, 97 S. Ct. 1614 (1977)* (township ordinance prohibiting posting of "For Sale" and "Sold" signs to prevent white flight selectively and impermissibly bans signs based on content); *Carey v.* [**14] *Brown, 447 U.S. 455, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980)* (differential treatment of labor and nonlabor picketing impermissibly accords preferential treatment to views on one subject); *Erznoznik v. Jacksonville, 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975)* (law prohibiting drive-ins from showing films with nudity invalidated; government may not selectively shield public from certain kinds of speech that may be more offensive than others); *Consolidated Edison v. Public Service Comm'n of New York, 447 U.S. 530, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980)* (ban on bill inserts discussing controversial issues of public policy such as nuclear power not content neutral even though it suppressed both pro and con points of view; invalidated as an impermissible restriction based on message and subject matter).

A few cases have approved regulations which differentiate on the basis of subject matter. In *Lehman v. Shaker Heights, 418 U.S. 298, 41 L. Ed. 2d 770, 94 S. Ct. 2714 (1974),* the Court upheld an ordinance banishing political signs from city-owned buses. And in *Greer v. Spock, 424 U.S. 828, 47 L. Ed. 2d 505, 96 S. Ct. 1211 (1976),* a regulation prohibiting partisan [**15] political speeches on a federal military base was sustained. The *Metromedia* plurality distinguished these cases as turning on "unique fact situations involving government-created forums [*58] ...." *Metromedia, Inc. v. San Diego, 453 U.S. 490, 514, 69 L. Ed. 2d 800, 101 S. Ct. 2882 n.19 (1981).* Chief Justice Burger, dissenting in *Metromedia* found the *Lehman* principle, permitting a city to exclude all political advertisers, to be applicable to the San Diego ordinance, so long as no particular point of view or issue of public debate is censored. *Metromedia, supra, 453 U.S. at 568 n.8.*

The Antioch political sign ordinance is content neutral in the sense that it does not discriminate among political messages. But it imposes severely restrictive time limits on the posting of political signs -- limits not imposed, for example, on temporary signs advertising upcoming commercial, charitable, or civic events. By singling out political signs for restrictive treatment, the Antioch ordinance clearly conflicts with the *Metromedia* plurality and the *Mosley* line of cases. n5 Commercial speech, although subject to other limitations in the city's municipal sign [**16] ordinance, is merely regulated in Antioch; political speech is outlawed except during the sixty day period before an election.

n5 *See also Aiona v. Pai, 516 F.2d 892 (9th Cir. 1975)* (Hawaii statute banning movable political signs but not commercial signs from sidewalks violates equal protection); *Orazio v. Town of North Hempstead, 426 F. Supp. 1144 (E.D. N.Y. 1977)* (ordinance limiting posting of political wall signs to six weeks before election impermissibly discriminates on the basis of political content); *John Donnelly & Sons v. Campbell, 639 F.2d 6 (1st Cir. 1980), aff'd, 453 U.S. 916, 69 L. Ed. 2d 999, 101 S. Ct. 3151 (1981)* (state law banning billboards with limited exceptions imposed greater restrictions on ideological than commercial speech).

The Antioch ordinance, by imposing specially restrictive treatment to political signs, unconstitutionally discriminates in the exercise of First Amendment rights in the setting where they have their "most urgent application ... the conduct of campaigns [**17] for political office." *Monitor Patriot Co. v. Roy, 401 U.S. 265, 272, 28 L. Ed. 2d 35, 91 S. Ct. 621 (1971).*

IV. *First Amendment*

Apart from its shortcomings under the equal protection principle of the plurality in *Metromedia*, the Antioch ordinance must fail because the city has not sustained its heavy burden of justification under the First Amendment. The city has not shown that its ordinance is the least drastic means of protecting its governmental interest under the test announced by the Ninth Circuit in *Rosen, supra.*

Each medium of communication offers special advantages to those seeking to convey a message and presents special regulatory problems to local governments seeking to mitigate the negative spillover effects that the medium may have on the rest of the community. Courts have stressed the uniqueness of each medium of expression in striving to find the proper accommodation of First Amendment values and other societal interests. "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses, and dangers. Each, in my view, is a law unto itself ...." *Kovacs* [**18] *v. Cooper, 336 U.S. 77, 97, 69 S. Ct. 448, 93 L. Ed. 513 (1949)* (Jackson, J.) We deal in this case with the temporary political sign, a medium with its own special virtues and vices.

The question whether durational limits on the posting of temporary political signs unnecessarily restrict the exercise of First Amendment rights has not been decided by this Circuit or by the U.S. Supreme Court. The *Metromedia* case did not directly decide whether it is constitutional to place time limits on political advertisement using temporary signs. The majority of Justices rejected the restrictions imposed by the ordinance at issue there on political and ideological speech. But the San Diego ordinance regulated billboards. n6 Permanent, fixed structures like billboards are a medium [*59] different from small, detachable political signs and present different regulatory problems. The Court of Appeals twice made passing reference to such time limits in other cases dealing with local sign ordinances, apparently considering them unobjectionable in the context of these cases. *See Baldwin v. Redwood City, 540 F.2d 1360, 1370 (9th Cir. 1976); Verrilli v. City of Concord, 548 F.2d* [**19] *262, 265 (9th Cir. 1977).* But it has not had occasion to consider fully the countervailing policy arguments and conflicting interests which must be weighed in determining whether a 60 day rule represents a fair and reasonable accommodation of the city's interest in protecting its aesthetic appearance and the public's interest in full and vigorous debate of political issues. n7

n6 The Antioch ordinance specifically exempts billboards from its political sign regulations. Antioch, California Municipal Code § 9-5.1115(b)(7)(ii)(1979) (amended 1981). And only outdoor political signs are subject to the 60 day rule. Antioch, California Municipal Code § 9-5.1115(b) (7) (i) (1979) (amended 1981).

n7 In its recent decision in *Taxpayers, supra,* the Ninth Circuit invalidated, on First Amendment grounds, an ordinance of the City of Los Angeles prohibiting the posting of signs on sidewalks, curbs, posts, telephone poles and other public objects. *Contra, Sussli v. City of San Mateo, 120 Cal. App.3d 1, 173 Cal. Rptr. 781 (1981).*

[**20]

Antioch enacted the 60 day rule in order to keep the community's streets, sidewalks, parks, and business and residential districts attractive, clean, and visually uncluttered. The governmental interest advanced is aesthetics and concern for visual amenities in the community. The legitimacy of this governmental objective is not disputed. *See Taxpayers for Vincent v. Members of City Council, 682 F.2d 847, 851-52 (9th Cir. 1982); Baldwin v. Redwood City, 540 F.2d 1360, 1370 (9th Cir. 1976).*

But this particular ordinance, banning the posting of temporary political signs everywhere in the city for all but a 60 day period before an election, is not the sort of narrowly drawn, sufficiently detailed restriction which can pass constitutional muster. It does not adequately accommodate its aesthetic and environmental goals to the public's right to be informed about upcoming elections.

The temporary political sign offers special advantages to the candidate seeking public office and to the advocate promoting a particular position on a state ballot measure. These signs are a relatively inexpensive means of campaigning. Their use can be localized so that certain areas which the advocate [**21] wishes especially to reach may be targeted. A candidate or partisan can use the temporary sign to place a name or an issue before the public. In a campaign for political office, political posters can be effectively utilized to

build up the candidate's name recognition and to establish him as a serious contender. The temporary political sign has special value to the non-incumbent or relatively unknown candidate who can use the signs to identify his name among the electorate. The less well-known candidate can test the waters to see whether his candidacy is viable before going to more expensive media such as television or radio.

As the Ninth Circuit noted in *Baldwin v. Redwood City, 540 F.2d 1360, 1368 (9th Cir. 1976),* in striking down an ordinance which, among other things, limited the aggregate area of temporary signs allowed on a parcel of land and banned them from residential areas altogether:

> Means of political communication are not entirely fungible; political posters have unique advantages. Their use may be localized to a degree that radio and newspaper advertising may not. With the exception of handbills, they are the least expensive means by which a candidate [**22] may achieve name recognition among the voters in a local election.
>
> Although the Antioch ordinance does not bar all campaigning outside the sixty day period, it does severely restrict the use of one important vehicle for political advertisement, the temporary sign. The alternative means for informing the voters in Antioch -- newspapers, radio, television, and door-to-door solicitation -- may not be satisfactory substitutes as they may be more costly n8 and perhaps less effective if not preceded by a vigorous sign campaign. *See* [*60] *Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 93, 52 L. Ed. 2d 155, 97 S. Ct. 1614 (1977); Baldwin v. Redwood City, supra, at 1368.*
>
> n8 In the Joint Statement of Facts, all parties to the suit stipulated to the following: "Political signs can constitute an important element in many political campaigns in California and offer a relatively effective and inexpensive means by which little-known candidates can achieve name recognition among the electorate."

Other [**23] courts have found ordinances which impose time limits on the posting of temporary political signs to be unconstitutional. A state appellate court in Oregon struck down a statute limiting the right to erect temporary political signs on land bordering state highways to 60 days before an election. *Van v. Travel Information Council, 52 Or. App. 399, 628 P.2d 1217 (1981).* While recognizing the legitimacy of the state's interest in the beauty of its highways, the Oregon court found that this interest did not sufficiently justify the restrictions imposed on political speech. The court stated:

> The process of acquainting the public with new candidates is a slow one. Two months is simply not enough time to allow a relatively unknown person to achieve household familiarity.

Id. at 413, 628 P.2d at 1226.

A district court in New York, considering a similar ordinance which limited the posting of "political wall signs" to six weeks prior to an election, invalidated the rule on equal protection grounds. *Orazio v. Town of North Hempstead, 426 F. Supp. 1144 (E.D.N.Y. 1977).* Addressing the inherent public policy problems associated with the imposition of time limits [**24] on political advertisement, the *Orazio* court noted:

> Defendants ... assert that time restrictions on political wall signs are necessitated by the fact that politics is a temporary business. Whether temporary or not, politics is an important business and it is difficult to see what governmental interest is served by placing time limits on the public's opportunity to be informed about political candidates who are seeking public office or organizations which support them.

Id. at 1149.

These precedents are persuasive. The city has failed to show that its legitimate interest in maintaining a clean, litter-free, visually attractive community justifies placing time limits on the posting of political signs but not on temporary signs that convey commercial messages or ideological messages unrelated to an upcoming election. Nor has the city shown that this particular time period of sixty days, even if evenhandedly applied to all temporary signs, reasonably and adequately provides for the exercise of First Amendment rights. Before the city may impose durational limits or other restrictions on political advertising within its community to advance aesthetic goals, [**25] it must show that it is "serious and comprehensively addressing aesthetic concerns with respect to its environment." *Taxpayers for Vincent v. Members of City Council, 682 F.2d 847, 852 (9th Cir. 1982)* (quoting *Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 530-31, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981).*

V. *Less Drastic Alternatives*

This Court is sensitive to the need for judicial restraint in intruding on the exercise of the police power

by local governments to regulate land uses in the interest of public safety, health, morality, peace and quiet, and the general welfare. Temporary political signs, while possessing unique advantages as a means for informing voters about candidates and public issues, may also pose special problems to a city in its attempts to maintain aesthetic standards. Because of their eye-catching colors and the profusion in which they are sometimes posted, political signs may convey their message in a strident or discordant fashion. *See Ross v. Goshi, 351 F. Supp. 949, 953-54 n.13 (D. Hawaii 1972).* If completely uncontrolled, they could subject the community to visual blight and pollution.

However not all efforts to regulate temporary **[**26]** signs will necessarily be invalid. In its recent opinion in *Taxpayers, supra,* the **[*61]** Ninth Circuit has pointed the way toward less restrictive alternatives available to city government:

Instead of a general ban, the City might regulate the size, design, and construction of the posters ... institute clean up or removal requirements, ... or provide more stringent regulations for the areas of the City more in need of protection. Moreover, the City might specifically prohibit the erection of signs that obscure hydrants, traffic signs, and signals, or that block motorists' line of sight. We also think it clear that the City might prohibit the posting of signs on trees or shrubs.

Id. at 852-53 (citations omitted).

VI. *Conclusion*

For the reasons stated the City of Antioch's 60 day time limit on the posting of political signs is unconstitutional. The motion for a permanent injunction against enforcement of the ordinance is granted. All other relief is denied. The parties will bear their own costs.

IT IS SO ORDERED.

LEXSEE 121 wn 2d 737

Michael Collier, et al, Respondents, v. The City of Tacoma, Appellant

No. 52442-2

SUPREME COURT OF WASHINGTON

121 Wn.2d 737; 854 P.2d 1046; 1993 Wash. LEXIS 139

July 1, 1993, Decided

July 1, 1993, Filed

PRIOR HISTORY:
[*1]**

Superior Court: The Superior Court for Pierce County, No. 90-2-06091-3, Frederick B. Hayes, J., on February 15, 1991, entered a judgment in favor of the plaintiff but refused to award attorney fees.

DISPOSITION:

Holding that the ordinances restrict the right to political expression in violation of the federal and state constitutions, that only those portions of the ordinances that impermissibly restrict political speech are invalid, and that the plaintiff was entitled to an attorney fee award under *42 U.S.C. § 1988*, the court *affirms* the judgment in part, *reverses* it in part, and *remands* the case for an award of attorney fees.

COUNSEL:

William J. Barker, City Attorney, and *John C. Kouklis, Patricia Bosmans*, and *Heidi Ann Horst, Assistants*, for appellant.

Adam Kline, for respondents.

Richard L. Andrews, on behalf of the City of Bellevue and Washington State Association of Municipal Attorneys, amici curiae.

JUDGES:

En Banc. Guy, J. Utter, Dolliver, Smith, and Johnson, JJ., concur. Durham, J., Andersen, C.J., and Brachtenbach, J., concur in the result by separate opinion; Madsen, J., did not participate in the disposition of this case.

OPINIONBY:
GUY

OPINION:

[*741] **[**1048]** Michael Collier, a candidate for Congress, posted his political campaign signs in residential areas within the city of Tacoma more than 60 days prior to the 1990 primary election. City workers removed Collier's signs from residential yards and parking strips in accordance with two Tacoma ordinances that restrict the preelection posting of political **[*742]** signs **[***9]** in such areas to a 60-day campaign window. Collier sued Tacoma claiming the ordinances violated his free speech rights. The trial court entered judgment in favor of Collier, holding the ordinances unconstitutional. We accepted certification from the Court of Appeals and affirm in part and reverse in part.

Facts

Michael Collier was a candidate for the Democratic Party's nomination for Congress in the Sixth Congressional District of Washington in 1990. Collier had not previously held or run for any elective office. He was not considered a public figure or well known in political circles. Collier's opponent in the primary election was Representative Norm Dicks, a 14-year incumbent.

The primary election was scheduled for September 18, 1990. Collier began to plan his campaign in December 1989 and began fundraising in February 1990. Collier identified that the greatest obstacles to his campaign were lack of name familiarity and funding. During the course of the primary campaign, Collier

raised and spent a total of $ 29,000. Representative Dicks spent $ 329,000 in his primary campaign.

Given his resources, Collier determined that yard signs were the most cost-effective means of [***10] communicating his political message. At the beginning of May 1990, the Collier campaign assembled some 700 2-sided yard signs. The first of these was posted outdoors between May 20 and 30. Collier supporters placed "Mike Collier for Congress" signs in their front yards and parking strips.

Tacoma Municipal Code (TMC) 2.05.275 defines and regulates political signs. The ordinance defines political signs as "[a]ll signs which are displayed out-of-doors on real property relating to the nomination or election of any individual for a public political office or advocating any measure to be voted on at any special or general election". The ordinance limits the posting of such political signs to a period of not more [*743] than 60 days prior to and 7 days after the date of the election for which the signs are intended. TMC 2.05.275(1). n1

n1 The full text of TMC 2.05.275(1) provides:

"(1) Such political signs shall not be displayed more than sixty days prior to and seven days after the date of the election for which intended. In cases where a general election follows within 55 days of a primary election, those signs for candidates whose names will appear on the ballot in the general election may be displayed during the interim period and up to seven days after the general election. In all instances herein in which political signs are required to be removed within seven days after the election for which the political sign was displayed, if said signs are not removed, they will be subject to removal by the City of Tacoma Public Works Department. Provided, however, that this provision shall not prohibit political signs in areas where other provisions of the Official Code of the City of Tacoma allows the same as legally licensed outdoor advertising displays."

[***11]

[**1049] Tacoma Municipal Code 6.03.070 prohibits any person, firm, or corporation from posting any signs

on any public street or highway or upon any curbstone, lamp post, street sign, pole, hydrant, bridge, tree, or other thing situated upon any public street or highway or any publicly owned property within the City of Tacoma, except as may be authorized by ordinances of the City of Tacoma ... PROVIDED, HOWEVER, the prohibition contained herein shall not apply to political signs placed on parking strips preceding a primary or general election where such political signs are installed pursuant to the permission of the owner of the property abutting said parking strip and installed in such a manner as not to constitute a traffic hazard ....

Real estate signs advertising the sale or rent of the property upon which they stand or to which they are attached, and other signs attached to any building or sidewalk advertising the business carried on in the building, are *exempt* from the provisions of this chapter. TMC 6.03.080.

Pursuant to these ordinances, Tacoma Public Works Department employees removed signs displaying "Mike Collier for Congress" from residential yards [***12] and parking strips within the city of Tacoma that were posted more than 60 days prior to the primary election. Mr. Benjamin Thompson, City Engineer for Tacoma, testified that he directed personnel from his department to pick up all signs in the public [*744] right of way n2 throughout the city. Mr. Thompson testified that his department also removes commercial signs from residential areas since commercial signs are not permitted in those areas. Mr. Thompson understood that the ordinance allows an exception for on-site commercial signs pertaining to the sale or rent of private property. He testified that in order to enforce the ordinances, he differentiates between commercial and political signs by reading them.

n2 Mr. Thompson defined public "right-of-way" as "that area within a development that is set aside for and dedicated for use of a public street, sidewalks, and public utilities." Report of Proceedings, at 11. Mr. Thompson testified that the public right of way extends 15 feet from the curb: 5 feet for the parking strip, 5 feet for the sidewalk and an additional 5 feet into the homeowner's front yard.

[***13]

Collier filed this action in July 1990 seeking a temporary restraining order, an injunction against the ordinances' enforcement, a declaratory judgment that the ordinances are unconstitutional, and attorney fees. The complaint was subsequently amended to include plaintiff n3 Joel Beritich, a Collier supporter who had political signs removed from his yard and parking strip. The

amended complaint also cited *42 U.S.C. § 1983* as an additional source of protection for the rights involved and *42 U.S.C. § 1988* as the statutory basis for the claim of attorney fees. On February 15, 1991, the trial court entered judgment in favor of Collier, holding that the ordinances were unconstitutional, but denied Collier's claim for attorney fees. Tacoma appealed the trial court's judgment as to the ordinances, and Collier cross-appealed the trial court's denial of attorney fees. We accepted certification from the Court of Appeals and now affirm in part and reverse in part.

n3 Hereafter, both plaintiffs are identified collectively as "Collier".

[***14]

Issues

This case presents three issues for review. First, do the Tacoma ordinances unconstitutionally restrict Collier's free speech rights? We hold that Tacoma's durational limitation [*745] on the preelection posting of political signs unconstitutionally restricts Collier's right to political expression.

Second, did the trial court err in declaring the Tacoma ordinances unconstitutional in their entirety? We answer in the affirmative and hold unconstitutional only [**1050] those portions of the Tacoma ordinances that impermissibly restrict political speech.

Third, did the trial court err when it denied plaintiffs' request for attorney fees pursuant to *42 U.S.C. § 1988?* We reverse the trial court on the issue of attorney fees and remand for a determination of an award of fees consistent with this opinion.

Analysis

I

[1] The Tacoma ordinances are challenged under both the first and fourteenth amendments to the United States Constitution, and article 1, section 5 of the Washington Constitution. The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech". U.S. Const. amend. 1. The freedom of [***15] speech which is secured by the First Amendment is "among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State." *Burson v. Freeman, U.S. , 119 L. Ed. 2d 5, 12, 112 S. Ct. 1846 (1992)* (quoting *Thornhill v. Alabama, 310 U.S. 88, 95, 84 L. Ed. 1093, 60 S. Ct. 736 (1940)).* Article 1, section 5 of the Washington Constitution provides that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

[2, 3] As we stated in *O'Day v. King Cy., 109 Wn.2d 796, 801-02, 749 P.2d 142 (1988)* (citing *State v. Coe, 101 Wn.2d 364, 373-74, 679 P.2d 353 (1984)),* "[t]his court has a duty, where feasible, to resolve constitutional questions first under the provisions of our own state constitution before turning to federal law." We do so because in addition to our responsibility to interpret Washington's constitution, we must furnish a rational basis "for counsel [***16] to predict the future course of state decisional law." *State v. Gunwall, 106 Wn.2d 54, 60,* [*746] *720 P.2d 808, 76 A.L.R.4th 517 (1986). See* Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience,* 65 Temp. L. Rev. 1153 (1992). We recognize that the free speech clauses of the state and federal constitutions are different in wording and effect, but that the result reached by previous Washington cases in general adopted much of the federal methodology for application to state constitutional cases. The federal cases cited here and in our prior decisions are used for the purpose of guidance and do not themselves compel the result the court reaches under our state constitution. *See Michigan v. Long, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983); Seattle v. Mesiani, 110 Wn.2d 454, 456, 755 P.2d 775 (1988).* With these statements in mind, we turn to our analysis of the Tacoma ordinances.

II

[4] The Tacoma ordinances implicate several concerns in our [***17] free speech jurisprudence: regulation of political speech, regulation of political speech in a public forum, and regulation based on the content of the speech. The speech restricted by Tacoma Municipal Code sections 2.05.275 and 6.03.070 is political speech. The code defines "political signs" and restricts the time and place in which such signs may be posted. Wherever the extreme perimeters of protected speech may lie, it is clear the First Amendment protects political speech, *see Carey v. Brown, 447 U.S. 455, 467, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980),* giving it greater protection over other forms of speech. *Metromedia, Inc. v. San Diego, 453 U.S. 490, 513, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981).* The constitutional protection afforded political speech has its "fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy, 401 U.S. 265, 272, 28 L. Ed. 2d 35, 91 S. Ct. 621 (1971).*

[5, 6] The second important feature of the Tacoma [***18] ordinances is that they restrict political speech in a traditional public forum. The traditional public forum includes those places "'which by long tradition or

by government fiat have [*747] been devoted to assembly and debate,'" such as parks, streets and sidewalks. *Burson v. Freeman, supra at 13* [**1051] (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983)); Hague v. Committee for Indus. Org., 307 U.S. 496, 515, 83 L. Ed. 1423, 59 S. Ct. 954 (1939). See also* Buchanan, *The Case of the Vanishing Public Forum, 1991 U. Ill. L. Rev. 949, 951.* The parking strips n4 in which Collier and his supporters placed his political signs lie between the "streets and sidewalks" and thus are part of the "traditional public forum". Because these places occupy a special position in terms of First Amendment protection, the government's ability to restrict expressive activity is very limited. *Boos v. Barry, 485 U.S. 312, 318, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988).* [***19]

n4 Collier also raises an issue concerning the restriction of political speech on *private* property. This issue was not adequately addressed in the briefing, is not necessary to our decision in this case, and thus will not be discussed further.

[7] Since the Tacoma ordinances do not ban political signs altogether, we analyze the ordinances as time, place, and manner restrictions. *See, e.g., Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).* The United States Supreme Court has held that even in a public forum, the government may impose reasonable restrictions on the time, place, and manner of protected speech, provided the restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication. *Ward v. Rock Against Racism, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989);* [***20] *Perry Educ. Ass'n, 460 U.S. at 45.* We diverge from the Supreme Court on the state interest element of the time, place, and manner test, "as we believe restrictions on speech can be imposed consistent with Const. art. 1, § 5 only upon showing a compelling state interest." n5 [*748] *Bering v. Share, 106 Wn.2d 212, 234, 721 P.2d 918 (1986), cert. dismissed, 479 U.S. 1050 (1987).* The broad language of Const. art. 1, § 5 as compared with the federal constitution compels this result.

n5 Our prior holdings have required counsel to discuss at least the factors enunciated in *State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986)* when they assert the applicability of our state constitution. Counsel's failure in this case to discuss these factors would normally preclude our consideration of the state constitutional issues. *State v. Wethered, 110 Wn.2d 466, 472, 755 P.2d 797 (1988).* Citation of *Bering v. Share, 106 Wn.2d 212, 721 P.2d 918 (1986), cert. dismissed, 479 U.S. 1050 (1987)* is not enough. Because *Bering* is a post-*Gunwall* case without *Gunwall* analysis, it might be construed not to call for such an analysis. For this reason, in this case only, we will not require a separate analysis of the nonexclusive factors in *Gunwall* to reach the state constitutional issue. For future cases, we stress that this court must have the benefit of a state constitutional argument that is of assistance to the court to determine the meaning of the language used as it relates to the state constitutional claim and whether there are factors other than language that should determine the scope of our constitutional provisions. *See* Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 Temp. L. Rev. 1153, 1160-63 (1992).

[***21]

Tacoma and amici curiae City of Bellevue and Washington State Association of Municipal Attorneys argue that the Tacoma ordinances are constitutionally permissible restrictions on the time, place, and manner of political speech. We disagree. Applying the 3-part test for time, place, and manner regulations outlined above, we conclude that Tacoma's durational limitation on the preelection posting of political signs is unconstitutional. Our analysis of the Tacoma ordinances under each element of the time, place, and manner test follows.

Content Neutrality

[8] The trial court held that Tacoma Municipal Code sections 2.05.275 and 6.03.070 are "not content-neutral, in that they expressly define and regulate 'political' signs." Tacoma and amici argue that the ordinances are content-neutral because the City does not regulate the message conveyed -- only the method by which it is conveyed. Collier claims the ordinances are content based because they define and regulate political speech as a class of expression. Constitutionally permissible time, place, or manner restrictions may not be based upon either the content or *subject* [**1052] *matter* of speech. *See Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n, 447 U.S. 530, 536, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980).* [***22] Content-based restrictions on speech are presumptively [*749] unconstitutional and are thus subject to strict scrutiny. *Renton*, at 46-47; *Burson v. Freeman, 119 L. Ed. 2d at*

13-14. Under that intense level of review, government must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Perry Educ. Ass'n, 460 U.S. at 45.*

The Tacoma ordinances do not fit neatly into either the content-based or the content-neutral category. Our review of the case law and commentary on this subject indicates that the distinction is not always transparent. *See, e.g.*, Stone, *Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189* (1983-1984). In determining whether a restriction is content neutral or content based, the Supreme Court has held that "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism, 491 U.S. at 791.* [***23] While the Tacoma ordinances do not regulate political signs in terms of viewpoint, they describe and regulate permissible sign posting in terms of *subject matter.* Subject-matter restrictions are not directed at "particular ideas, viewpoints, or items of information, but at entire subjects of expression." Stone, *25 Wm. & Mary L. Rev. at 239.* In this case, political signs are subject to a 60-day restriction "out-of-doors on real property", whereas on-site commercial signs identifying a property for sale or for rent are not. TMC 2.05.275; TMC 6.03.070, .080. How long a sign may be maintained depends upon the kind of message the sign seeks to convey. The trial court found that Tacoma Public Works Department personnel have to read the signs in order to determine whether they are prohibited at a particular time.

The United States Supreme Court has held that an ordinance is content based if it distinguishes between permissible and impermissible signs at a particular location by reference to content. *Metromedia, Inc. v. San Diego, 453 U.S. 490, 516-17, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981); FCC v. League of Women Voters, 468 U.S. 364, 383-84, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984).* [***24] As one commentator noted, the United States [*750] Supreme Court's prohibition of content-based regulations is based "both on equal protection grounds and on a first amendment grant of equal access to an open forum." (Footnotes omitted.) Note, Members of the City Council v. Taxpayers for Vincent: *The Constitutionality of Prohibiting Temporary Sign Posting on Public Property to Advance Local Aesthetic Concerns, 34 De Paul L. Rev. 197, 208-09* (1984-1985). The question is "not whether all those within the classes defined by the state are treated equally but, rather, whether the classification itself is permissible." Stone, *Fora Americana: Speech in Public Places, 1974 Sup. Ct. Rev. 233, 276.* As the Supreme Court stated in *Burson v. Freeman, 119 L. Ed. 2d at 13 n.3,* content-based restrictions raise Fourteenth Amendment equal protection concerns because such restrictions differentiate between types of speech. *See Metromedia, 453 U.S. at 517-21* (billboard ordinance favoring commercial speech over noncommercial speech [***25] violated First Amendment neutrality); *Police Dep't v. Mosley, 408 U.S. 92, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972)* (ordinance that prohibited picketing near a school building, but that expressly exempted peaceful labor picketing, held unconstitutional); *Matthews v. Needham, 764 F.2d 58, 60 (1st Cir. 1985)* (town bylaw that barred the posting of political signs on residential property but permitted the posting of certain commercial signs held facially unconstitutional because bylaw was concerned with content, as opposed to the time, place, or manner of the speech); *People v. Middlemark, 100 Misc. 2d 760, 420 N.Y.S.2d 151 (Dist. Ct. 1979)* (ordinance which proscribed political signs but allowed other signs in residential [**1053] areas subjected to strict scrutiny); *Antioch v. Candidates' Outdoor Graphic Serv., 557 F. Supp. 52 (N.D. Cal. 1982)* (municipal ordinance which imposed a 60-day limitation on political signs but not on commercial signs discriminated in the exercise of First Amendment rights in violation of the [***26] equal protection clause). The Tacoma ordinances, by regulating sign posting in terms of subject matter, albeit viewpoint neutral, fall within the realm of content-based restrictions.

[*751] Tacoma and amici argue that in determining content neutrality, the question is not whether the signs must be read, but whether the City of Tacoma prohibited the signs out of disapproval of the message promoted. n6 Citing *Ward*, Tacoma claims the principal inquiry in determining content neutrality in time, place, or manner cases is whether the government has adopted a regulation of speech "because of disagreement with the message it conveys." *Ward, 491 U.S. at 791* (citing *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984)).* Tacoma contends that since the ordinances serve a purpose unrelated to a sign's content, the ordinances are content neutral. *See Ward,* at 791.

n6 The stated purpose of Tacoma's sign code is "to provide minimum standards to safeguard life, health, property and public welfare by regulating and controlling the design, quality of materials, construction, location, electrification, and maintenance of all signs and sign structures." TMC 2.05.020.

[***27]

Collier argues that this standard is too subjective, and that a showing of "improper legislative intent" would

be practically impossible to make. We agree. The Supreme Court has recognized that "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev., 460 U.S. 575, 592, 75 L. Ed. 2d 295, 103 S. Ct. 1365 (1983).* In some cases, the fact that a regulation is content based and invalid will be apparent from its face. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., U.S. , 116 L. Ed. 2d 476, 492, 112 S. Ct. 501 (1991)* (Kennedy, J., concurring). In other cases, a censorial justification "will not be apparent from the face of a regulation which draws distinctions based on content, and the government will tender a plausible justification unrelated to the suppression of speech or ideas." *Burson v. Freeman, U.S. , 119 L. Ed. 2d 5, 23, 112 S. Ct. 1846 (1992)* (Kennedy, **[***28]** J., concurring). Although the Tacoma ordinances are viewpoint neutral, they define and regulate a specific subject matter -- political speech. **[*752]** This content-based distinction, while viewpoint neutral, is particularly problematic because it inevitably favors certain groups of candidates over others. The incumbent, for example, has already acquired name familiarity and therefore benefits greatly from Tacoma's restriction on political signs. The underfunded challenger, on the other hand, who relies on the inexpensive yard sign to get his message before the public is at a disadvantage. We conclude therefore that while aesthetic interests are legitimate goals, they require careful scrutiny when weighed against free speech interests because their subjective nature creates a high risk of impermissible speech restrictions. "[D]emocracy stands on a stronger footing when courts protect First Amendment interests against legislative intrusion, rather than deferring to merely rational legislative judgments in this area". *Metromedia, 453 U.S. at 519.*

[9] Finally, Tacoma cites *Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986),* **[***29]** for the proposition that an apparently content-based statute may be content neutral if the restriction on speech is targeted at the speech's *secondary effects*. In *Renton*, the Supreme Court considered the constitutionality of a zoning ordinance that restricted the location of adult theaters to one area of town. The ordinance was held constitutional because it did not target the content of the films shown at the theaters. Rather, the ordinance was aimed at the secondary effects that adult theaters have on the **[**1054]** surrounding community. *Renton*, at 46. We do not find *Renton* dispositive since it did not analyze a content-based restriction on *political* speech. While a distinction between adult theaters and other kinds of theaters may be permissible based on a "secondary effects" analysis, drawing a similar distinction between commercial speech and political speech turns the favored status of political speech on its head. We therefore decline to draw such a distinction where a restriction on political speech in a public forum is at issue.

[10] In summary, the Tacoma ordinances are viewpoint neutral, but are content based in that they classify permissible **[***30]** **[*753]** speech in terms of subject matter. Ordinarily this conclusion would take the ordinances out of the domain of time, place, and manner restrictions, *Metromedia, 453 U.S. at 516-17*, and would instead require a strict scrutiny analysis. *Burson v. Freeman, 119 L. Ed. 2d at 13-14. See Perry Educ. Ass'n, 460 U.S. at 45.* We conclude, however, that the Tacoma ordinances can be reviewed under a time, place, and manner formulation. We hold that time, place, and manner restrictions on speech that are *viewpoint neutral*, but *subject-matter based*, are valid so long as they are narrowly tailored to serve a *compelling* state interest and leave open ample alternative channels of communication. This formulation of the standard of review comports with free speech jurisprudence under both article 1, section 5 of the Washington Constitution, *Bering v. Share, 106 Wn.2d 212, 234, 721 P.2d 918 (1986), cert. dismissed, 479 U.S. 1050 (1987),* **[***31]** and the first amendment to the United States Constitution. *See Burson v. Freeman, 119 L. Ed. 2d at 23* (Kennedy, J., concurring) (recognizing that in time, place, and manner cases, since the regulation's justification is a "central inquiry", the compelling interest test may be one analytical device to detect, in an objective way, whether the asserted justification is in fact an accurate description of the purpose and effect of the law). n7 In this manner, we are able to balance the competing interests while recognizing that the burden of justifying a restriction on speech *remains on the State. See Burson*, at 32 (Stevens, J., dissenting).

n7 For cases requiring careful judicial scrutiny of regulations to ensure that no covert content-based restrictions exist, *see Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n, 447 U.S. 530, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980); Erznoznik v. Jacksonville, 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975). See* Note, Members of the City Council v. Taxpayers for Vincent: *The Constitutionality of Prohibiting Temporary Sign Posting on Public Property To Advance Local Aesthetic Concerns, 34 De Paul L. Rev. 197, 206* (1984-1985).

[*32]**

Compelling State Interest

[11, 12] Inasmuch as we have dealt with the first element of the time, place, and manner analysis, content neutrality, we next discuss the state interest element. Applying the standard enunciated above, Tacoma must prove that its [*754] ordinances, taken together, are narrowly drawn to serve a compelling state interest. To constitute a compelling interest, the purpose must be a fundamental one and the legislation must bear a reasonable relation to the achievement of the purpose. *Adult Entertainment Ctr., Inc. v. Pierce Cy., 57 Wn. App. 435, 439, 788 P.2d 1102, review denied, 115 Wn.2d 1006 (1990). See Bates v. Little Rock, 361 U.S. 516, 524-25, 4 L. Ed. 2d 480, 80 S. Ct. 412 (1960).* We determine the reasonableness of a time, place, and manner restriction by balancing the public interest advanced by the regulation against the extent of the restriction on free speech rights. *State v. Lotze, 92 Wn.2d 52, 58, 593 P.2d 811, appeal dismissed, 444 U.S. 921 (1979);* [***33] *Metromedia, Inc. v. San Diego, 453 U.S. 490, 502, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981).*

[13] Tacoma argues that its interest in city aesthetics and traffic safety is a compelling state interest, and that the ordinances were "narrowly tailored" to serve that interest. We disagree. Although [**1055] aesthetics has been determined to be a significant governmental interest, *Members of City Coun. v. Taxpayers for Vincent, 466 U.S. 789, 805, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984),* it has not been determined to be an interest sufficiently compelling to justify restrictions on political speech in a public forum. The record in this case does not justify such a result. While Tacoma and amici cite *Vincent* and *State v. Lotze, supra,* for support, neither decision supports their premise that aesthetics and traffic safety are state interests sufficiently compelling to outweigh the restrictions imposed on Collier's free speech.

In *Vincent,* the Court upheld a municipal ordinance prohibiting the posting of any [***34] signs on public property. Roland Vincent was a candidate for election to the Los Angeles City Council. His political signs were attached to utility poles throughout the city. Pursuant to the ordinance, his signs were removed from the poles. The Court concluded that the ordinance was a valid time, place, and manner restriction. *Vincent,* at 815. *Vincent* is distinguishable from this case in two important respects. First, *Vincent* involved a law that prohibited the posting of all signs, regardless of content. Second, [*755] the utility poles upon which Vincent's signs were posted were not considered part of the traditional public forum. *Vincent,* at 814. *See also* Note, Members of the City Council v. Taxpayers for Vincent: *The Constitutionality of Prohibiting Temporary Sign Posting on Public Property To Advance Local Aesthetic Concerns, 34 De Paul L. Rev. 197, 227* (1984-1985) (analyzes *Vincent* as misapplying First Amendment precedent and the primacy of political speech).

In *State v. Lotze, supra,* we held that aesthetics and, to a greater extent, traffic safety were interests [***35] sufficiently compelling to outweigh the incidental restrictions on the appellants' exercise of First Amendment speech. *Lotze,* at 58-60. In *Lotze,* the State sought to remove political billboards adjacent to a highway under the authority of Washington's highway sign law (RCW 47.42), which generally prohibits all signs visible from interstate, primary or scenic systems except as permitted under the act. The listed exceptions under the act include signs advertising the sale or lease of property upon which they are located. We stated that unlike on-premise business signs and realty for sale signs, political messages such as the signs involved in *Lotze* are addressed "to the general universality of political ideas" and need not be linked with a specific site in order to derive meaning. *Lotze,* at 59. We held that the statute met the test for a state restraint on First Amendment rights because appellants' speech was not controlled as to content and because alternative means of communicating such views were available. *Lotze,* at 60.

The Supreme Court in *Metromedia, 453 U.S. at 513 n.18,* overruled its prior [***36] summary approval of *State v. Lotze, 92 Wn.2d 52, 593 P.2d 811, appeal dismissed, 444 U.S. 921 (1979).* Finding that San Diego's aesthetic interests were sufficiently significant to justify its ban on off-site commercial advertising, but were insufficient to warrant a ban on noncommercial signs, the Court observed that some decisions, including *State v. Lotze, supra,* have failed to give adequate weight to the distinction between commercial and noncommercial speech. *Metromedia, 453 U.S. at 513 n.18.* Other courts have also criticized the analysis in *Lotze.* In [*756] *Van v. Travel Information Coun., 52 Or. App. 399, 628 P.2d 1217 (1981),* the Oregon Court of Appeals held that a 60-day restriction on temporary political signs adjacent to highways was unconstitutional. The *Van* court relied on a majority of decisions which were contrary to *Lotze* in order to conclude that aesthetic interests were insufficient to justify the significant restriction [***37] on political speech imposed by the 60-day limitation on political campaign signs. *Van,* at 416.

[14] We agree with Collier that *Lotze* should not be controlling on this issue. We depart from our holding in *Lotze* to the extent it [**1056] implies that aesthetics and traffic safety are compelling interests justifying greater restrictions on political speech than on commercial speech. We recognize that Tacoma's ordinances, unlike the statute at issue in *Lotze,* do not completely prohibit political sign posting. Given the preferred status of political speech, however, Tacoma has failed to show that its interest in maintaining a clean,

litter-free community n8 is sufficiently compelling to justify its disparate treatment of political speech. In *Metromedia*, San Diego's allowance of some billboards, but not others, was evidence that its interests in traffic safety and aesthetics, while "substantial", fell short of "compelling". *Metromedia, 453 U.S. at 520.* Likewise, Tacoma's disparate treatment of on-site commercial signs over political signs indicates that its interest in aesthetics is significant, **[***38]** but not compelling.

n8 Indeed, Collier argues that the self-interest and good sense of candidates already serves to regulate political yard signs.

Furthermore, Tacoma has not shown that yard signs create a substantial traffic hazard. There was no evidence that any of Collier's signs were hazardous to traffic or blocked pedestrian access. Mr. Thompson knew of no yard signs that had been found blocking sidewalks, utility lines or poles, or streets. Tacoma's claim that it restricts political yard signs to a 60-day period on behalf of a "compelling state interest" in traffic safety lacks evidentiary support. Once political signs are allowed on a temporary basis, "it is difficult to imagine how prohibiting political signs at other times significantly promotes highway safety." *Van, 52 Or. App. at 412.*

[*757] A regulation that serves a compelling state interest must be narrowly tailored to serve that interest. *Ward v. Rock Against Racism, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989);* **[***39]** *Bering v. Share, 106 Wn.2d 212, 233-34, 721 P.2d 918 (1986), cert. dismissed, 479 U.S. 1050 (1987).* The trial court found that neither ordinance is narrowly tailored to serve a compelling state interest. Tacoma argues that its restrictions are narrowly drawn since they allow political signs to be posted for the duration of a political campaign. We disagree.

The Tacoma ordinances restrict political expression by imposing durational limitations on the preelection posting of political campaign signs. Tacoma cites two cases for authority that preelection sign limitations have been upheld. Neither decision provides a satisfactory rationale for upholding such restrictions. In *Huntington v. Estate of Schwartz, 63 Misc. 2d 836, 839, 313 N.Y.S.2d 918 (Dist. Ct. 1970),* the court held that a 6-week limitation on political signs was within the scope of the municipality's police powers. The court found that the municipality could use or consider aesthetic considerations in applying such power. *Cf. People v. Middlemark, 100 Misc. 2d 760, 763, 420 N.Y.S.2d 151 (Dist. Ct. 1979)* **[***40]** (distinguished *Huntington*, holding that a similar political sign ordinance was unconstitutional because it made an impermissible distinction between political signs and other signs). In *Ross v. Goshi, 351 F. Supp. 949, 955 (D. Hawaii 1972),* the court upheld a 60-day restriction, stating only that the ordinance was a "proper balancing of the conflicting interests". We find these decisions unpersuasive since they lack a discussion of the First Amendment and equal protection considerations at issue.

Other courts have held that preelection durational limitations on political campaign signs are unconstitutional. In *Antioch v. Candidates' Outdoor Graphic Serv., 557 F. Supp. 52 (N.D. Cal. 1982),* the court held that the Antioch municipal ordinance, which banned the posting of temporary political signs everywhere in the city for all but a 60-day period before an election, unconstitutionally discriminated in the **[*758]** exercise of First Amendment rights in violation of the equal protection clause. The *Antioch* court viewed the ordinance as a general "ban" on political speech, with a temporary, 60-day suspension, prior **[***41]** to an election. *Antioch*, at 56. *See also Van v.* **[**1057]** *Travel Information Coun., supra at 416* (60-day limitation unnecessarily restrictive in light of the First Amendment interests involved and the State's interests sought to be advanced); *Orazio v. North Hempstead, 426 F. Supp. 1144 (E.D.N.Y. 1977)* (ordinance which limited the posting of political wall signs to 6 weeks prior to an election was invalidated on equal protection grounds). *See generally* Blumoff, *After* Metromedia: *Sign Controls and the First Amendment, 28 St. Louis U.L.J. 171, 194-96 (1984).*

[15] Tacoma's 60-day restriction, unlike the typical time, place, and manner restriction, does not attempt to determine whether and at what times the exercise of free speech rights is compatible or incompatible with the normal uses of a traditional forum or place. The Tacoma ordinances, like the ordinances in *Antioch, Van*, and *Orazio*, unnecessarily restrict the preelection posting of signs promoting the candidacy of certain individuals or advocating a certain viewpoint on an upcoming ballot proposition. Tacoma has not **[***42]** shown that its restrictive time period of 60 days, even if evenhandedly applied to all temporary signs, reasonably and adequately provides for the exercise of political speech. Before the City may impose durational limits or other restrictions on political speech to advance aesthetic interests, it must show that it is seriously and comprehensively addressing aesthetic concerns with respect to its environment. *Antioch, 557 F. Supp. at 60. Accord, Tauber v. Longmeadow, 695 F. Supp. 1358, 1362 (D. Mass. 1988). See also Metromedia, Inc. v. San Diego, 453 U.S. 490, 528-31, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981)* (Brennan, J., concurring in judgment) (failure to provide

adequate justification for a restriction on protected activity merits invalidation of the restriction). Tacoma has made no showing on the record that it is seriously and comprehensively addressing aesthetic or traffic safety concerns other than through the ordinances in question.

[*759] While Tacoma is correct that the ordinances are not invalid simply because there may be some "imaginable alternative [***43] that might be less burdensome on speech", *Ward, 491 U.S. at 797* (quoting *United States v. Albertini, 472 U.S. 675, 689, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985))*, the ordinances fail to provide adequately for Collier's free speech rights. Given the preferred status accorded political speech, and the persuasive authority in other jurisdictions which have dealt with this issue, we conclude the Tacoma ordinances are not narrowly drawn to serve a compelling state interest. In balancing the competing interests, we hold that Tacoma's regulatory interests in aesthetics and traffic safety, as demonstrated on the record, do not outweigh Collier's right to political speech. We depart from our decision in *Lotze* to the extent it conflicts with our decision in this case.

Alternative Channels of Communication

The third and final element of both the federal and state constitutional tests requires that a time, place, and manner restriction leave open ample alternative channels for communication. *Ward, 491 U.S. at 791;* [***44] *Bering, 106 Wn.2d at 234.* The trial court found that Collier had not "sustained [his] burden of proof that the ordinances do not leave open ... an alternative means of communication". Collier assigns error to the trial court's placement of the burden of proof on him. We agree with Collier.

[16] Government may impose reasonable restrictions on the time, place, or manner of speech, provided the restrictions meet the standards enunciated above. Because Tacoma seeks to uphold the ordinances as reasonable time, place, and manner restrictions on political speech, it has the burden of meeting each element of the time, place, and manner test. We conclude the trial court erred in assigning Collier the burden of proving the "availability of alternative channels of communication", the third element of the time, place, and manner test. *See Bering, 106 Wn.2d at 234; Ward, 491 U.S. at 791.* That burden properly rests [**1058] with Tacoma, and Tacoma has failed to meet it.

[*760] [17] Both Tacoma and amici argue that politicians [***45] have numerous ways of expressing themselves through other media than the posting of signs. Collier does not dispute that he had the right to purchase radio and television time and to engage in direct mail. His argument is that these alternative modes of communication were effectively unavailable to him as an underfunded challenger. Based on our review of the record, we agree with Collier. In Collier's case, the yard sign was the most cost-effective, realistic method of increasing his name familiarity. Because means of political speech are not entirely fungible, the political yard sign offers special advantages to the candidate seeking public office. Political yard signs are relatively cost-effective and can be localized to a high degree. *Antioch, 557 F. Supp. at 59* (citing *Baldwin v. Redwood City, 540 F.2d 1360, 1368 (9th Cir. 1976), cert. denied, 431 U.S. 913 (1977))*. In Collier's case, the issue is not whether "ample alternatives" are available, but whether they are *practically* available. Alternatives are not "alternatives" if they are far from satisfactory. *Metromedia, 453 U.S. at 516.* [***46] Thus, the "summary seizure of a political sign for even a few days can deprive the sign's owner of an important First Amendment liberty interest." *Baldwin, 540* F.2d at 1374. Given the record before us, we conclude that Tacoma's restrictions on political sign posting did not afford Collier adequate alternative channels of communication.

In summary, we concur with the trial court that the Tacoma ordinances are invalid time, place, and manner restrictions. Tacoma has failed to prove that its interests in aesthetics and traffic safety are sufficiently compelling to justify the restrictions imposed on Collier's rights to political expression. Tacoma has also failed to prove that its restrictions left Collier ample alternative channels in which to communicate his message. We conclude, therefore, that Tacoma's durational limitation on the preelection posting of political campaign signs violates the free speech provisions of both the Washington and the United States Constitutions.

[*761] III

Tacoma claims the trial court erred in declaring both ordinances unconstitutional in their entirety. We agree. The record indicates that the parties' dispute focused [***47] on section (1) of TMC 2.05.275, rather than on the ordinance as a whole. No issue was raised as to section (2) (size limitations), or section (3) (requiring consent of private property owners). Similarly, only those portions of TMC 6.03.070 and .080 that affect political expression are at issue.

[18] As a general rule "only the part of an enactment that is constitutionally infirm will be invalidated, leaving the rest intact." *National Advertising Co. v. Orange, 861 F.2d 246, 249 (9th Cir. 1988). See Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684, 94 L. Ed. 2d 661, 107 S. Ct. 1476 (1987).* We hold unconstitutional only those provisions of the ordinances which impermissibly restrict the scope of political speech through limitations on the

time and place for the preelection posting of political signs. Tacoma's interests in aesthetics and traffic safety are sufficient to justify reasonable, content-neutral regulation of the *noncommunicative* aspects of political signs, such as size, spacing, and consent of the private property owner.

We are sensitive to the need for judicial restraint **[***48]** in intruding on the exercise of the police power by local governments to regulate land uses in the interest of public health, safety, and welfare. Consequently, our holding does not compel a change to postevent *removal* requirements as long as such requirements are reasonable and apply to all temporary events, such as political campaigns, home sales and residential renting. While preelection political speech interests may outweigh a municipality's regulatory interests in a given case, those same interests are not present postevent and may be outweighed by a **[**1059]** municipality's demonstrated interests in aesthetics or traffic safety. *See Baldwin v. Redwood City, supra* (10-day postelection removal requirement upheld).

[*762] IV

Collier assigns error to the trial court's holding that the "special circumstances" of trial publicity and representation by the ACLU preclude an award of attorney fees under *42 U.S.C. § 1988*. Collier also requests additional fees for the purposes of this appeal.

[19] A party prevailing in an action under *42 U.S.C. § 1983* may recover reasonable **[***49]** attorney fees pursuant to *42 U.S.C. § 1988. Jacobsen v. Seattle, 98 Wn.2d 668, 675, 658 P.2d 653 (1983)*. A prevailing plaintiff "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Jacobsen*, at 675-76 (quoting *Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402, 19 L. Ed. 2d 1263, 88 S. Ct. 964 (1968))*.

[20, 21] In the instant case, the trial court ruled in favor of plaintiffs Collier and Beritich. They are "prevailing parties" for the purposes of the statute. The trial court, however, identified publicity gained by the suit and ACLU representation as "special circumstances" which warranted denial of an award of attorney fees. We disagree. In *Runyon v. Fasi, 762 F. Supp. 280 (D. Hawaii 1991)*, the plaintiff requested attorney fees pursuant to *42 U.S.C. § 1988* in a factually similar action challenging the constitutionality of a city ordinance which prohibited outdoor political signs. The *Runyon* **[***50]** court addressed the identical issue of public service representation as a "special circumstance". We agree with the *Runyon* court's conclusion that the fact that the prevailing party was represented by a public service firm or association funded by public funds is irrelevant. *See Runyon, 762 F. Supp. at 286* (citing *Watkins v. Mobile Housing Bd., 632 F.2d 565 (5th Cir. 1980))*. As to the issue of trial publicity, Tacoma urges this court to accept the trial court's denial of attorney fees as a proper use of discretion. The trial court, however, made no finding that Collier used the judicial system to gain publicity for political purposes.

Tacoma argues that should this court reverse the trial court on the issue of attorney fees, the court should limit the amount of attorney fees to reflect work performed from the **[*763]** point after which the complaint was amended. Tacoma reasons that until respondents filed the amended complaint which cited *42 U.S.C. § 1988* as statutory authority for attorney fees, Tacoma had no notice of any claim for attorney fees. We disagree. Tacoma had **[***51]** notice of respondents' claim for attorney fees with the filing of Collier's original complaint. Collier's amendment of his complaint to add an additional source of authority for obtaining attorney fees does not alter the fact that Tacoma had sufficient notice to prepare an adequate response to Collier's request for attorney fees.

The final issue to resolve is whether the requested fees were reasonable. The trial court found that the plaintiffs' attorney had spent 99.3 hours in the prosecution of this action, and "said hours have been expended reasonably and necessarily in view of the result obtained." The trial court also found that the plaintiffs' attorney's hourly rate of $ 150 was reasonable compensation for the work performed. These findings were uncontroverted. We will not disturb these findings on appeal.

Conclusion

The Tacoma ordinances impermissibly restrict Collier's right to political expression in violation of article 1, section 5 of the Washington Constitution, and the first and fourteenth amendments to the United States Constitution. We hold unconstitutional those portions of the Tacoma ordinances that impose durational limitations on the preelection posting of political **[***52]** signs. We remand for a determination of a reasonable **[**1060]** attorney fee, to include a determination of attorney fees on appeal.

CONCURBY:
DURHAM

CONCUR:

Durham, J. (concurring)

For 15 years, this court has wrestled with the difficult concept of independent state constitutional analysis. The circumstances under which it should be

applied has been the subject of many divided opinions and [*764] considerable acrimony. Finally, in 1986, this court *unanimously* agreed on a list of six nonexclusive criteria to aid in determining when state constitutional analysis is appropriate. *State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986).* Shortly thereafter, in *State v. Wethered, 110 Wn.2d 466, 472, 755 P.2d 797 (1988),* we unequivocally stated the necessity of employing the *Gunwall* criteria:

> Wethered urges this court to follow our holding in *State v. Lavaris, 99 Wn.2d 851, 664 P.2d 1234 (1983)* under Const. art. 1, § 9 and cites *State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980)* [***53] as general authority that the Washington Constitution can be and has been interpreted as more protective of individual rights than the United States Constitution. *He fails to use the Gunwall interpretive principles to assist this court .... By failing to discuss at a minimum the six criteria mentioned in Gunwall, he requests us to develop without benefit of argument or citation of authority the "adequate and independent state grounds" to support his assertions. See Michigan v. Long, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983). We decline to do so consistent with our policy not to consider matters neither timely nor sufficiently argued by the parties. In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986).*
>
> (Italics mine.)

Since *Gunwall* and *Wethered*, over 70 Washington appellate decisions have acknowledged our rule barring consideration of state constitutional issues absent briefing of the *Gunwall* factors. *E.g., State v. Greenwood, 120 Wn.2d 585, 614, 845 P.2d 971 (1993); Tellevik v. 31641 West Rutherford St., 120 Wn.2d 68, 77, 838 P.2d 111, 845 P.2d 1325 (1992);* [***54] *State v. Rodriguez, 65 Wn. App. 409, 414 n.1, 828 P.2d 636, review denied, 119 Wn.2d 1019 (1992).* In fact, one noteworthy commentator has explained that:

> Assistance from counsel in interpreting state constitutional provisions is *vitally important. Wethered* directs counsel to bring the constitutional issues into as sharp a focus as they possibly can by *requiring* them to fashion a state constitutional argument that addresses textual language, constitutional and common law history, structural differences, and local concerns. *Our decision in Wethered reaffirmed that the criteria are a necessary starting point for a discussion between bench and bar about the meaning of a state constitutional provision.*
>
> (Italics mine.) Justice Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's* [*765] *Experience.* 65 Temp. L. Rev. 1153, 1162 (1992). This same commentator has recognized that "*Gunwall* functions as a *procedural threshold* for considering state constitutional claims". (Italics mine.) Utter, at 1165.

Today, however, 8 years of painfully [***55] crafted jurisprudence is cast aside in a footnote: "[b]ecause *Bering* [*v. Share, 106 Wn.2d 212, 721 P.2d 918 (1986)]* is a post-*Gunwall* case without *Gunwall* analysis, it might be construed not to call for such an analysis. For this reason, in this case only, we will not require a separate analysis of the nonexclusive factors in *Gunwall* to reach the state constitutional issue." Majority, at 747-48 n.5. This reasoning completely ignores the *Wethered* rule, which was adopted 2 years after *Bering*. Moreover, putting aside the majority's attempt to limit its own case to the facts, there is no principled way to keep this exception from swallowing the rule. *Bering* was not unique. There were several cases between *Gunwall* and *Wethered* that engaged in a state constitutional exegesis without the [**1061] benefit of the *Gunwall* factors. *See, e.g., Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775 (1988)* (interpreting Const. art. 1, § 7); *O'Day v. King Cy., 109 Wn.2d 796, 801-02, 749 P.2d 142 (1988)* (interpreting Const. [***56] art. 1, § 5); *State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986)* (plurality opinion) (interpreting Const. art. 1, § 7). As such, the majority's analysis only serves to cast doubt on a wide body of law under Const. art. 1, § § 5 and 7 requiring briefing of the *Gunwall* factors. If, indeed, it is the intention of a majority of this court to cast aside the *Gunwall/Wethered* principles, it should be done forthrightly and with reasoned analysis. n9

> n9 It is so that "[t]his court has a duty, *where feasible,*" to consider state constitutional analysis. (Italics mine.) Majority, at 745. However, the case cited in the lead opinion for this proposition, *O'Day, 109 Wn.2d at 801-02* (citing *State v. Coe, 101 Wn.2d 364, 373-74, 679 P.2d 353 (1984)),* was decided prior to the *Wethered* rule. In fact, *Wethered* specifically recognized that this language from *O'Day* and *Coe* was limited by, and subject to, briefing of the *Gunwall* factors. *See 110 Wn.2d at 471-72.*

[***57]

Ironically, the majority's result in negating the Tacoma sign ordinance could be reached under federal law analysis. *See, e.g., Burson v. Freeman, U.S. , 119 L. Ed. 2d 5,* [*766] *112 S. Ct. 1846 (1992)* (both plurality and dissent would require strict scrutiny for content-based, but viewpoint-neutral speech): *Antioch v. Candidates' Outdoor Graphic Serv., 557 F. Supp. 52*

(N.D. Cal. 1982) (law banning posting of political signs except for 60 days prior to election violated equal protection clause). It is only because of the applicability of federal law that I concur in the result.

LEXSEE 746 p2d 961

George W. PIGG, Plaintiff-Appellee, v. STATE DEPAR State of Colorado; State Highway Commission of Color King H. Harris, Grant Wilkins, Charles Hanavan, Ge Brennan, James Golden, Bill E. Roundtree and Richard capacities as State Highway Commissioners, and Robert capacity as Chief Engineer, State Division of Highway

No. 86SA4

Supreme Court of Colorado

746 P.2d 961; 1987 Colo. LEXIS 657

November 30, 1987

PRIOR HISTORY:
[1]**

Appeal from District Court, City and County of Denver, Honorable John W. Coughlin, Judge, Judgment Reversed and Case Remanded.

COUNSEL:

Morris, Lower & Sattler, Bruce W. Sattler, Attorneys for Plaintiff-Appellee.

Duane Woodard, Attorney General, Charles B. Howe, Chief Deputy Attorney General, Richard H. Forman, Solicitor General, Mark E. May, Assistant Attorney General, Natural Resources Section, Robert A. Hykan, Assistant Attorney General, Lynn B. Obernyer, First Assistant Attorney General, Attorneys for Defendants-Appellants.

JUDGES:

En Banc. Justice Rovira.

OPINIONBY:

ROVIRA

OPINION:

[*962] JUSTICE ROVIRA delivered the Opinion of the Court.

The Colorado Outdoor Advertising Act (Act), § 43-1-401 to -420, 17 C.R.S. (1984), and regulations promulgated thereunder by the appellant *Colorado State Department of Highways (Department), 2 C.C.R. 601-3 (1983)*, restrict the content, size, lighting, and spacing of signs that may be erected and maintained along highways in Colorado. The issue in this case is whether the Act applies to noncommercial advertising devices, and if so whether it is constitutional.

I.

Appellee George W. Pigg operates a ranching business near Pueblo, Colorado. Interstate **[**2]** Highway 25 divides Pigg's property into four parts: one large parcel abuts the east side of the highway, and three smaller parcels abut the west. Pigg purchased the property in 1956, and from then until 1974 he maintained a number of commercial advertising signs along both sides of the highway.

In 1974, the Department condemned 21 of Pigg's signs pursuant to the Act, *§ 43-1-414(1), 17 C.R.S.* (1984), and later paid him $ 17,900 for the taking; that figure was determined to be just compensation in an eminent domain proceeding. *See § 43-1-414(2), 17 C.R.S.* (1984). Pigg appealed the award as inadequate. In a separate proceeding, the Department obtained permission to remove five more signs Pigg erected after the eminent domain proceeding. Pigg appealed that decision, also, but was unsuccessful on both appeals. *See State Department of Highways v. Pigg, 656 P.2d 46 (Colo. App. 1982)* (affirming $ 17,900 compensation award); *State Department of Highways v. Pigg, 653 P.2d 67 (Colo. App. 1982)* (affirming summary judgment in favor of Department on its complaint to remove signs).

Before those two cases were resolved on appeal, Pigg erected over 50 signs bearing noncommercial messages, [**3] most of which were related to his dissatisfaction with the condemnation award and his dealings with [*963] the Department. n1 In response, the Department sent Pigg a Notice of Violation (Notice) of the Act on July 27, 1982, directing him to remove all but three of the signs. Of the 54 "advertising devices" enumerated in the Notice as standing in violation of the Act and regulations, 35 bore noncommercial messages, one bore an arguably commercial message, and 18 were in some state of disrepair or were bare structures holding no signs at all.

n1 Some signs are intended primarily to decry the inadequacy of the compensation Pigg was awarded for the condemnation of his signs:

Help! if the Right to 21 Advertising Signs

WAS AGAIN RETURNED TO ME

OR JUST COMPENSATION For the taking

NOT STARVING WOULD I BE

And:

This Sign Produced Landowner / Compensation Paid Landowner

$ 50.00 Net Per Mo. / For Its Taking $ 4.00 Per Mo.

ANYONE WHO CLAIMS

$ 50.00 TAKEN FROM ME

WILL EQUALLY BE REPLACED

WITH $ 4.00

Can Only Be Classed As An Idiot

Others comment more generally on Pigg's perception of the government after his dealings with the Department:

The small thief is sent to CANON sentenced to LUXURY for his Act

The big thief goes to Denver and becomes a Bureaucrat

And:

Take all the Bulls in Texas Pile the manure in a stack

The volume would be minor Compared to bureaucrats

[**4]

Pigg challenged the Notice pursuant to the State Administrative Procedure Act. After a hearing at which Pigg was represented by counsel, the hearing officer concluded that the Notice was correct and ordered Pigg to remove the advertising devices.

Pigg then appealed to the Colorado Highway Commission (Commission), which affirmed and adopted the hearing officer's decision in its final decision and order. Pigg then filed a complaint in the district court seeking judicial review of a final agency decision. He claimed that the Act regulates only commercial speech, and that the Department's regulations are void because the Act does not authorize the regulation of structures bearing noncommercial messages. Further, he argued, if the Act and regulations were interpreted to apply to his noncommercial signs, they would be in violation of the first and fourteenth amendments to the United States Constitution and article II, section 10 of the Colorado Constitution.

The district court ruled that the Act was intended to govern only commercial advertising devices, and therefore the Department had no statutory authority to place restrictions on noncommercial advertising devices such as Pigg's. The [**5] court reversed the Commission's final decision and order. The Department, the Commission, and the chief engineer of the Department appeal that decision. We reverse the judgment of the district court.

II.

A.

Colorado began regulating roadside advertising in the early part of this century, but for the most part the restrictions on advertising were minimal. *See 1963 C.R.S. 120-5-1* to -13 The Act, which effectively bans outdoor advertising in rural and residential areas, was enacted in 1966 primarily to enable the state to receive its full share of federal aid highway funds in light of the Federal Highway Beautification Act of 1965, *23 U.S.C.A. § 131* (1966 & Supp. 1987) (Beautification Act).

The Beautification Act was enacted to combat the overuse of billboards and other outdoor advertising devices along the nation's highways "in order to protect the public investment in such highways, to promote the

safety and recreational value of public travel, and to preserve natural beauty." *Id.* § 131(a). The Beautification Act does not itself regulate outdoor advertising. Instead, it penalizes a state that fails to provide "effective control" of outdoor advertising by mandating forfeiture [**6] of 10 percent of its federal aid highway funds until such time as the state provides for effective control. *Id.* § 131(b). The statute specifies that:

[*964] Effective control means that such signs, displays, or devices .... shall, pursuant to this section, be limited to (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 ....

23 U.S.C.A. § 131(c) (1987 Supp.).

The Secretary of Transportation has promulgated regulations pursuant to the Beautification Act further defining "effective control" in terms of restrictions on the content, size, lighting, and spacing of signs permitted under section 131. 23 C.F.R. § 750.101 *et seq.* (1987). Those regulations include certain limitations with respect to the on-premise signs referred to in section 131(c)(2) and (3), but at the same time require states to determine the circumstances in which certain signs are exempt from section 131(c):

On-property or on-premise advertising [7]**

(d) Signs are exempt from control under *23 U.S.C. 131* if they solely .... advertise activities conducted on the property on which they are located .... State laws or regulations shall contain criteria for determining exemptions. These criteria may include:

...

(2) A purpose test for determining whether a sign has as its sole purpose the identification of the activity located on the property ....

(3) The criteria must be sufficiently specific to curb attempts to improperly qualify outdoor advertising as "on-property" signs, such as signs on narrow strips of land contiguous to the advertised activity when the purpose is clearly to circumvent *23 U.S.C. 131.*

23 C.F.R. § 750.709 (1987).

The Act, as it was originally enacted, followed the formal requirements and utilized the language of the Beautification Act. As the Act was amended over the years, the legislature ensured the statute's conformity with the Beautification Act by adopting those definitions and restrictions set out in federal regulations. The practice of the legislature in conforming the Act to the federal law with few substantial changes suggests both that the legislature's primary concern [**8] has remained the preservation of the state's share of federal highway funds, and that the legislature intended to prohibit only those signs that would conflict with federal law. n2

n2 Additional history of the Act may be found in *Nat'l Advertising Co. v. Dept. of Highways, 718 P.2d 1038 (Colo. 1986).*

We turn now to the specific statutory provisions at issue in this case. The Act defines "advertising device" to mean:

Any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or any other contrivance designed, intended, or used to advertise or to give information in the nature of advertising and having the capacity of being visible from the travel way of any state highway ....

§ 43-1-403(1), 17 C.R.S. (1984). *See* 23 C.F.R. 750.703(i) (1987) (utilizing substantially identical definition, but with phrase "used to advertise or inform").

The Act specifies the types of advertising devices that may be erected and maintained "when in compliance with [**9] all provisions of this [Act] and the rules and regulations adopted by the department [of highways]." *§ 43-1-404(1), 17 C.R.S.* (1984). Included among the permitted advertising devices are on-premise advertising devices. § 43-1-404(1)(b).

The Department contends that Pigg's signs fall within the category of "on-premise" advertising devices and that the regulations governing the number of such signs are valid. Further, the Department argues that the order requiring Pigg to limit the size and number of billboard's on his property did not infringe his constitutional right to free speech.

Pigg asserts three bases for upholding the district court's judgment. He argues [*965] first -- and the district court found -- that the Act was intended to govern only commercial advertising devices and not political or ideological signs. Therefore, the Department's regulations which purport to control Piggs' signs are void as falling outside the Department's statutory authority.

Second, he contends that if the Act bans all advertising devices except those enumerated, it is

unconstitutional since ideological signs are not "on-premise" advertising devices and are not otherwise permitted. As [**10] a consequence, the Act impermissibly discriminates in favor of commercial signs.

Finally, he argues, even if the Department's regulations allow the construction of noncommercial on-premise signs, the statute unconstitutionally favors commercial speech by exempting certain tourist-related signs.

We disagree with all three arguments.

B.

The Act was modeled on the Beautification Act and designed to permit the erection and maintenance of any sign consistent with the restrictions imposed by the federal law. We thus look first to the federal law to assist us in determining whether the Act was intended to govern only commercial advertising devices. We then consider the language of the statute and its legislative history to determine whether it should apply only to commercial signs.

Unfortunately, the history of the Beautification Act contains no clear evidence of how Congress itself viewed the law as affecting noncommercial and ideological signs. The witnesses called before House and Senate subcommittees testified either to support the economic necessity of commercial advertising devices, or else to support the proposed limitations on signs for aesthetic reasons. Neither the subcommittees [**11] nor the witnesses appear to have addressed the law's effect on ideological signs located on a sign owner's land. *See generally, Hearings on S. 2084 Before the Subcommittee on Roads of the Senate Committee on Public Works*, 89th Cong., 1st Sess. (1965); *Hearings on H.R. 8487 Before the Subcommittee on Roads of the House Committee on Public Works*, 89th Cong., 1st Sess. (1965). In addition, neither the House Report on the Beautification Act as it was finally passed nor the Senate Report on its own similar legislation sheds much light on the Act's intended scope with respect to noncommercial signs. *See* H.R. Rep. No. 1084, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 3710; S. Rep. No. 709, 89th Cong., 1st Sess. (1965). Finally, we are reluctant to accord much weight to what little legislative history there is, especially since passage of the Beautification Act was accomplished quickly and with little consideration either in committee or on either floor. *See* Minority Views on S. 2084, H.R. Rep. No. 1084, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 3710, 3724.

The legislative history of the Act is similarly unenlightening. [**12] It is axiomatic that "legislative intent is the polestar of statutory construction." *People v. District Court, 711 P.2d 666, 670 (Colo. 1985); Schubert v. People, 698 P.2d 788, 793 (Colo. 1985).* We may look both to the language of the statute and to the purposes underlying enactment of the law to help us ascertain that intent. *Schubert, 698 P.2d at 793-94; Colorado Department of Social Services v. Board of County Commissioners, 697 P.2d 1 (Colo. 1985).* In both the purposes of the Act and in its various definitional provisions we find strong reasons to believe that the Act was intended to cover noncommercial, as well as commercial, advertising.

The definition of "directional" advertising devices indicates that the legislature was concerned with noncommercial, as well as commercial, advertising devices:

> (4) "Directional advertising device" includes, but is not limited to: Advertising devices containing directional information about public places owned or operated by federal, state, or local governments or their agencies; publicly or privately owned natural phenomena, historic, cultural, [*966] scientific, educational, and religious sites; and areas of natural [**13] scenic beauty or naturally suited for outdoor recreation, deemed to be in the interest of the traveling public ....

§ 43-1-403, 17 C.R.S. (1984). The legislature's specific enumeration of permissible directional signs, many of which clearly are noncommercial, belies the claim that the legislature was concerned only with commercial signs. If Pigg were correct that noncommercial signs are not subject to the regulations promulgated under the Act, then there would be little purpose in the statute's inclusion of devices advertising governmentally controlled places or devices identifying natural wonders as permitted directional advertising devices.

The definition of "official advertising device" is similarly telling:

> (13) "Official advertising device" means any advertising device erected for a public purpose authorized by law, but the term shall not include devices advertising any private business.

43-1-403, 17 C.R.S. (1984). Had the legislature intended to control only commercial signs, it would have been unnecessary to specify that official signs may be maintained. The express exclusion of signs "advertising any private business" from the class of "official [**14] advertising devices" further demonstrates that the Act was intended to provide for the regulation of more than just commercial signs.

Moreover, noncommercial signs pose as much a threat to the goals underlying the Act as do commercial signs. The Act was designed:

To further the following substantial state interests:

(I) Protection of the public investment in the state highway system;

(II) Promotion of safety upon the state highway system;

(III) Promotion of the recreational value of public travel;

(IV) Promotion of public pride and spirit both on a statewide and local basis;

(V) Preservation and enhancement of the natural scenic beauty of this state;

(VI) Broadening the economic well-being and general welfare by attracting to this state tourists and other travelers ....

§ 43-1-402(1)(a), 17 C.R.S. (1984).

It is self-evident that an advertising device detracts from the natural scenic beauty visible from the highway whether it bears a commercial message or a noncommercial message. Also, to the extent the state is concerned about the safety of travelers when drivers are distracted by reading signs, that concern does not depend on the **[**15]** nature of the message being communicated.

We believe that neither the history of the Act nor its language suggests that the legislature intended that the Act apply only to commercial signs. We hold that the Act's proscriptions cover advertising devices bearing noncommercial messages.

C.

Among the advertising devices permitted by the Act are "on-premise advertising devices," which the Act defines as encompassing any

(14) Advertising device advertising the sale or lease of the property on which it is located or advertising activities conducted on the property on which it is located.

§ 43-1-403, 17 C.R.S. (1984).

The Department is responsible for adopting and enforcing rules and regulations governing on-premises advertising devices. *§ 43-1-415(1)(c), 17 C.R.S.* (1984). The Department's regulations divide on-premise signs into several categories based on their content, and tailor restrictions to the category in which the sign belongs. *See Rule V.1, 2 C.C.R. 601-3 (1983).*

The Department asserts that Pigg's signs are subject to the following regulation:

For the purposes of noncommercial advertising devices (ex. religious, social or political commentaries) **[**16]** erected by the owner or lessee of property, the premises is the primary structures, parking area and private roadway. Noncommercial signs that are on the premises or within **[*967]** approximately 50 feet thereof are on-premise signs. To further the purposes of the act, noncommercial signs that are more than approximately fifty feet from the premises may be no larger than 150 square feet and are limited to two signs visible to traffic proceeding in any one direction if the highway frontage of the property upon which the premises is located is less than one mile in length. If the highway frontage of the property upon which the premises is located is more than one mile in length, one sign visible to traffic proceeding in any one direction per mile is allowable.

Rule V.1.f, 2 C.C.R. 601-3 (1983). The size and placement restrictions are identical to those imposed on commercial on-premise signs. *Rule V.1.d, 2 C.C.R. 601-3 (1983).*

Pigg contends that his signs are not "on-premise" advertising devices within the meaning of the Act. As a consequence, he argues, the Act imposes an unconstitutional ban on ideological speech. n3

n3 Pigg does not suggest a definition of "ideological" in his brief. For the purposes of his argument, we will assume that Pigg's signs display the type of speech that is afforded protection by the first amendment. *See City of Lakewood v. Colfax Unlimited Ass'n, Inc., 634 P.2d 52, 57 n.5 (Colo. 1981).*

Because we find that the Act does permit the maintenance of advertising devices that exhibit noncommercial or ideological messages, we do not address whether a complete ban on such speech would be unconstitutional. Pigg asserts that it would be, but provides no authority or argument in support of his contention. The courts that have addressed the issue are not in agreement. *Compare Wheeler v. Comm'r of Highways, 822 F.2d 586 (6th Cir. 1987) and State v. Lotze, 92 Wash. 2d 52, 593 P.2d 811, appeal dismissed, 444 U.S. 921, 62 L. Ed. 2d 177, 100 S. Ct. 257 (1979)* (bans on political

billboards held constitutional) *with Metromedia, Inc. v. San Diego, 453 U.S. 490, 514, 69 L. Ed. 2d 800, 101 S. Ct. 2882 n.18 (1981)* (plurality opinion) (disagreeing with *Lotze) and Van v. Travel Information Council, 52 Ore. App. 399, 628 P.2d 1217 (1981)* (ban on political billboards held unconstitutional) *and State v. Pile, 603 P.2d 337 (Okla. 1979), cert. denied, 453 U.S. 922, 69 L. Ed. 2d 1004, 101 S. Ct. 3158 (1981)* (suggesting that ban on noncommercial signs would raise serious constitutional problems).

[17]**

The crux of Pigg's argument is that under the Act, a sign must advertise the sale or lease of the property on which the sign is located, or advertise activities conducted thereon, to constitute an on-premise sign. By construing ideological signs as on-premise signs, he claims, the regulations go beyond the scope of authority granted by the Act.

Administrative regulations are presumed valid and will be set aside only when the party who challenges them establishes their invalidity beyond a reasonable doubt. *Augustin v. Barnes, 626 P.2d 625, 627 (Colo. 1981).* In addition, we will accord deference to the interpretation of a statute by the executive agency charged with enforcing it. *Ingram v. Cooper, 698 P.2d 1314, 1316 (Colo. 1985); City & County of Denver v. Industrial Commission, 690 P.2d 199, 203 (Colo. 1984).* We will not, however, enforce a regulation which modifies or contravenes a statute or regulates beyond the scope of authority granted by the legislature. *Miller International, Inc. v. Department of Revenue, 646 P.2d 341, 344 (Colo. 1982); Travelers Indemnity Co. v. Barnes, 191 Colo. 278, 282, 552 P.2d 300, 303 (1976).*

In *South Dakota v. Adams, 506 F.* **[**18]** *Supp. 60* (D.S.D.), *aff'd, 635 F.2d 698 (8th Cir. 1980), cert. denied, 451 U.S. 984, 68 L. Ed. 2d 841, 101 S. Ct. 2316 (1981),* the court addressed a similar challenge to the federal regulations. South Dakota forfeited a portion of its federal aid highway funds after the Secretary of Transportation determined that South Dakota's content restrictions on directional signs were inadequate to satisfy the "effective control" requirement of section 131 of the Beautification Act. South Dakota argued that the content restrictions embodied in the federal regulations went beyond those authorized by Congress. The court disagreed:

> The Highway Beautification Act explicitly gives the Secretary authority to promulgate regulations relative to directional signs. This authority has been delegated to the Federal Highway Administration .... When authority is thus expressly delegated, a reviewing court does not have the power to set aside the regulations simply because the court **[*968]** might have interpreted the statute in a manner different from the agency's interpretation. The regulations under § 131(c)(1) are not merely interpretative, but rather, legislative regulations. They **[**19]** have the force and effect of law and can be set aside only if they clearly exceed the statutory authority or are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. The record is barren of any evidence that the rules constitute this type of abuse. The court might have adopted different standards, but Congress did not assign the task of adopting such standards to the court. The regulations were adopted under express authority and have been in place since 1973. Congress has not acted to change them. Since their adoption is not clearly outside the statutory mandate, the regulations cannot now be set aside merely because this court might interpret § 131(c)(1) differently.

506 F. Supp. at 67 (citations omitted).

Although *Adams* dealt with the federal regulation of directional advertising devices, we find its reasoning persuasive and consistent with the applicable principles of Colorado law.

We noted above that the scant legislative history available suggests only that the legislature intended to permit the maintenance of any sign not inconsistent with the Beautification Act. The regulations promulgated under the Beautification Act in turn **[**20]** require states to establish criteria, either through statutes or through administrative regulations, for assessing whether particular classes of signs satisfy the "on-premise" exception. The Colorado legislature left the specification of those criteria to the Department, and made no statutory change to alter the Department's interpretation of the "on-premise" exception after those regulations were promulgated.

The effect of the regulation is to permit the owner of property to place on his land any sign, not leased or rented to a third party, which conforms to the applicable size, spacing, lighting, and content requirements. The regulations do not discriminate against noncommercial or ideological signs, inasmuch as they are governed by the same restrictions which apply to other on-premise signs. We also note in passing that by so interpreting the statute, the department's regulations avoid the potential constitutional problems that would arise were the statute to be interpreted as entirely prohibiting ideological signs on the owner's property.

D.

Finally, Pigg argues that the Act and regulations, as promulgated and interpreted by the Department, discriminate unconstitutionally in [**21] favor of certain tourist-related signs. We are not persuaded by his argument.

Section 43-1-414(5)(a), 17 C.R.S. (1984), exempts from removal under the Act "tourist-related advertising devices which comply with the rules and regulations adopted by the department ....," when such removal would work "substantial economic hardship" in the affected area. The exemption was adopted after Congress specifically permitted states to provide such exemptions consistent with the Beautification Act. *23 U.S.C.A. § 131*(o) (Supp. 1987). Pigg is correct in asserting that the tourist-related sign exemption operates to permit the maintenance of certain commercial signs only and not the maintenance of any noncommercial signs. That it does so does not, however, render the statutory scheme unconstitutional.

In *Metromedia, Inc. v. San Diego, 453 U.S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981)*, Justice Brennan concurred in the judgment and, although finding San Diego's sign regulations impermissible, added:

[A] city can have specific goals the accomplishment of which would conflict with the overall goals addressed by the total billboard ban. It would make little sense to say that a city [**22] has an all-or-nothing proposition -- either ban all billboards or none at all .... If a city can justify a total ban, I would allow an exception only if it directly furthers an interest that is at least as important as the interest underlying the total ban, if the exception is no broader than necessary [*969] to advance the special goal, and if the exception is narrowly drawn so as to impinge as little as possible on the overall goal. To the extent that exceptions rely on content-based distinctions, they must be scrutinized with special care.

453 U.S. at 532 n.10. We adopted Justice Brennan's analysis in *City of Lakewood v. Colfax Unlimited Association, 634 P.2d 52, 69 (Colo. 1981)*, when we considered under what circumstances *de minimis* content-based distinctions could be drawn by a municipal sign ordinance.

Here, the tourist-related sign exception is directly related to the state's goal of avoiding "substantial economic hardship," which the statute defines as:

[A] significant negative economic effect, such as a loss of business income, an increase in unemployment, a reduction in sales taxes or other revenue to the state or other government entity, [**23] a reduction in real estate taxes to the county, and other significant negative economic factors.

§ 43-1-403(18), 17 C.R.S. (1984).

The state's interest in not undercutting the economic base of those areas heavily dependent on tourist-related income is, we believe, as important as its desire to protect the safety of highway travel and to enhance the scenic view from highways. The Act defines the exception narrowly so as to permit only those signs in existence on May 5, 1976, *see § 43-1-403(16), 17 C.R.S.* (1984), and imposes on the sign owners the burden of demonstrating the economic necessity of their signs, *§ 43-1-414(5)(a), 17 C.R.S.* (1984), as do the regulations promulgated to implement the exemption. *See Rule XVIII, 2 C.C.R. 601-3 (1983).* Finally, claims of hardship to a single business are insufficient to justify an exemption for that business's signs. Several businesses must demonstrate that they will be adversely affected and that "the defined area as a whole will be significantly economically impacted .... if those businesses' non-conforming signs are removed." *Rule XVIII.B.2.b, 2 C.C.R. 601-3 (1983). See also* 23 C.F.R. § 750.503(a) (1987) ("Neither [**24] the States not the FHWA shall rely on individual claims of economic hardship.").

Because the tourist-related sign exemption is tailored narrowly to further an important interest of the state, that exception does not unconstitutionally discriminate in favor of tourist-related advertising devices.

We conclude, therefore, that the Act applies to noncommercial advertising devices and that the Notice of Violation was issued pursuant to valid regulations of the Department. The judgment is reversed, and the case remanded to the district court with directions to dismiss the complaint.

Alaska State Legislature

Representative Jim Holm
District 9

Session
Capitol Building, Room 110
Juneau, AK 99801
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HB230
Sectional Analysis

Section 1.

This section adds the findings of the legislature to give guidance in application and set forth the basis for amending statute.

Section 2.

This section adds paragraph 6 to AS.19.25.105(a) which sets the parameters for placing political signage on your private property. It is also the section under which DOT would set any regulation.

Alaska State Legislature

Representative Jim Holm
District 9

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SPONSOR STATEMENT FOR HB230

"An Act relating to political signs on private property"

The ability of citizens to express political opinion, even to advocate for the same, is a fundamental right. This basic right becomes even more pronounced when the expression is made on one's own private property.

Currently, State law prohibits the posting of campaign or political signs within road view or 660 feet (whichever is greater). This applies to federally funded roads and state roads. The restriction includes private property. If you or I were to erect a "NO WAR IN IRAQ" or "SUPPORT THE TROOPS" sign today within the distance limits, we would be in violation of State law. The reasoning for this restriction has its genesis in the Federal Highway Beautification Act of '65. It has been interpreted to say that without a sign restriction, political or otherwise, Alaska *may* lose federal highway funds for being out of compliance. Correspondence with the Federal Highway Administration on this subject, shows this to be untrue (see attached letter from FHWA).

Similar restrictions, contained in city/county ordinance or state law, have been struck down in three out of four state supreme courts; Washington, Oregon, Colorado, and California. A U.S. District Court in Missouri found in '93 that very few restrictions could be placed on signage erected on private property. The U.S. Supreme court heard a case in '94 concerning private property and upheld the rights of the property owner. Further, there is a landslide of peripheral case law relating to this subject. If AS 19.25.105 stands as currently written, the state of Alaska is in danger of litigation and certain defeat.

We have a country which is based on the premise that all powers reside in the people and that the government derives its authority from the consent of the governed. Hence, we the people have the right to advocate or choose who governs us. This right should have little or no restriction.

This law needs to be amended, first to save the time and expense to the individual citizen who must challenge the current restriction of free speech, and second to save the state the cost of defense plus the likely legal fees awarded to a victorious citizen. I urge your support for this legislation.

HB 248

SENATE COMMITTEE REPORT

DATE: 4/30/03

FURTHER: Finance

DATE TURNED IN TO OFFICE: 5/9/03

State Affairs Committee considered HOUSE BILL NO. 248

HB 248 SALARY OF CHIEF PROCUREMENT OFFICER

"An Act relating to the annual salary of the chief procurement officer; and providing for an effective date."

and recommends:

Senate Bill:
[ ] same title
[ ] new title
House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR #____

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
DOA	4/16/03		✓	2

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
			✓	
			✓	
	✓			
CHAIR:	✓			

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 248
(H) Publish Date: 4/4/03

Revision Date/Time (Note if correction):
Dept. Affected: Administration

Title: An Act relating to the annual salary of the chief procurement officer; and providing for an effective date.
BRU: Centralized Administrative Services
Component: Purchasing

Sponsor: Rules Committee
Requester: Governor
Component No.: 60

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The proposed legislation will set the annual salary of the Chief Procurement Officer at range 24. The current annual salary is range 23. Funding for the increased salary cost is available in the current appropriation.

Prepared by: Vern Jones, Chief Procurement Officer
Phone (907)465-5684
Division: General Services
Date/Time 2/11/03 11:59 AM
Approved by: Mike Miller, Commissioner
Date 2/11/2003
Agency: Department of Administration

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: HB 248
(H) Publish Date: 4/22/03

Revision Date/Time (Note if correction):
Dept. Affected: Administration

Title: An Act relating to the annual salary of the chief procurement officer; and providing for an effective date.
BRU: Centralized Administrative Services
Component: Purchasing

Sponsor
Requester: State Affairs
Component No.: 60

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This fiscal note is for informational purposes. As explained below, the Governor's FY2004 operating budget includes adequate funding for this legislation. This legislation changes the annual salary of the Chief Procurement Officer (COP) from range 23 to range 24. The CPO has assumed the role of lead manager in the Division of General Services and the division director position (range 26) has been reclassified to to Deputy Director, range 23. The net fiscal impact of this legislation and the reclassification of the director position is an annual savings in FY2004 of $8.2 at the salary step placement of the incumbents.

Position	Old Annual Salary	New Annual Salary
CPO range 23 / 24	79.4	84.9
Director range 26	84.8	0.0
Deputy Director	0.0	71.1
Total Old / New	**164.2**	**156.0**

Prepared by: Vern Jones, Chief Procurement Officer
Phone (907)465-5684
Division: General Services
Date/Time 4/16/03 4:15 PM

Approved by: Mike Miller, Commissioner
Date 4/16/2003
Agency: Department of Administration

(Revised 9/2002 OMB)

MEMORANDUM

State of Alaska
Department of Administration
Division of Administrative Services

To: Kevin Jardell
Assistant Commissioner

Date: April 23, 2003

Phone: 465-5655

From: Dan Spencer
Director

Subject: Talking points for HB 248

House Bill 248 will change the salary of the State's Chief Procurement Officer (CPO) from range 23 to range 24.

This change will recognize the additional responsibilities of the CPO and will compensate him at one salary range higher than his two subordinate managers. Although the salary will be below that of a Division Director (normally a range 26) the CPO, by statute, is appointed to a six year term and may be removed only for cause, unlike a Division Director who normally serves at the pleasure of a Commissioner and the Governor.

The leadership of the Division of General Services has been restructured under this administration. The Chief Procurement Officer will act as the lead manager for the Division, with two other senior managers reporting to him. Those two positions are a Leasing/Facilities Manager (range 23) and a Deputy Director, range 23. The Deputy Director position was created by reclassifying the former Division Director (range 26) position, and this position will manage the administrative and non-procurement functions of the division, including the property management and centralized mail services programs.

The net effect of these changes, including the salary change proposed by HB 248, will be a reduction in salary cost of $8,200 in FY 2004. This savings will be used within the program to help meet the challenges posed by the Governor's budget, including identifying more than $1.5 million in lease savings and $2.0 million dollars in general procurement related savings over the course of FY2003.

HB 266

The Corrected
final Note Recds
to be Adopted

Adopted
w/o Exh -
replaced w/ their
4/11/03 final recds

SENATE COMMITTEE REPORT

DATE: 5/2/03

FURTHER: Finance

DATE TURNED IN TO OFFICE: 5/9/03

State Affairs Committee considered CS FOR HOUSE BILL NO. 266(FIN)

HB 266 ELECTIONS

"An Act relating to questioned ballots and questioned voters, voter registration, training of election officials, preparation of election materials, provision of election materials, forms, and supplies for polling places, voter identification, absentee voting, and counting ballots; and providing for an effective date."

and recommends:

Senate Bill:
[ ] same title
[ ] new title

House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR #____

[ ] be **replaced** with ____ **CS** _____ (____)

[ ] adopt **previous** ____ **CS** _____ (____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
GOV	4/15/03	✓		

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
DOA	4/11/03		✓	2

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
			✓	
	✓			
	✓			
			✓	
CHAIR:	✓			

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB266
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Office of the Governor
Title "An act relating to elections, questioned ballots and questioned voters, voter registration, training of election.."
BRU Elections
Component Elections
Sponsor Rules
Requester House State Affairs
Component No. 21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual	382.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**382.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	382.0					
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**382.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal: X

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

THE FOLLOWING COSTS ARE INCLUDED IN THE GOVERNOR'S FY 2004 CAPITAL APPROPRIATION REQUEST OF 5000.0 IN FEDERAL RECEIPTS. These items are estimated expenditures that the Division will incur due to new federal election reform legislation (Help America Vote Act PL 107) as reflected by the statutory changes in the bill: Revising forms for provisional and absentee voting and new registration requirements (100.0); computer programming (80.0); estimated toll free access annual costs (2.0) and information access exchange with other state agencies(200.0).

Prepared by: Lauri Allred
Division Division of Elections
Phone 465-5347
Date/Time 4/15/03 4:16 PM
Approved by: Laura A. Glaiser, Director/LJP
Agency Office of the Lt. Governor, Division of Elections
Date 4/15/2003

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 266
(H) Publish Date: 4/14/03

Revision Date/Time (Note if correction):
Dept. Affected: Office of the Governor
Title and questioned: "An act relating to elections, questioned ballots voters, voter registration, training of election.."
BRU: Elections
Component: Elections
Sponsor: Rules
Requester: Governor
Component No.: 21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The following items are estimated expenditures that the Division will incur as a result of new federal election reform legislation (Help America Vote Act PL 107), reflected by the statutory changes in this bill: Revising forms for provisional and absentee voting and new registration requirements (100.0); computer programming (80.0); estimated toll free access annual costs (2.0) and information access exchange with other state agencies (200.0). These expenditures will be funded through an appropriation in the FY04 capital budget (total capital appropriation request is $5,000.0 in federal funds).

Prepared by: Lauri Allred
Phone 465-5347
Division: Division of Elections
Date/Time 4/11/03 2:53 PM
Approved by: Laura A. Glaiser, Director/LJP
Date 4/11/2003
Agency: Office of the Lieutenant Governor, Division of Elections

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: HB 266
(H) Publish Date: 4/14/03

Revision Date/Time (Note if correction):
Title: An act relating to elections.....
Sponsor
Requester

Dept. Affected: Administration
BRU: Motor Vehicles
Component: Motor Vehicles
Component No.: 2348

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill will have no fiscal impact on DMV. DMV already produces a similar database copy of driver license information for the Permanent Fund Division each year. A second copy will be made at the same time for Division of Elections.

Prepared by: Charles R. Hosack
Division: Motor Vehicles
Phone: 269-5559
Date/Time: 4/10/03

Approved by: Mike Miller, Commissioner
Agency: Department of Administration
Date: 4/11/2003

(Revised 9/2001 OMB)

STATE OF ALASKA

FRANK H. MURKOWSKI, GOVERNOR

OFFICE OF THE LT. GOVERNOR

DIVISION OF ELECTIONS
P.O. BOX 110017
JUNEAU, ALASKA 99811-0017
PHONE: (907) 465-4611

CS HB 266 (FIN)

"An Act relating to questioned ballots and questioned voters, voter registration, training of election officials, preparation of election materials, provision of election materials, forms, and supplies for polling places, voter identification, absentee voting, and counting ballots; and providing for an effective date."

In October 2002, President Bush signed the "Help America Vote Act," (H.R. 3295) into law (P.L. 107-252). HAVA is the result of a bipartisan effort in Congress to make sweeping changes to federal election laws to improve the overall administration of elections, increase accessibility to those with disabilities, and also to prevent voter fraud.

Many changes required under HAVA do not require amending Alaska statute, but HB 266 includes those necessary to meet federal mandates. Changes recommended in the bill before you follow the intent of the federal law and do not place unnecessary burdens on the voter. It is imperative that these changes mandated by federal law are passed by the Legislature this year.

HB 266 also includes changes the Division recommends. The Division supports the language recommended in Senator Lincoln's SB 24, and it has been included in this bill with her permission. Other changes regarding returning identification/voter cards to other jurisdictions, reference to a "master list," and adding types of information that can be provided by the voter when registering in person are requested by the Division in this bill.

The House State Affairs Committee removed the language suggested by the Division changing the term "questioned ballots" to "provisional ballots." The federal law refers to "provisional voting," (which Alaskans refer to as "questioned voting") and the Division originally recommended changing the references in statute to conform to the federal language.

05/01/03
12:06 PM

The State Affairs Committee also restored references to the Division sending voters letters regarding the status of their absentee, questioned, or partially counted ballot in addition to the "free access system" required in HAVA.

The House Finance Committee substitute removes perhaps the most significant change NOT mandated by the federal act. In the first two versions of the bill the Division recommended replacing the terms "non partisan" and "undeclared" with the term "unaffiliated." As a result, there will be no changes to the current references to "non partisan" and "undeclared."

The Division of Elections asks for your support of House Bill 266.

05/01/03
12:06 PM

CSHB 266 (FIN)

"An Act relating to questioned ballots and questioned voters, voter registration, training of election officials, preparation of election materials, provision of election materials, forms, and supplies for polling places, voter identification, absentee voting, and counting ballots; and providing for an effective date."

Section 1 – NEW subsection requiring the Director of Elections to enter into an agreement with DMV and PFD to allow the Division to match voter information for first-time registrants who are registering by mail, facsimile, or other electronic transmission.

Required by HAVA section 303(b)(3)(B)(ii).

Section 2 - Applicants for voter registration will be required to supply additional information –
An Alaska driver's license or Alaska I.D. card (if issued)
Last four digits of the applicant's social security number (if issued)
Date of birth

Required by HAVA section 303(b)(3)(B)(i) and (ii).

Section 3– Applicants who have been previously registered to vote in another jurisdiction would no longer be required to surrender to the registration official any voter registration or ID card or credentials from that previous jurisdiction. The Director would not be required to return that applicant's voter registration or ID card or credentials to that jurisdiction.

The Director will, however, still be required to notify the chief elections officer in that jurisdiction that the applicant has registered to vote in Alaska and to cancel the applicant's voter registration in that jurisdiction

"Houskeeping" change – the Division has not been requiring the surrender of the voter registration or ID card or credentials, nor has the Director been returning them to the election official in the previous jurisdiction, as other jurisdictions do not require that function.

Section 4 – Adds a state ID card or a valid photo identification to the list of acceptable forms of identification that can be shown when applying for voter registration in person.

"Houskeeping" change – adds to the options of types of identification that are acceptable.

Section 5 – NEW subsections requiring the Director to verify information provided by an applicant requesting initial registration by mail, through agency records (DMV/PFD). If an applicant cannot provide an Alaska driver's license, state id or social security number, because the applicant has not been issued any of those numbers, they may instead submit a copy of a driver's license (other than Alaska's), state I.D. card, current and valid photo I.D., birth certificate, passport, or a hunting/fishing license.

All Alaskan registrants who submit a complete voter registration form are assigned a "unique identifying number" on their voter card. This language is added to emphasize intent of HAVA.

Required by HAVA sections 303(a)(5)(A)(i) and(ii), 303(a)(5)(b)(i), 303(b)(4)(A), 303(b)(4)(B).

Section 6– In regards to the voter registration database (master register) the phrase "located in the office of the director and on the district register located in the office of the election supervisor" is removed. The Voter Registration Election Management database (VREMS) is the "master register" and is accessible by all regional supervisors and the Director's office.

"Housekeeping" change.

Section 7 – Replaces the phrase "may not," with "is not eligible to." Removes language related to the master register and its location (same as above). Also makes a stylistic change with regard to when a voter is eligible to vote.

"Housekeeping" change.

Section 8 – Adds "absentee in person". The information obtained on the envelope used for voting a questioned or absentee in person ballot will be the same as that required on a voter registration form. If the voter voting such a ballot completes the information, the director is required to place the voter's name on the voter registration list.

Required by HAVA section 303 (b).

Section 9 – This language more accurately reflects Division practices. The Director is required to file a plan describing the training program provided to election officials every year by March 1st to the Lt. Governor. (replaces January to enable staff to determine more accurate costs related to training.) The word "annual" was removed because the training plans are based on the election cycle calendar.

"Housekeeping" change.

Section 10 - NEW subsection that requires the Director to provide materials, forms and supplies for each polling place to include-

Hours the polling place will be open
Instructions on how to cast a provisional ballot
Instructions for first time voters who initially registered by mail
General information on voting rights
Prohibitions on acts of fraud/misrepresentations and how to report these violations

Required by HAVA section 302 (b)(2).

Section 11 - Requires that a voter who casts a questioned ballot be given information at the time they vote that the voter will be able to ascertain whether the ballot was counted, and if not, why not.

Required by HAVA section 302.

Section 12 – Adds types of identification required at the polls before voting to
State ID card
Current and valid photo ID
An original or copy of a current utility bill, bank statement, paycheck, government check, or other government document bearing the name and current address of the voter

Required by HAVA sections 303(b)(1) and 303 (b)(2)(A)(i) and (ii).

Section 13- Identification requirements may not be waived for voters who are first-time voters who initially registered by mail, facsimile, or other electronic transmission and did not provide the identification required when registering by mail.

Required by HAVA sections 303(b)(1) and 303 (b)(2)(A)(i) and (ii).

Section 14– removes the phrase "hand count precincts" when explaining how the election board shall count ballots, thereby providing a uniform definition of what constitutes a vote.

Required by HAVA section 302(a)(6).

Section 15 – Requires first-time voters who initially registered by mail, facsimile, or other electronic transmission and who are voting absentee by mail, to provide a copy of:

Driver's License or State ID card
Current and valid photo ID
Birth certificate, passport, or hunting or fishing license
A current utility bill, bank statement, paycheck, government check, or other government document bearing the name and current address of the voter

Required by HAVA section 303 (b)(2)(A)(ii).

Section 16 – NEW subsection that allows for absentee ballot applications of absent uniformed services voters and absent overseas voters to be valid through the next two general elections.

Required by HAVA section 704.

Section 17 – Requires the Director to provide "special absentee ballots" to Alaskans living, working or traveling in a remote area of the State where distance, terrain, or other natural conditions deny the voter reasonable access to a polling place.

Duplicates the language offered in Senator Lincoln's SB 24 with permission of the Senator.

Section 18 – Specifies that the absentee ballot of a first-time voter who registered by mail, facsimile, or other electronic transmission will not be counted if the proper identification was not provided or if the voter was not personally known by the election officials, or if the identification can not be verified by state agency records.

Required by HAVA section 303(b)(2).

Section 19 – NEW subsection that requires the Director to provide a "free access system" so absentee voters can determine whether their ballot was counted, or if not, why not.

A "free access system" may be a toll free number or a website address, or both. The information must be available not less than 10 days after certification of the primary election and not less than 30 days after the certification of a general or a special election.

Required by HAVA section 302 (b)(2).

Section 20 – Specifies that the questioned ballot of a first-time voter who registered by mail, facsimile, or other electronic transmission will not be counted if the proper identification has not been provided or did not provide identification that could be verified by state agency records.

Required by HAVA sections 302 (a)(5)(A), 303 (b)(1), 303 (b)(2)(A)(I) and (ii) and 303 (b)(3)(B).

Section 21 – NEW subsection that requires the Director to provide a "free access system" so those who voted a questioned ballot can determine whether their ballot was counted, or if not, why not.

A "free access system" may be a toll free number or a website address, or both. The information must be available not less than 10 days after certification of the primary election and not less than 30 days after the certification of a general or a special election.

Required by HAVA section 302 (a)(5)(B).

Section 22 – NEW subsection that requires the Director to provide a "free access system" so those who voted a ballot that was partially counted can determine whether their ballot was partially counted, or if not counted, why not.

A "free access system" may be a toll free number or a website address, or both. The information must be available not less than 10 days after certification of the primary election and not less than 30 days after the certification of a general or a special election.

Required by HAVA section 302 (a)(5)(B).

Section 23 - "handcount precincts" was removed because there is a uniform definition of what constitutes a vote. (Section 14 of this bill)

Required by HAVA section 302(a)(6).

Section 24– Repeals the following section:

15.15.360 (c) stated that the votes described in that section are only those in handcount precincts, but in reality it is how ALL votes are treated.

Repealed because Section 14 provides for a UNIFORM definition of what constitutes a vote.

Section 25– Provides for an **immediate effective date.** <u>The State must pass this legislation to comply with the federal act this year.</u>

HB

273

SENATE COMMITTEE REPORT

DATE: 04/16/04

FURTHER: Judiciary

DATE TURNED IN TO OFFICE: 4/30/04

State Affairs Committee considered CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 273(JUD) am

HB 273 PARENTS' WAIVER OF CHILD'S SPORTS CLAIM

"An Act relating to the right of a parent to waive an unemancipated child's claim of negligence against a provider of sports or recreational activities."

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

Senate Bill:
[ ] Same Title
[ ] New Title

House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
Law	3/21/04			✓	1

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
			✓	
			✓	
CHAIR:			X	

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Chair, Judiciary Committee

Vice-Chair, House Committee on
Economic Development,
Trade and Tourism

Member
Oil & Gas Committee

Representative Lesil McGuire

House District 28

Sponsor Statement
CSSSHB 273(JUD) am
"An Act relating to the right of a parent to waive an unemancipated child's claim of negligence against a provider of sports or recreational activities."

CSSSHB 273(JUD) am encourages the availability and affordability of sports and recreational activities to children by recognizing the right of a parent to choose to release, on behalf of his or her child, prospective negligence-based claims that the child may accrue against the provider of such activities.

As a result of a recent Colorado Supreme Court case, Cooper v. Aspen Skiing Co., wherein the Court refused to uphold or recognize the mother of a seventeen year old skier's signature on a release document used in a juvenile race camp program, the outdoor industry has been trying to respond to the myriad problems and potentially severe ramifications created by this holding. This erroneous rationale is contrary to a body of authority derived from Midwestern and Eastern states, which find that parents do specifically have the legally binding right to sign release documents on behalf of their minor children. In these states, the courts have articulately stated that prohibiting a parent's right to release or waive on behalf of a minor child would detrimentally chill school, scouting, athletic, and other extra-curricular programs. There exists a well-settled legal history of recognizing parental rights regarding making decisions on behalf of minor children regarding education and medical treatment. To not extend the same logic to recreational activities in Alaska would be legally illogical and unfair.

The practical consequences of not recognizing this parental authority are profound. If an outdoor recreation company is found to have been operating without a valid release/waiver document, either insurance coverage will not be offered or will be voided. Very few programs will stay in business without proper insurance in place. As an outdoor recreation-oriented and supported state, Alaska simply cannot stand by and watch this type of result.

In addition, it is important to note that HB 273 would not defeat in any way a parent or guardian's right to sue an operator that is not providing a safe service or program. An ordinary release/waiver document provides only a release to causes of action sounding in negligence. Claims of reckless or intentional misconduct are never released in a release/waiver document. It is also crucial to remember that, with respect to pre-recreation releases, these documents regard activities that are totally voluntary in nature; they are activities that regard personal choice for the participant. As such, participants and parents of participants should have the freedom to decide which sports or recreational activities they want to participate in or that they want to have their children participate in and should have the freedom to contract regarding these activities. That fundamental right to make choices regarding a child's activities is what is being protected here; the bill does not negate a parent's rights, it in fact strengthens them.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: HB273-LAW-T&WC-3-21
Bill Version: HB273
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to the rights of a parent to waive a child's claim of negligence against a provider of sports..."
RDU CIVIL
Component Torts & Workers' Compensation
Sponsor Representative McGuire
Requester House Judiciary
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill allows a parent to waive prospective claims of negligence by a child against providers of sports or recreational activities in Alaska. It excepts cases that allege willful, wanton, reckless, or grossly negligent acts or omissions.

Passage of this legislation will have no foreseeable fiscal impact on the Department of Law.

Prepared by: Kathryn A. Daughhetee, Director
Phone 465-3673
Division Administrative Services
Date/Time 3/21/04 10:58 AM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 3/21/2004
Agency Department of Law

(Revised 12/2003 OMB)

HB 280

SENATE COMMITTEE REPORT

DATE: 5/14/03

FURTHER:

DATE TURNED IN TO OFFICE: 5/17/03

State Affairs Committee considered CS FOR HOUSE BILL NO. 280(FIN)

HB 280 COMMERCIAL MOTOR VEHICLES:REGULATIONS

"An Act relating to the regulation of commercial motor vehicles to avoid loss or withholding of federal highway money, and to out-of-service orders concerning commercial motor vehicles; moving authority for commercial motor vehicle regulation from the Department of Public Safety to the Department of Transportation and Public Facilities; amending Rule 43.1, Alaska Rules of Administration; and providing for an effective date."

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

Senate Bill:
[ ] same title
[ ] new title

House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Zero	FN#
DOA	4/28/03		✓	1

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
			✓	
			✓	
John J Caudery	✓			
CHAIR:				

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 280
(H) Publish Date: 4/30/03

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An act relating to the regulation of commercial motor vehicles....
BRU: Motor Vehicles
Component: Motor Vehicles
Sponsor: (H) FIN
Requester: (H) TRA
Component No.: 2348

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill has no fiscal impact on DMV.

Prepared by: Charles R. Hosack
Phone 269-5559
Division: Motor Vehicles
Date/Time 4/28/03
Approved by: Mike Miller, Commissioner
Date 4/28/2003
Agency: Department of Administration

(Revised 9/2001 OMB)

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Alaska State Legislature

House Finance Committee

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Juneau, AK 99801-1182

Sponsor Statement for CSHB 280(FIN)
Commercial Motor Vehicles: Regulations

"An Act relating to the regulation of commercial motor vehicles to avoid loss or withholding of federal highway money, and to out-of-service orders concerning commercial motor vehicles; moving authority for commercial motor vehicle regulation from the Department of Public Safety to the Department of Transportation and Public Facilities; amending Rule 43.1, Alaska Rules of Administration; and providing for an effective date."

House Bill 280 would transfer certain authority to regulate commercial motor vehicles from the Department of Public Safety (DPS) to the Department of Transportation and Public Facilities (DOT&PF). This change is needed to avoid losing federal highway money. The bill also directly amends Rule 43.1 of the Alaska Rules of Administration.

Under current law, the authority to adopt regulations regarding commercial motor vehicles is divided among: the Department of Administration (DOA) for licensing of drivers of commercial motor vehicles; the DOT&PF for matters relating to commercial motor vehicle inspections; and the DPS for all matters relating to commercial motor vehicles. Under this bill, the authority to adopt regulations necessary to avoid the loss or withholding of federal highway money would be vested in DOT&PF, except for matters that relate to licensing of drivers of commercial motor vehicles.

The bill corrects an oversight that occurred when implementing Executive Orders 98 and 99 in 1997. EO 98 transferred the responsibility for commercial motor vehicle safety inspections from the DPS to the DOT&PF. EO 99 transferred most functions related to motor vehicles found in Title 28 from DPS to the Department of Administration (DOA). After the issuance of EO's 98 and 99, DPS retained the authority to adopt regulations related to commercial motor vehicles, except for safety inspections and driver licensing. HB280 would transfer the remaining regulation authority in DPS relating to commercial motor vehicles to DOT&PF. The Department needs the authority to adopt these regulations to avoid the loss or withholding of federal funding.

Federal Motor Carrier Safety Administration regulations provide that a state becomes ineligible for Basic Program or Incentive funds under the Motor Carrier Safety Assistance Program for failure to adopt any new regulation or amendment to the Federal Motor Carrier Safety Regulations (FMCSR) or

the Hazardous Materials Regulations (HMR) within three years of its effective date. Since the state's adoption of federal regulations pertaining to CMV operations, driver/vehicle safety standards and hazardous materials transport has not been updated since 1995, Alaska is out of compliance.

Alaska will receive $685.5 in Basic Program and Incentive Funds in FFY2003. Loss of these funds through failure to pass this legislation and the subsequent failure to adopt the current regulations will virtually eliminate commercial vehicle safety enforcement effort in Alaska.

The Alaska Trucking Association, Teamsters Local 959 and the Associated General Contractors of Alaska support the bill provisions correcting the regulation adoption authority problems and supporting the language in existing statute. The Departments of Public Safety and Administration also support this legislation.

The Committee Substitute, which passed the House Finance Committee without objection, changes the title to add the phrase "moving authority for commercial motor vehicle regulation from the Department of Public Safety to the Department of Transportation and Public Facilities". This has the effect of tightening the title to clarify what the bill does.

Contact: Tim Barry, Aide to Representative Bill Williams, at (907) 465-3424

Commercial Vehicle Statute Changes

Driver/Vehicle Safety Requirements
Hazardous Material Transport Requirements
House Bill 280
May ~~13~~ 14, 2003 CSHB280

Thank you Mr. Chairman, my name is Aves Thompson. I am the Director of the Division of Measurement Standards and Commercial Vehicle Enforcement in the Alaska Department of Transportation and Public Facilities.

Our division is responsible for commercial vehicle size, weight and safety enforcement, commercial vehicle operating credentials and also for enforcing and maintaining standards for weights and measures used in commerce in Alaska.

The key elements of the Commercial Vehicle Safety Program include fixed weigh station and mobile commercial vehicle enforcement. The Commercial Vehicle

Enforcement Officers conduct driver / vehicle safety inspections, enforce size and weight regulations and inspect hazardous material transport.

At the beginning of FY98, Executive Order 98 consolidated commercial motor vehicle regulation and enforcement from the Departments of Public Safety and Community and Economic Development into DOT&PF. The consolidation of these programs in one state agency was intended to result in greater convenience to industry and the public, as well as more efficient management of the programs. To a very large extent, this has been accomplished. In implementing the consolidation, one minor omission occurred in the transfer of the necessary regulation promulgation authority.

While most of the authority to effectively operate the truck size, weight, safety and permitting programs was

given at that time to DOT&PF, the authority to promulgate regulations for driver/vehicle safety requirements and hazardous materials transport was not transferred and currently resides in the Department of Public Safety. HB 280 transfers that authority to DOT&PF and completes the consolidation of CMV regulatory and enforcement programs started with EO98.

Except for matters that relate to licensing of drivers of commercial motor vehicles, HB 280 gives the authority to adopt regulations necessary to avoid the loss or withholding of federal highway money to DOT&PF. These commercial motor vehicle safety regulations address equipment standards, working conditions for drivers and vehicle inspection standards. The hazardous material transport regulations deal with notification, movement, labeling and documentation of hazardous materials loads.

In addition, HB 280 sets a prohibition in Title 28, against operating a commercial motor vehicle after being placed out of service under a regulation adopted under Title 19. Other sections provide for changes to the bail schedule and allow for a transition period for DPS regulations to continue in force until new regulations are adopted by DOT&PF.

The department is prepared to proceed with the regulation adoption process once these legislative changes are effective.

Federal Motor Carrier Safety Administration regulations provide that a state becomes ineligible for Basic Program or Incentive funds under the Motor Carrier Safety Assistance Program for failure to adopt any new regulation or amendment to the Federal Motor Carrier Safety Regulations (FMCSR) or the Hazardous Materials

Regulations (HMR) within three years of its effective date.

Adoption of changes to these federal regulations has not occurred since 1995, and we are out of compliance.

In FFY2003, Alaska will receive $685.5 in Basic Program and Incentive Funds. Passage of this bill is critically important as DOT&PF needs the authority to adopt these regulations to avoid the loss or withholding of federal funding. Loss of these funds through failure to pass this legislation and the subsequent failure to adopt the current regulations will virtually eliminate our commercial vehicle safety enforcement effort.

The bill provisions correcting the regulation adoption authority problems and supporting the language in existing statute are supported by the Alaska Trucking

Association, Teamsters Local 959 and the Associated General Contractors of Alaska. The Departments of Public Safety and Administration also support this legislation.

I urge you to move HB 280 out of committee with a favorable recommendation. Thank you for the opportunity to testify and I will try to answer any of your questions.

Aves Thompson, Director
Measurement Standards and
Commercial Vehicle Enforcement
Department of Transportation
and Public Facilities
907.341.3210

HB

288

23-LS1651\A
Bullock
2/5/04

SENATE CONCURRENT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Introduced:
Referred:

A RESOLUTION

Suspending Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, concerning House Bill No. 288, relating to changing the name of the Department of Community and Economic Development.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

That under Rule 54, Uniform Rules of the Alaska State Legislature, the provisions of Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, regarding changes to the title of a bill, are suspended in consideration of House Bill No. 288, relating to changing the name of the Department of Community and Economic Development.

L

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: 2d CSHB 288(RLS)
(H) Publish Date: 1/21/04

Revision Date/Time (Note if correction):
Dept. Affected: DCED
Title: DCED Name Change
RDU: Executive Admin & Dev (119)
Component: Commissioner's Office
Sponsor: Representative Kohring
Requester: House Rules
Component No.: 1027

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill changes the name of the Department of Community and Economic Development to the Department of Commerce and Economic Development. The department will implement the change to the new name as supplies need to be replenished; therefore, no new funds are required to implement this bill.

Prepared by: Tom Lawson, Director
Phone (907) 465-2506
Division: Administrative Services
Date/Time 1/14/04 9:17 AM
Approved by: Edgar Blatchford, Commissioner
Date 1/14/2004
Agency: Department of Community & Economic Development

(Revised 9/2002 OMB)

ALASKA STATE LEGISLATURE

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Juneau, Alaska 99801-1182
(907) 465-2186
Fax (907) 465-3818

REPRESENTATIVE VIC KOHRING
DISTRICT 14

SPONSOR STATEMENT

CS for House Bill 288

"Changing the name of the Department of Community & Economic Development"

Confusion exists as to the actual mission of the Department of Community & Economic Development (DCED) on whether Alaska has an agency that is tasked with promoting commerce and economic development. It has somewhat complicated efforts to attract investment to the state.

Governor Murkowski, in his State of the State speech in January, announced his administration was now referring to the department as the "Department of Commerce" (short, for the Department of Commerce & Economic Development).

The Committee Substitute for House Bill 288 officially renames DCED to the Department of *Commerce* and Community and Economic Development. I believe the name change more closely reflects its mission. That is, to further commerce and develop Alaska's economy.

Further, the name change more correctly reflects the goals and strategies of the department, such as promoting local economic development and crucial infrastructure, marketing Alaska's goods and services throughout the world, organizing and conducting business trade missions to expand product sales in current markets and develop new markets, and facilitating the exchange of information between Alaska exporters and potential customers.

Lastly, by adding the name "Commerce" into the title, it becomes consistent with numerous other states, including Utah, Montana, Idaho, and North Dakota and South Dakota.

ALASKA STATE LEGISLATURE

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REPRESENTATIVE VIC KOHRING
DISTRICT 14

SECTIONAL ANALYSIS

HB 288
Changing the name of the Department of Community and Economic Development

Section 1. States that the purpose of the Act is to change the name of the Department of Community and Economic Development to the Department of Commerce and Economic Development.

Section 2. Changes the name of the Department of Community and Economic Development to the Department of Commerce and Economic Development.

Section 3. Instructs the revisor of statutes and the regulations attorney to amend the Alaska Statutes and the Alaska Administrative Code to change the name of the Department of Community and Economic Development to the Department of Commerce and Economic Development and to change the Commissioner of Community and Economic Development to the Commissioner of Commerce and Economic Development.

E-Mail: Representative_Vic_Kohring@legis.state.ak.us • *Toll Free During Session Year Round: (800) 468-2186*
Website: www.akrepublicans.org/kohring/

ANCHORAGE
Economic Development
Corporation

May 7, 2003

Representative Vic Kohring
Alaska State Legislature
State Capital (MS 3100)
Juneau, Alaska 99801-1182

Dear Representative Kohring:

The purpose of this letter is to express AEDC's support for HB 288 'Changing the Name of the Department of Community and Economic Development' to the Department of Commerce and Economic Development. The name change seems to more accurately reflect the mission of the Department. Substituting the word "commerce" should also provide clearer direction to those parties interested in contacting state government about doing business in the state.

If you have any questions, please don't hesitate to call me at (907) 258-3700.

Sincerely,

Larry Crawford
President & CEO, AEDC

907-258-3700 • 800-462-7275 • fax 907-258-6646 • 900 West Fifth Avenue, Suite 300, Anchorage, AK 99501
www.aedcweb.com

Frank H. Murkowski, Governor

Alaska **Department of Community and Economic Development**

Office of the Commissioner
P.O. Box 110800, Juneau, AK 99811-0800
Telephone: (907) 465-2500 • Fax: (907) 465-5442 • Text Telephone: (907) 465-5437
Email: questions@dced.state.ak.us • Website: www.dced.state.ak.us/

07 May 2003

The Honorable Vic Kohring
House of Representatives
Alaska State Capitol, Room 24
Juneau, AK 99811

RE: Support of HB 288 – Name Change for the Department of Community and Economic Development

Dear Representative Kohring;

Thank you for introducing House Bill 288 - Name Change for the Department of Community and Economic Development. The administration supports changing the name of the Department of Community and Economic Development to the Department of Commerce and Economic Development.

In the coming years, our mineral, oil and gas resources will become a stronger element in the health of the state's economy. The new title of the Alaska Department of Commerce and Economic Development implies that the economic growth of the state will improve living conditions for all individuals. As our commercial interests grow stronger, there will be more opportunities for Alaskans to receive training to engage in the spectrum of jobs that will become available.

This name change will communicate to international business partners that Alaska is serious and focused on development. The government to government message will be crisp and clear. Alaska is intent on being an honorable and competent player in the commercial system of the world. The Department will serve as a liaison between private sector business, state and local government and the people across the state of Alaska. It will focus on both local and external commercial conditions, and will assist the communities to participate in the associated economic activity.

As we commercialize Alaska's resources and move toward utilization of emerging routes to global markets, the Alaska Department of Commerce and Economic Development will send a clear message to the world. Thank you for your support in helping accomplish this change.

Sincerely,

Ed. Blatch

Edgar Blatchford
Commissioner

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BILL J. ALLEN
Publisher

Voice of the Times

A CONSERVATIVE VOICE FOR ALASKANS

MONEY MAGAZINE RATES ANCHORAGE AS A . . .

Hot city

ANCHORAGE'S RATING by CNN Money Magazine as the 13th-best city in the West was a notable achievement. Now we can prove what most of us have always known.

The magazine ranked our city among all other cities in the West with populations of more than 100,000. The rating was based on criteria like weather, family incomes, lack of an income tax, housing costs, leisure, recreational and cultural facilities, health care available, environment, crime, student-teacher ratios and educational institutions.

One notable aspect of the ranking was that 11 of the 12 top Western cities were Sunbelt cities in California, Arizona and Texas. The only other Snowbelt community was Westminster, Colo., a mile-high suburb of Denver.

Anchorage was also the largest of the 13 top "hottest cities," with a listed population of 272,830, which it cited as a 21 percent increase from 1990. The next largest was Plano, Texas, the number one Western city, which has a population of 271,090, an increase of 113 percent from 1990.

THE RATING was based on a scientific approach. The magazine started with statistics on 271 U.S. cities with the highest median household income levels in the nation and above average population growth. That data was then cross-referenced with what the magazine called lifestyle segmentation data supplied by an organization that tracks such things.

Anchorage's median household income was given as $59,548, ranking 11th in that category. Plano topped the household income ratings with $82,857 per family.

Only 87 communities met the magazine's criteria and made the final cut — 31 in the West, 22 in the Central Region and 34 in the East. Eighteen Western cities of less than 100,000 population made the list; all of them were in California and Texas.

The fact that Anchorage is a great place to live is no surprise to most of those who live here. It is quite a surprise to see a national organization like CNN Money Magazine use scientific data and prove that to be the case.

It makes sense

THE HOUSE has approved a new name for the state Department of Community & Economic Development. If the Senate goes along, the new moniker will be the Department of Commerce, Community & Economic Development.

In these days when the state is involved in endless arguments about budget gaps and financial reserves, putting a new emphasis on the department's mission to stimulate commercial development makes good sense.

Rep. Vic Kohring, a Valley Republican, is the sponsor of the measure. The change, he said, will let "the world know that we're open to do business and we welcome investments here." Yes, indeed.

Letters to T

Youth ponders gun control

With all the recent shootings in Anchorage, people are saying we need better gun control. That's ridiculous! Have you ever read the book "Hatchet?" The main character, Brian, is stranded in the middle of nowhere with nothing but a hatchet, which he uses to hunt and start fires. Taking away everyone's firearms would be like the author taking away Brian's hatchet and source of life.

We need our firearms. They keep us alive like the hatchet kept Brian alive. We need them for protection. Please call your legislators and tell them to let us keep our firearms.

Justin Oiler, age 10
Anchorage

Look at your gas bill

Yammering against the development of coal bed methane, the greenies and NIMBYs in MatSu and Homer areas are demanding that the state buy up all subsurface mineral leases. They claim to be shocked about private property rights and don't want unwilling property owners to have wells forced on their properties. (Evergreen always asks first, pays rent, and does not force wells on unwilling property owners.)

What would happen if the state caves in and buys back all outstanding leases? First, every property owner who wants a well on their property is deprived of that choice and lease revenues, and Mat-Su and Anchorage are deprived of a large number of new, high-paying jobs. Most importantly, Southcentral Alaska will not get a new source of natural gas to replace Cook Inlet fields that are being rapidly depleted. If you don't think this is a problem, look at your rising Enstar bill.

Keep selling the leases. Drill the wells. Bring on the jobs and natural gas.

Alex Gimarc
Anchorage

Grizzly People

Just to set the record straight: Grizzly People is a legitimate nonprofit under the fiscal sponsorship of SEE, Social and Environmental Entrepreneurs. Ev-

ery donation is tax dedu
reporter who reported th
on Timothy Treadwell (fr
Jan. 10 editorial is drawn
ter spending quite a bit of
to me and SEE, yet he
doubt. You can go to sav
if there are any questions
Grizzly People's legitimacy

Man on Mars a lon

A recent Voice of the T
lauded President Bush's p
a man on Mars using the
as an example of good sp
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Russians to service it, a
from completion.

At the same time, one
successful space endeavor
telescope, is now going t
earlier than planned, ac
NASA announcement. At
date I am sure we will est
base and even go to Mar
statements by the presider
makes one wonder if he
which way is up.

Yours, mine or ours

The Times' Jan. 20 edit
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The Anchorage Times

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