Case No. A17-2072

STATE OF MINNESOTA
IN COURT OF APPEALS

Jeffrey Berger,

Appellant,

v.

State of Minnesota,

Respondent.

BRIEF AND ADDENDUM OF APPELLANT JEFFREY BERGER

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument in this matter pursuant to Minn. R. Crim. 28.02, subd. 13(1).

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Ruling below: The District Court denied Appellant's Motion to Dismiss on Constitutional Grounds. (Doc. 22.)

Manner preserved: After trial, Appellant filed a Notice of Appeal on December 29, 2017. (Doc. 54.)

Most Apposite Authorities:

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2. Whether the District Court erred when it denied Appellant's Motion to Dismiss the public nuisance charge on the grounds that Minn. Stat. § 609.74(2) is unconstitutional under the First Amendment as applied to him.

Ruling below: The District Court denied Appellant's Motion to Dismiss on Constitutional Grounds. (Doc. 22.)

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- *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011 (9th Cir. 2009)
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3. Whether the District Court erred when it denied Appellant's Motion to Dismiss the Public Nuisance Charge on the grounds that Minn. Stat. § 609.74(2) is unconstitutionally vague.

Ruling below: The District Court denied Appellant's Motion to Dismiss on Constitutional Grounds. (Doc. 22.)

Manner preserved: After trial, Appellant filed a Notice of Appeal on December 29, 2017. (Doc. 54).

Most Apposite Authorities:

- *State v. Ness*, 819 N.W.2d 219 (Minn. Ct. App. 2012)
- *Stahl v. City of St. Louis, Missouri*, 687 F.3d 1038 (8th Cir. 2012)

4. Whether the District Court erred when it determined that the evidence at trial was sufficient to support a conviction for public nuisance under Minn. Stat. § 609.74(2).

Ruling below: The District Court determined that the evidence was sufficient for a reasonable jury to render a guilty verdict on the public nuisance charge. (T-I, 168.)

Manner preserved: After trial, Appellant filed a Notice of Appeal on December 29, 2017. (Doc. 54.)

Most Apposite Authorities:

- *State v. Otterstad*, 734 N.W.2d 642 (Minn. 2007)
- *State v. Johnson*, 163 N.W.2d 750 (Minn. 1968)

STATEMENT OF THE CASE

On July 9, 2016, Appellant Jeffrey Berger entered Interstate 94 in the course of his peaceful participation in a march protesting police violence against African Americans. The state charged Appellant with three counts based on this conduct, including a charge of misdemeanor public nuisance in violation of Minn. Stat. § 609.74(2). Following a two-day trial, the jury convicted Appellant of public nuisance. The Court sentenced Appellant to 90 days in jail, suspended upon completion of one year probation, and a fine of $300.00 plus $86.00 in fees. Appellant has appealed from the judgment of conviction.

STATEMENT OF THE FACTS

I. Appellant Jeffrey Berger.

Appellant Jeffrey Berger is a retired computer scientist with a PhD in artificial intelligence. (Nov. 28, 2017 Tr., ("T-II"), 25, 27.)[1] He also practices Zen Buddhism. (T-II, 27) Appellant has a long history of non-violent political and civil rights activism. (T-II, 27-30.) Appellant's activism is motivated by a desire to heal racial rifts and to protect people of color, including his grandchildren. (T-II, 25, 29-30.)

II. The July 9, 2016 Demonstrations.

A. The Castile Shooting.

On July 6, 2016, Philando Castile was shot and killed by a police officer during a routine traffic stop while coming home from the grocery store. (T-I. 102.) Castile's killing immediately captured public attention, in part because Castile's girlfriend "live streamed" the confrontation with police on her mobile phone.[2] Castile's death came just

[1] Appellant's trial was held November 27-29, 2017. References to the transcript for November 27, 2017 are hereinafter abbreviated "T-I"; references to the transcript for November 28, 2017, "T-II"; and references to the transcript for November 29, 2017, "T-III."

[2] *See, e.g.*, P. Pheifer & C. Peck, *Aftermath of Fatal Falcon Heights Officer-Involved Shooting Captured on Video*, Star Tribune (July 9, 2016), available at http://www.startribune.com/aftermath-of-officer-involved-shooting-captured-on-phone-video/385789251/#1; *Philando Castile: Transcript of the Facebook Live Shooting Aftermath*, Star Tribune (July 7, 2016), available at http://www.startribune.com /transcript-of-facebook-live-shooting-aftermath-video/385850431/; Julie Bosman, *After Poised Live-Streaming, Tears and Fury Find Diamond Reynolds*, N.Y. Times (July 7, 2016), available at https://www.nytimes.com/2016/07/08/us/after-poised-live-streaming-tears-and-fury-find-diamond-reynolds.html.

two days after Alton Sterling, an African American man, was shot and killed by police officers in Baton Rouge, Louisiana.[3]

Public protests erupted in the immediate aftermath of Castile's killing. They centered on the Governor's residence near the intersection of Lexington Parkway and Summit Avenue in St. Paul. (T-I, 102-03.) The protests continued uninterrupted for several days, and the number of demonstrators and protesters fluctuated from hundreds to more than ten thousand. (T-I, 103.)

B. The March to Interstate 94.

State and city law enforcement agencies convened an "emergency operation center" to monitor and provide quick government response to the demonstrations. (T-I, 107.) A special investigation unit monitoring social media learned that a group of demonstrators planned on marching to Interstate 94 ("I-94") via Lexington Parkway ("Lexington"). (T-I, 106.) The marchers planned to combine with another group of demonstrators at the Lexington overpass. (T-I, 106.) Law enforcement told demonstrators that they could go anywhere they wanted if they stayed off I-94, and railroad and lightrail tracks. (T-I, 104-05.) Commander Steven Frazer, Chief Deputy of the Ramsey County Sheriff's Department, stated that law enforcement intended to help the protesters "go any place they wanted to go as a peaceful protest." (T-I, 105.) He explained that squad cars were deployed as "rolling road blocks to clear traffic and hold

[3] R. Fausset, R. Pérez-Peña & C. Robertson, *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Review*, N.Y. Times (July 6, 2016), available at https://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html.

the intersections where people were marching in what normally would be an open roadway" in order to ensure the safety of the demonstrators. (T-I, 105.) However, law enforcement had also "pre-positioned" State Troopers and St. Paul Police officers at the tops of the I-94 entrance ramps at Lexington to block marchers from entering the Interstate. (T-I, 111.) The emergency operations center had arranged for Metro Transit buses to be available for transporting arrestees. (T-I, 136.)

Appellant joined the demonstrations at the Governor's residence on July 9 because he learned that a rally was going to take place there. (T-II, 31.) Appellant testified that his purpose for attending was to help heal the community. (T-II, 30.) The march between the Governor's residence and the Lexington overpass began at roughly 7:30 p.m. (T-I, 108.) Protestors, including Appellant, left the Governor's residence and marched approximately one mile to the Lexington and 1-94 overpass. (T-I, 109-110; T-II, 32.) A smaller, separate group of protesters marched toward I-94 from the north. (T-I, 110.) At this time, State Troopers, St. Paul Police officers, and Metro Transit Police officers were stationed in marked squad cars on the overpass. (T-I, 110.)

Most marchers stopped at the entrance ramps to I-94. (T-I, 111.) Some marchers entered the freeway, however. At that moment, eleven vehicles stopped on I-94 east of the Lexington overpass. The drivers locked the vehicles and left them parked in the lanes of traffic, which "brought all vehicular traffic to a halt." (T-I, 112.) Commander Frazer testified that shortly after vehicular traffic was blocked, "literally hundreds and hundreds of people poured on to the interstate in both lanes, both directions," though the majority of the demonstrators were on the eastbound lanes of I-94. (T-I, 114.)

Commander Frazer testified that in the moments that followed, law enforcement implemented a "complex plan" involving "signage, Department of Transportation trucks, State Troopers, [and] St. Paul Police officers to get traffic stopped and diverted off of I-94[.]" (T-I, 114-15.) These efforts succeeded, and I-94 vehicular traffic was completely blocked between the I-94/I-35 interchange near downtown St. Paul and the I-94/Highway 280 interchange near the University of Minnesota. (T-I, 115.) This section of I-94 was not re-opened to vehicle traffic until the early morning hours of the following day. (T-I, 163.)

Appellant was not among the initial group of protestors to enter the freeway. Standing at the overpass, Appellant saw "dozens if not hundreds of people going down on to the interstate[.]" (T-II, 32.) He was not on the freeway when the eleven cars were parked and abandoned. The freeway was already closed in both directions when he arrived at the Lexington and I-94 overpass. Appellant entered I-94 after the second wave of protestors, joining a group of marchers on the westbound lanes. (T-II, 16.) Witness Rachel Mueller ("Mueller"), who was with Appellant during the march, testified that Appellant was "very, very calm" and "consistently smiling[.]" (T-II, 17.) While on the highway, the marchers, including Appellant, were "standing, linking arms [and] singing songs." (T-II, 15.)

C. Police Arrest Demonstrators Marching in the Westbound Lanes.

Police allowed eastbound marchers to proceed down the Interstate, even though their ultimate destination was unknown. (T-I, 117.) During this time, police focused on guiding marchers off the freeway. (T-I, 117.) Police warned protestors through a

loudspeaker that marchers were engaged in an unlawful assembly and told protestors to leave the freeway or face the use of force, including "riot control munitions." (T-I, 118.) The police repeated these messages 30 times. (T-I, 118.) While some marchers in the eastbound lane apparently engaged in violence, the marchers on the westbound lanes did not. (T-I, 122.)

Around 9:30 p.m., police began arresting the westbound marchers. (T-I, 123.) At 9:40 p.m., someone tossed a firework at the police. (T-I, 119.) "[A]lmost instantaneously," some in the crowd began throwing heavy debris at the line of officers in the freeway. (T-I, 119.) Police interrupted the first set of arrests to deal with this confrontation. They resumed arrests in the westbound lanes around 10:30 p.m. (T-I, 123.)

Lieutenant Travis Schaap, who participated in the decision to begin arrests, was on the freeway during the arrests. (T-I, 149.) He testified that the westbound marchers were peaceful. Most stood with "their arms linked together . . . chanting and yelling." (T-I, 150- 51.) Police arrested forty-seven marchers in the westbound lanes "for being on the freeway." (T-I, 153.) Appellant was among these forty-seven arrested marchers. (T-I, 163.) Police arrested him at approximately 11:15 p.m. (*Id.*)

III. Procedural History.

On July 11, 2016 the State of Minnesota filed a Complaint against Appellant charging him on the following counts: (1) riot third degree, under Minn. Stat. § 609.71 subd. 3; (2) public nuisance, under Minn. Stat. § 609.74(2); and (3) unlawful assembly, under Minn Stat. § 609.705(2). On October 21, 2016, Appellant moved to dismiss the

Complaint on First Amendment and Due Process grounds ("Constitutional Law Motion") and argued that the statutes charging Appellant were unconstitutional on their face and as applied to him. (*See* Def's Mem in Supp. Motion to Dismiss on Grounds that Statutes are Unconstitutional Both Facially and As Applied, Doc. 10.) Appellant also moved to dismiss the Complaint for lack of probable cause and moved for a probable cause hearing ("Probable Cause Motion"). (*See* Def's Mem. in Supp. Motion to Dismiss for Lack of Probable Cause, Doc. 9.)

The District Court denied Appellant's Constitutional Law Motion on January 9, 2017, holding that the statutes at issue were constitutional on their face and as applied to Appellant. (Doc. 22; ADD 32.) On January 11, 2017, the District Court granted in part and denied in part the Probable Cause Motion. (Doc. 23; ADD 42.) The Court dismissed the riot third degree charge, but held the remaining two counts, public nuisance and unlawful assembly, were supported by probable cause. (*See id*.)

A jury trial was held before Judge Atwal. On November 29, 2017 a jury found Appellant guilty of public nuisance under Minn. Stat. § 609.74(2) ("Section 609.74(2)" or the "Public Nuisance Statute"), and not guilty of unlawful assembly under Minn Stat. § 609.705(2). (T-III, 2-3.) On the same day, the District Court sentenced Appellant to 90 days in a correctional facility, suspended upon successful completion of one year of probation and a $300.00 mandatory minimum fine plus $86.00 in fees and costs. (*Id.* at 8.)

ARGUMENT

I. SUMMARY OF THE ARGUMENT.

The First Amendment protects our right to protest the public policies and public acts with which we disagree. The ability to exercise this right is the foundation of our democracy, and it is a long, proud part of our civic tradition. Unfortunately, Minnesota's Public Nuisance Statute is at odds with the right to public protest.

Protests often occur in public places such as parks, sidewalks, and roadways. Protests gain power and meaning when held in shared community spaces. The Supreme Court has long recognized this fact of American civic life, and it has been scrupulous about protecting citizens' right to protest in public places.

The Public Nuisance Statute's plain language is so broad, however, it essentially criminalizes being in public. It sweeps up almost all public exercises of protected speech and conduct. Accordingly, it violates the First Amendment on its face and as applied to Appellant.

Further, because the statute's language is so broad, it implicitly delegates to law enforcement the decision of what public presence is lawful and what is illegal. The flip side of this broad delegation is that citizens cannot know ahead of time if the State will consider their conduct legal or illegal. Permitting law enforcement this wide discretion invites arbitrary application of the statute, which is just what happened here. Vague statutes that invite arbitrary enforcement, like this one, violate due process and cannot serve as the basis for a criminal conviction.

Finally, notwithstanding these Constitutional infirmities, the evidence at trial was insufficient as a matter of law to support Appellant's conviction for public nuisance. The evidence failed to show that Appellant individually committed any act of obstruction or interference of a public highway. To the contrary, the evidence at trial demonstrated that the highway was obstructed by other actors—namely, other marchers, motorists who blocked traffic, and the law enforcement agencies who closed the highway prior to Appellant's entry.

For any and all of these reasons, Appellant's conviction must be reversed.

II. THE PUBLIC NUISANCE STATUTE, ON ITS FACE, VIOLATES THE FIRST AMENDMENT.

The district court incorrectly rejected Appellant's contention that the Public Nuisance Statute is facially unconstitutional under the First Amendment. This decision was in error and must be reversed.

A. Standard of Review.

The constitutionality of a statute is a question of law, which this court reviews *de novo*. *State v. Hensel*, 901 N.W.2d 166, 170 (Minn. 2017).

B. The Public Nuisance Statute is Unconstitutionally Overbroad.

The First Amendment guarantees that the government shall "make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. Const. amend. I.[4] A statute is unconstitutional as overbroad under the First

[4] Appellant relies on both the U.S. Constitution and Article I, Section 3 of the Minnesota Constitution, which offers protection no narrower than that offered by the federal First Amendment. *State v. Davidson*, 481 N.W.2d 51, 58 (Minn. 1992).

Amendment if "a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Hensel*, 901 N.W.2d at 170 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). A person may challenge a statute as facially unconstitutional, even if the person's own conduct falls squarely within the statute's constitutionally permissible prohibition, if the statute implicates First Amendment protected speech or conduct. *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998) ("The underlying reason for allowing a defendant to challenge a statute on its face, even when the defendant's own conduct may be constitutionally prohibited, is the potential chilling effect that overbroad statutes have on the exercise of protected speech."); *see Hensel*, 901 N.W.2d at 170. The Public Nuisance Statute is unconstitutionally overbroad and criminalizes a vast amount of protected speech and expressive conduct.

i. The Public Nuisance Statute Implicates Speech and Expressive Conduct Protected by the First Amendment.

In analyzing whether a statute is unconstitutionally overbroad, "the first step is to interpret the statute itself to determine whether it includes protected speech or expressive conduct within its coverage." *Hensel*, 901 N.W.2d at 171.

The Public Nuisance Statute criminalizes any intentional act or omission that "interferes with, obstructs, or renders dangerous for passage, any public highway or right-of-way, or waters used by the public." Minn. Stat. § 609.74(2). It is not facially limited to non-expressive conduct or categories of speech unprotected by the First Amendment.

Indeed, as discussed in more detail below, the terms "right-of-way," "interfere[] with" and "obstruct" do nothing to constrain the types of expressive conduct or speech that might run afoul of the statute. Rather, the statute encompasses nearly every public gathering, including what are commonly considered the core exercises of free speech under the First Amendment: assemblies, rallies, protests, and marches. *See*, *e.g.*, *Hague v. CIO*, 307 U.S. 496, 515 (1939) (stating that public fora "have immemorially been held in trust for the use of the public" for "assembly, communicating thoughts between citizens, and discussing public questions"); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (9th Cir. 2009) ("Public parks and sidewalks 'are uniquely suitable for public gatherings and the expression of political or social opinion.'") (quoting *ACORN v. City of Phoenix*, 798 F.2d 1260, 1267 n.5 (9th Cir. 1986)).

ii. The Public Nuisance Statute Is Facially Overbroad.

The Public Nuisance Statute is facially overbroad because "it . . . prohibits a substantial amount of constitutionally-protected speech." *Hensel*, 901 N.W.2d at 172 (internal quotation marks omitted). Three aspects of Section 609.74(2) demonstrate the statute's overbreadth.

First, the statute's scope is unrestrained because it applies to any "right-of-way" and in "any waters used by the public." A "right-of-way" is "the right to pass through property owned by another." [5] Black's Law Dictionary (10th ed. 2014 ("right-of-way")).

[5] Although other chapters of Minnesota Statutes contain various specific definitions of "right-of-way" or similar phrases, none of these definitions apply to the public nuisance

As members of the public generally have the "right to pass through" all public spaces, nearly any public space can be thought of as a right-of-way. The statute is therefore not limited to paved paths or roadways, as public property takes many forms, such as designated parks, state lands, nature preserves, and lakes and rivers which the public are regularly and freely allowed to use. Indeed, the statute is so broad that it encompasses all public waters as well as public lands. This dimension of the statute by itself raises grave First Amendment concerns as public fora "are uniquely suitable for public gatherings and the expression of political or social opinion." *Long Beach*, 574 F.3d at 1022 (internal quotation omitted).

Second, the statute attaches criminal liability to any intentional act that "interferes with" or "obstructs" a public right-of-way. The statute does not define either "interfere" or "obstruct." The dictionary definitions of these terms confirm, however, that the terms "do not place any meaningful limitation on the statute's scope." *See Hensel*, 901 N.W.2d at 172-73. To "interfere" might encompass being in the way of another person, crossing the path of another person, or even merely affecting some action. *See* Oxford English Dictionary (online) (definition of "interfere, v."). The term "obstruct" is similarly expansive. The common meaning of "obstruct" includes "to block or impede passage along or through (an opening, thoroughfare, waterway, etc.); to place or be an obstacle; to render impassable or difficult passage." Oxford English Dictionary (online) (definition of

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statute. *See, e.g.*, Minn. Stat. §§ 84.787, subd. 10 ("public road right-of-way"), 84.797, subd. 11 (same), 84.92, subd. 6a (same), 169.011, subd. 66 ("right-of-way"), 222.63, subd. 1(b) ("right-of-way"), 237.162, subd. 3 ("public right-of-way").

"obstruct, v."). By these definitions, a person obstructs or interferes by his or her mere physical presence.

Indeed, the plain language of the statute, as well as the case law interpreting it's statutory predecessor, make clear that a person's conduct need not even occur on a public right-of-way in order to constitute a public nuisance so long as the *effect* of the conduct might "interfere with" or "obstruct" a public right-of-way. *See Kelty v. City of Minneapolis*, 196 N.W. 487, 487 (Minn. 1923) (holding that constructing a retaining wall and staircase abutting a sidewalk "will constitute an obstruction to the full and free use of said sidewalk when the same will make possible and probable accumulations of ice and snow by reason of its height and close proximity to such sidewalk.").

Finally, the statute fails to set forth the quantum of interference or obstruction that would trigger criminal liability. Any interference constitutes a criminal nuisance under the statute, no matter how *de minimis* in time or scope. Even the civil law of nuisance, by contrast, requires some heightened showing in order to trigger liability. *E.g.*, *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 803 (Minn. Ct. App. 2001) (holding that an interference with the enjoyment of life or property must be material and substantial to be classified as a nuisance). By contrast, the Public Nuisance Statute imposes no such requirement.

The combined impact of the statute's use of the generic terms "interfere with," "obstruct," and "right-of-way" is a "'criminal prohibition of alarming breadth.'" *Hensel*, 901 N.W.2d at 172 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). The Public Nuisance Statute makes it a crime for a person to stand anywhere in a public park,

on a sidewalk, or in the street. Both the federal and state constitutions prohibit criminalizing such activity. *Stahl v. City of St. Louis, Mo.*, 687 F.3d 1038, 1040 (8th Cir. 2012) ("Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside the frontiers that is a part of our heritage." (quoting *City of Chicago v. Morales*, 527 U.S. 41, 54 (1999)).

There can be no doubt that the statute prohibits a substantial amount of First Amendment protected activities. Prohibited activities include essentially all speech and expressive conduct relating to any topic occurring in nearly any public place. To illustrate, the statute prohibits "spontaneous" demonstrations held in reaction to current events occurring in any public forum, as the mere presence of demonstrators will inevitably obstruct or interfere with others' ability to pass through the space physically occupied by the demonstrators. *See, e.g.*, *Douglas v. Brownell*, 88 F.3d 1511, 1523 (8th Cir. 1996) (recognizing the First Amendment right to spontaneous demonstration); *Long Beach*, 574 F.3d at 1036-38 (same); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 607 (6th Cir. 2005) (same). "Far from providing the 'breathing space' that 'First Amendment freedoms need . . . to survive,' the [Public Nuisance Statute] is susceptible of regular application to protected expression." *City of Houston, Texas v. Hill*, 482 U.S. 451, 467 (1987) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)) (alteration in original).

The indiscriminate nature of the statute assures that it is "violated scores of times every day." *City of Houston*, 482 U.S. at 466-67. It imposes potential criminal liability

on every pair of friends standing on the sidewalk to chat, and on each person pausing on a walking path in a park to check his smartphone. Despite the obvious frequency of violations of the Public Nuisance Statute, "only some individuals—those chosen by the police in their unguided discretion—are arrested." *Id.* The testimony in this case demonstrates that law enforcement was responsible for determining, in its discretion, at what point it would be appropriate to enforce the Public Nuisance Statute. Commander Frazer testified that law enforcement had determined that no arrests would be made if the marchers "stayed on secondary streets," even though marching on secondary streets surely constitutes a public nuisance as defined by Section 609.74(2). (T-I, 104.) It was only after protesters entered I-94 and after allowing protectors to spend over an hour on the Interstate, that law enforcement officials decided to enforce the Public Nuisance Statute. (T-I, 111-112, 123.)

The Supreme Court is clear that it does not satisfy the First Amendment to leave to law enforcement the weighty task of determining whether enforcement of a broad statute would violate individuals' rights. For example, the Supreme Court long ago declared that a law making it a criminal offense "'to stand or loiter upon any street or sidewalk * * * after having been requested by any police officer to move on'" cannot withstand constitutional scrutiny. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) (quoting Birmingham General City Code s 1142). The Court explained:

> Literally read . . . this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer in that city. The constitutional vice of so broad a provision needs no demonstration. It 'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his

> beat.' *Cox v. Louisiana*, 382 U.S. 536, 559 (1965) (separate opinion of Mr. Justice Black). Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears on the hallmark of a police state.

Id. at 90-91. Minnesota's Public Nuisance Statute is even broader than the ordinance quoted above, as its plain terms do not limit its application to "street[s] or sidewalk[s]," and it requires no warning by police before it is violated.

Nor is the Public Nuisance Statute "readily susceptible" to any narrowing construction. Limiting the type of conduct, the quantum of conduct, or the places in which that conduct occurs in order to narrow the application of the statute would all involve either adding to or deleting from the statutory text,[6] and thus "require [the court] to 'perform plastic surgery upon the face of the [statute],' rather than just adopting an alternative reasonable construction." *Hensel*, 901 N.W.2d at 176-77 (quoting *Shuttlesworth*, 394 U.S. at 153). Because Section 609.74(2) is overbroad on its face and is not readily susceptible to any narrowing construction, Appellant's conviction under the statute must be reversed.

C. In the Alternative, the Public Nuisance Statute Represents an Impermissible Time, Place, and Manner Restriction.

The Public Nuisance Statute is not a time, place, and manner restriction. To the extent it attempts to restrict conduct based on the place of that conduct, it fails as it encompasses all public places on land, water and even in the air. Nevertheless, even if

[6] Although the district court did not state that its reasoning relied on a narrowing of the statutory text, it implicitly narrowed the language of the statute by referring exclusively to public nuisances occurring on "highways" and ignoring entirely the phrase "or right-of-way" in the statute. (*See* ADD. 24-25.)

the Court were to analyze the Public Nuisance Statute under the Supreme Court's "time, place, and manner" test for constitutionality, the statute violates the First Amendment.

Under the time, place, and manner doctrine, the government has "very limited" ability to restrict expressive conduct occurring in public fora. *Long Beach*, 574 F.3d at 1022 (citing *Grace*, 461 U.S. at 177). In public fora, "First Amendment protections are strongest and regulation is most suspect." *Id.*; *see also The Coalition to March on the RNC and Stop the War v. City of St. Paul*, 557 F. Supp. 2d 1014, 1020 (D. Minn. 2008). The state cannot restrict speech in a traditional public forum unless it acts in a content-neutral manner, the restriction serves a significant government interest, and the restriction is narrowly tailored and leaves open ample alternative channels for expression. *Hensel*, 901 N.W.2d at 174 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). A statute is narrowly tailored only if it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Hensel*, 901 N.W.2d at 174-75 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) and *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989)). For the same reasons that Section 609.74(2) is unconstitutionally overbroad, it is neither narrowly tailored nor does it leave ample alternative channels for expression.

As discussed in detail above, the Public Nuisance Statute's expansive language means that nearly any activity occurring in public is criminal. The Statute does not preserve individuals' First Amendment rights to engage in political speech, to assemble in public, or to participate in spontaneous demonstrations. The wide range of conduct prohibited by the statute leaves law enforcement free to exercise unfettered discretion in

enforcing it. "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular view.'" *Forsyth Cnty., Ga. v. Nationalist Movement,* 505 U.S. 123, 130-31 (1992) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)).

Moreover, because the Public Nuisance Statute applies to conduct in any "right-of-way"—a term so broad it could include nearly any public space, it does not leave ample alternative channels for communication. The Public Nuisance Statute does not just limit speech and expressive conduct such as public assemblies, leafleting, soliciting, signs and displays, and demonstrations from occurring "at a certain time, in a particular place, or in a specific manner," *Hensel*, 901 N.W.2d at 174, it criminalizes *all* of these modes of expression in any public place at any time. This blanket prohibition on speech and expressive conduct in public cannot withstand constitutional scrutiny.

III. THE PUBLIC NUISANCE STATUTE VIOLATES THE FIRST AMENDMENT AS APPLIED TO APPELLANT.

Even if this Court concludes that Section 609.74(2) is not facially overbroad, Appellant cannot, consistent with the First Amendment, be convicted under the statute. Appellant's core political expression was the basis of the public nuisance charge. By enforcing the statute here, the State criminalized free expression in a public forum in a manner that was not sufficiently tailored to a significant government interest. *See Forsythe Cnty.*, 505 U.S. at 130.

A. Standard of Review.

Appellate courts "review as-applied challenges to the constitutionality of statutes *de novo*." *Newstrand v. Arend*, 869 N.W.2d 681, 687 (Minn. Ct. App. 2015).

B. The State's Enforcement of the Public Nuisance Statute Was Not a Narrowly Tailored Restriction of Expression Protected by the First Amendment.

A criminal conviction must be reversed if it represents an unconstitutional application of the statute. *State v. Bussman*, 741 N.W.2d 79, 95 (Minn. 2007). Because the Public Nuisance Statute punished Appellant's exercise of his First Amendment right to march in protest of injustice in his community, its application to him is unconstitutional and his conviction must be reversed. *E.g.*, *Hensel*, 901 N.W.2d at 181.

The First Amendment protects political marches on public highways, which is a form of expression of singular significance in this country's civic tradition. *See Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 611 ("There is scarcely a more powerful form of expression than the political march.") History shows that some of our most cherished civil rights were secured, in large part, through marches, protests and similar demonstrations. For example, a federal court not only enjoined Alabama police from stopping a civil rights march on U.S. Highway 80 between Selma and Montgomery, it *required* law enforcement to protect the marchers. *Williams v. Wallace*, 240 F. Supp.100, 110 (M.D. Ala. 1965). In doing so, the court relied on the Constitutional right of citizens to "assemble and petition their government . . . by mass demonstrations as long as the exercise of these rights is peaceful. These rights may also be exercised by marching, even along public highways, as long as it is done in an orderly and peaceful manner." *Id.*

at 106; *see also, United States v. Grace*, 461 U.S. 171, 177 (1983) (noting that public forums include "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks")).

Courts have recognized that political marches, as distinct from other forms of demonstration, carry particular expressive value:

> [u]nlike stationary demonstrations or other forms of pure speech, the political march is capable of reaching and mobilizing the larger community of citizens. It is intended to provoke emotive and spontaneous action, and this is where its virtue lies. As it progresses, it may stir the sentiments and sympathies of those it passes, causing fellow citizens to join in the procession as a statement of solidarity.

Am.-Arab Anti-Discrimination Comm., 418 F.3d at 611. And as Justice Harlan observed in *Shuttlesworth*, the timing of a political march is often an integral element of its expressive value because "when an event occurs, it is often necessary to have one's voice heard promptly if it is to be considered at all." *Shuttlesworth*, 394 U.S. at 163 (Harlan, J., concurring); *see also N.A.A.C.P., Western Region v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984) ("[S]imple delay may permanently vitiate the expressive element of a demonstration.")

In this case, Appellant was arrested "for being on the freeway." (T-I, 153.) When the State acts to restrict expression because of *where* the expression occurs, it may be reviewed under the Supreme Court's "time, place, and manner" test for constitutionality. [7] *See Hensel*, 901 N.W.2d at174. Under the time, place, and manner doctrine, the State

[7] However, as set forth above, Appellant contends that the nearly unlimited breadth of the Public Nuisance Statute means that the statute, on its face, cannot be fairly characterized as a "time, place, and manner restriction." See Part II(C) *supra*.

must show that its action was content neutral, narrowly tailored towards a significant government interest, and leaves open sufficient alternative means of expression. *Id.* (citing *Clark*, 468 U.S. at 293), *Phelps-Roper v. Koster*, 713 F.3d 942 (8th Cir. 2013) (State bears burden).

At trial, the State maintained that Appellant was not arrested because of the content of his message.[8] Instead, the State maintained at trial that keeping marchers off the Interstate was necessary to ensure the safety of marchers and motorists. (*See* T-I, 105.) *See McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014) (the State has a legitimate interest "in ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks"). Taking these factors as true, however, does not save the State from First Amendment scrutiny in this case. The narrow tailoring requirement prohibits the state from restricting "expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). For several reasons, the State cannot meet that burden.

[8] Though there was no direct testimony that the marchers' message itself was the reason the arrest decision was made, the state's key witness, Commander Frazer, testified that he held a dim view of the marcher's message: "A lot of chanting. A lot of anti-government statements. A lot of what I would call hate speech towards either law enforcement or white people." (T-I. 113:15-17.) The First Amendment prohibits the state from enforcing a content-neutral time, place, and manner restriction with a content-based purpose. *See Holder v. Hum. Law Project*, 561 U.S. 1, 28 (2010) (stating that *Cohen v. California*, 403 U.S. 15, 18-19 (1971) held unconstitutional the use of a content-neutral breach of peace statute to punish a protester for wearing a "F--k the Draft" jacket in courthouse)); *see also Long Beach*, 574 F.3d at 1024 (noting that "an improper censorial motive is sufficient . . . to render a regulation content-based.").

First and foremost, the State's enforcement of Section 609.74(2) cannot be justified under the actual facts of this case. *See Coalition to March*, 557 F. Supp. at 1022 (noting that the time, place, and manner analysis is a necessarily fact-specific inquiry.) Commander Frazer himself testified that traffic had been entirely blocked by motorists who, apparently sharing in the marchers' message, "brought their cars to a halt, parked them across the lanes, and abandoned them[.]" (T-I, 112.) Moreover, as the march moved onto the highway, the state had taken extensive measures allow the march to proceed in a safe manner. (T-I, 117 ("Q: As the incident commander, did you allow the marchers to proceed eastbound even though you didn't know what their final location or destination was? A: I did.").)

Indeed, by the time the decision to arrest was made, traffic on the Interstate had been halted for several hours and law enforcement had closed the freeway completely. (T-I, 115.) Having done so, the State cannot now maintain that enforcing the Public Nuisance Statute against Appellant was a narrowly tailored means of achieving public safety. To the contrary: silencing Appellant's expressive conduct, protest chants, and songs, by arresting him on a closed public highway was a "club" when the First Amendment requires a "scalpel." *ACT-UP v. Walp*, 755 F.Supp. 1281, 1290 (M.D. Pa. 1991). Where the record shows that the State's purported interest is not in fact advanced by its restriction on free expression, the narrow tailoring requirement is not satisfied. *See id.* (prohibiting public access to legislative chamber to protect legislative decorum violated First Amendment); *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699, 705 (N.D. Miss. 2010) (cancelling high school prom to prevent female student from

communicating message by wearing a tuxedo and bringing same-sex date violated First Amendment), *Thomasin v. Jernigan*, 770 F. Supp. 1195, 1200 (E.D. Mich. 1991) (closing public right-of-way around abortion clinic had unconstitutional effect of silencing anti-abortion protestors and thus violated First Amendment).

Second, the State's chosen means of restriction must leave sufficient alternative means of expression. *Hensel*, 901 N.W.2d at 174. Though courts consider several factors important to the alternative means analysis, an "alternative is not ample if the speaker is not permitted to reach the intended audience." *Long Beach*, at 1025. The alternatives may not foreclose the opportunity for a speaker to engage in spontaneous demonstrations held in reaction to current events, as the march in this case was. *Id*.; *see also Douglas v. Brownell*, 88 F.3d 1511, 1523 (8th Cir. 1996); *Am.-Arab Anti-Discrimination Comm.* 418 F.3d at 606; *Church of Am. Knights of Ku Klux Klan v. City of Gary, Indiana*, 334 F.3d 676, 682 (7th Cir. 2003); *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994); *Vocak v. City of Chicago*, 639 F.3d 738, 749 (7th Cir. 2011). Moreover, it is possible that no alternative location for a march is adequate if the location of the march is integral to its message. *Long Beach*, at 1025.

The State's testimony at trial suggested that it gave Appellant and his co-marchers the opportunity to use side streets for their march. That misses the point. Relegating the march to the quiet side streets of St. Paul would have rendered it incapable of "reaching and mobilizing the larger community of citizens." *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 611. Simply put, the march would have been unable to provoke the type of "emotive and spontaneous action" that the marchers intended—which is precisely

"where [the political march's] virtue lies." *Id.* And, importantly, the march would have been deprived of its symbolic location, I-94, which itself evokes the painful history of racial segregation and injustice in the City of St. Paul.[9] *See Galvin v. Hay*, 374 F.3d 739, 752 (9th Cir. 2004) ("[T]here is a strong First Amendment interest in protecting the right of citizens to gather in traditional public forum locations that are critical to the content of their message.").

Because the application of the Public Nuisance Statute against Appellant in this case is not narrowly tailored to advance the State's interest and did not leave open an adequate alternative for Appellant to reach his intended audience, his conviction violated his First Amendment rights and must be reversed.

IV. THE PUBLIC NUISANCE STATUTE IS UNCONSTITUTIONALLY VAGUE.

The district court's determination that the Public Nuisance Statute does not violate the void-for-vagueness doctrine was in error and should be reversed. A challenge to the constitutionality of a statute under the void-for-vagueness doctrine is a question of law reviewed *de novo. Bussmann*, 741 N.W.2d at 83.

[9] In building I-94 during the 1960s, the State demolished St. Paul's Rondo neighborhood, which at that time was St. Paul's largest African American neighborhood. The racial injustices caused by I-94's placement are well documented: "[t]he construction of I-94 shattered this tight-knit community, displaced thousands of African Americans into a racially segregated city and a discriminatory housing market, and erased a now-legendary neighborhood." Minnesota Historical Society, *Rondo Neighborhood & I-94: Overview*, available at http://libguides.mnhs.org/rondo. In 2015, the Minnesota Department of Transportation and the Mayor of St. Paul issued a formal apology for the destruction of "this once vibrant community." Allen Costantini, *Rondo neighborhood gets apologies for I-94*, USA Today (July 17, 2015) available at https://www.usatoday.com /story/news/local/2015/07/17/rondo-apologies-zelle-coleman/30328463/.

"Vague penal statutes are prohibited as a violation of due process" under the Fifth and Fourteenth Amendments. *Dunham v. Roer*, 708 N.W.2d 552, 567 (Minn. Ct. App. 2006). To survive a due process challenge, statutes that impose criminal penalties must contain a "higher standard of certainty" than noncriminal statutes. *Id.* "[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Bussmann*, 741 N.W.2d at 83 (internal quotation marks omitted) (quoting *Kolender v. Lawson*, 46 U.S. 352, 357 (1983)). The standard is even stricter in the context of the First Amendment: "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Button*, 371 U.S. at 433.

Thus, a penal statute can violate the void-for-vagueness doctrine in two ways: (1) "if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute"; or (2) "if it authorizes or encourages arbitrary and discriminatory enforcement." *State v. Ness*, 819 N.W.2d 219, 228-29 (Minn. Ct. App. 2012) (citing *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985)). The Public Nuisance Statute fails both tests.

"[P]ersons of common intelligence must not be left to guess at the meaning of a statute nor differ as to its application." *Newstrom*, 371 N.W.2d at 528 (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1925)). As discussed above, the Public Nuisance Statute does not define what acts might "interfere[] with" or "obstruct." Nor does the statute provide a definition of the term "right-of-way."

Section 609.74(2) does not explain under what circumstances an interference with or obstruction of a right-of-way is criminal. For example, the statute provides no guidance regarding whether the following situations fall to the level of criminal conduct: a group of friends walking shoulder-to-shoulder on a sidewalk, a person who uses a wheelchair moving slowly on an icy sidewalk, two people discussing current events as they cut across a grassy area in a park, a person reciting poetry while standing on a street corner. It particular, the statute is unclear regarding the quantum of that is criminal. Thus, the statute does not define criminal conduct with enough specificity that persons of common intelligence need not guess at the statute's meaning or differ as to the application of the statute.

The Eighth Circuit has struck down an ordinance that prohibited "impeding" another person's movement as unconstitutionally vague. *Stahl*, 687 F.3d at 1041. The court explained that criminal prohibitions which condition liability on the impact of a person's conduct on third parties, fail to "provide people with fair notice of when their actions are likely to become unlawful." *Stahl*, 687 F.3d at 1041. The Court emphasized that First Amendment interests are particularly weighty when they are implicated by a vague statute:

> The fact that a person only violates the ordinance if his or her action evokes a particular response from a third party is especially problematic because of the ordinance's chilling effect on core First Amendment speech. A law's failure to provide fair notice of what constitutes a violation is a special concern where laws abut upon sensitive areas of basic First Amendment freedoms because it *inhibits the exercise of freedom of expression and inevitably leads citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.*

Id. (emphasis added) (quotations and alterations omitted).

Like the ordinance in *Stahl*, Section 609.74(2) is too nondescript to give a speaker fair notice as to when his conduct rises to an interference or obstruction. As a result, the speaker has no choice but to refrain from speaking or risk prosecution. That is the essence of impermissible speech-chilling.

Moreover, the Public Nuisance Statute invites arbitrary and discriminatory enforcement because it "lacks adequate standards restricting the discretion of the governmental authority that applies it." *Ness*, 819 N.W.2d at 228 (citing *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966); *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974)). As discussed above, the Public Nuisance Statute fails to define its key component parts and lacks any express language limiting what conduct might merit criminal enforcement. Accordingly, police, prosecutors, judges and jurors will be "free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio*, 382 U.S. at 402-03.

The facts of this case attest to the grave Constitutional concerns that arise when a vague statute permits arbitrary enforcement by the State. At several points throughout the evening of July 9, 2016, law enforcement enjoyed and utilized complete discretion regarding when to enforce or not enforce the Public Nuisance Statute. For example, law enforcement determined that it would permit marching on secondary streets (even though marching on secondary streets certainly violates the statute), but would not permit marching on train tracks, the highway or on the lightrail tracks. (T-I, 104-05.) Similarly, once marchers entered I-94, officials decided that the marchers would be permitted to

march eastward for nearly a mile on the Interstate before arrests would be made. (T-I, 117.) By contrast, marchers in the westbound lanes were subject to arrest. (*See* T-I, 150.) Laws permitting this type of arbitrary enforcement have no place in our Constitutional system, as they "provide [not] for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." *Shuttlesworth*, 82 U.S. at 90-91.

Because the Public Nuisance Statute fails to give a person of ordinary intelligence fair notice of what is prohibited and because it authorizes arbitrary and discriminatory enforcement, it is unconstitutionally vague on its face and Appellant's conviction under the statute cannot stand.

V. APPELLANT'S CONVICTION IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

A. Standard of Review.

When reviewing a challenge to the sufficiency of the evidence, an appellate court must view the evidence in the light most favorable to the verdict and assume the jury disbelieved any conflicting testimony. *State v. Daniels*, 361 N.W.2d 819, 826 (Minn. 1985). In making its determination, the appellate court must conduct a "painstaking analysis of the record[.]" *State v. Otterstad*, 734 N.W.2d 642, 645 (Minn. 2007.) Generally, a reviewing court will not disturb a guilty verdict if, based on the evidence in the record, a jury acting with due regard for the presumption of innocence and the necessity of overcoming it by proof beyond a reasonable doubt could reasonably conclude that the defendant was guilty of the charged crime. *State v. Pierson*, 530

N.W.2d 784, 787 (Minn. 1995). When careful scrutiny of the record creates grave doubt as to a defendant's guilt, however, the interests of justice and the rights of the accused require the appellate court reverse the conviction. *See State v. Formo*, 416 N.W.2d 162, 165 (Minn. Ct. App. 1987); *see also State v. Langteau*, 268 N.W.2d 76, 77 (Minn. 1978); *State v. Boyce*, 170 N.W.2d 104, 115 (Minn. 1969).

B. The Trial Evidence Does Not Support Appellant's Conviction.

The Due Process Clause of the Fourteenth Amendment requires the State to prove every fact necessary constitute the crime with which the defendant is charged. *Otterstad*, 734 N.W.2d at 645 (citing *In re Winship*, 397 U.S. 358, 364 (1970). Thus, an appellate court should vacate a conviction if the crime charged does not reach a defendant's conduct. *Id.* at 647. In order to survive a sufficiency challenge, the facts, taken in the light most favorable to the State, must establish each element of the offense. *See Otterstad*, 734 N.W.2d at 645. For example, in *Otterstad*, the Minnesota Supreme Court held that the convictions under a different subsection of the Public Nuisance Statute could not stand because the State's evidence did not establish that the defendants' conduct "endangered members of the public" as required by the statute. *Id.* at 645-46. In that case, defendants hung large, graphic signs above a freeway during rush hour to protest abortion, which the State alleged caused a traffic safety hazard because of the "gawker effect." The defendants were convicted of a public nuisance, but the Court vacated their conviction, noting that there was no evidence that established a nexus between the defendant's actions and the claimed interference and safety risk. Rather, the

court noted that the "gawker effect" was the result of the police investigation, not the defendant's signs. *Id*. at 646.

Further, guilt by association is not enough. Evidence must connect the individual defendant to the crime. In *State v. Johnson*, 163 N.W.2d 750 (Minn. 1968), the Minnesota Supreme Court held that even "where the record fairly establishes a pattern of wrongful conduct by defendants as a group," a conviction cannot be sustained if the evidence does not show that the individual defendant had committed acts supporting the charge. *Id.* at 755. In that case, the Court therefore reversed the defendant's conviction under a breach of the peace statute in connection with anti-Vietnam war protests that blocked a busy intersection in downtown Minneapolis. *Id*., at 751. The Court admonished that "it must be kept in mind that the defendants are not charged with a conspiracy. We must examine the record as it bears upon the wrongful conduct of the individual defendants separately charged with a breach of the peace." *Id.*

The testimony in this case, even viewed in the light most favorable to the State, does not establish that Appellant personally caused any "obstruct[ion]" or "interfere[nce]" with I-94, as Section 609.74(2) requires. The trial testimony established, instead, that the obstruction of traffic on I-94 was caused by several different factors that had nothing to do with Appellant. First, an early wave of marchers blocked traffic before Appellant entered the highway. (T-II, 32 (by the time Appellant arrived at the overpass, there were "dozens if not hundreds of people going down on to the interstate[.]").) Second, by the time Appellant entered the highway, "all vehicular traffic" had been brought to a halt by eleven cars that had been parked on the highway and abandoned. (T-

I, 112.) Third, law enforcement itself closed the stretch of I-94 between Highway 280 and downtown St. Paul. (T-I, 163; *see also* T-II 22 (testimony of Mueller that traffic had been obstructed by "the line of police officers . . ., so my body specifically was not obstructing anybody").)

Although the trial testimony may have established that traffic on I-94 was obstructed, no testimony indicated that Appellant caused the obstruction or that he personally interfered with traffic. If Appellant had been safe at home that night, the freeway would still have been closed.

Thus, the trial evidence does not support a conviction that Appellant obstructed or interfered with traffic on the highway because it does not establish "wrongful conduct committed by [the] defendant individually[.]" *Johnson*, 163 N.W.2d 755.

CONCLUSION

For the reasons forgoing, Appellant respectfully requests this Court the vacate his conviction under Section 609.74(2) as the statute violates the First Amendment, both on its face and as-applied to Appellant, violates principles of Due Process, and because his conviction is not supported by sufficient evidence.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Crim. P. 28.02 subd. 10 and Minn. R. Civ. App. P. 132.01, subdiv. 3(a). This brief was prepared using Microsoft Word Version 12.0 in 13-pt. proportional font, which reports that the brief contains 8, 659 words, which excludes the table of contents, table of authorities, and written addenda.

Dated this 11th day of May, 2018.

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