District Court, El Paso County, State of Colorado 270 South Tejon Street Colorado Springs, CO 80903-2203 Phone Number: (719)452-5000	DATE FILED: November 2, 2021 4:59 PM CASE NUMBER: 2021CV30854
Plaintiff-Appellant: PEOPLE OF THE STATE OF COLORADO, v. **Defendant-Appellee:** MOLLY NICOLE AVION.	▲ **COURT USE ONLY** ▲
Appeal from County Court El Paso County, Division F Honorable Stephen Sletta, Senior Judge Case Number 2020M5253	Case Number: 2021CV30854 Div.: 16 Ctrm.: S370

ORDER ON APPEAL FROM COUNTY COURT

STATEMENT OF THE CASE

This matter is on appeal from the county court's ruling that the obstructing a highway or passageway state statute found at C.R.S. 18-9-107(1)(a) is unconstitutionally vague. Based upon this finding, the court dismissed the case against the defendant. A variety of other arguments were made by the defendant in her motion and at the hearing on the matter. While the county court declined to address those, this court will do so as they are constitutional issues of significant public importance which may be raised for the first time on appeal.

FACTS

A hearing was held before the county court in which a Colorado Springs Police Officer involved in the investigation of the case was called as a witness. The salient facts provided by the witness are as follows:

On Tuesday June 30, 2020, between 6:00 and 7:30 p.m., 50-60 protesters and a number of automobiles blocked the northbound lanes on Interstate 25 just north of the Bijou exit in Colorado Springs. According to the officer, the protestors milled about the highway on the north lanes of traffic shielded by several vehicles which served as a barrier between northbound traffic and the protestors. The defense conceded the defendant was one of the persons who drove a vehicle onto the interstate to assist in creating the barrier of vehicles.[1]

According to the officer, the ensuing traffic jam was a "significant traffic blockage" which fully blocked all three lanes of traffic and went back to the previous exit. During the blockage, some protestors went among the stopped vehicles speaking to the drivers and there was at least one "heated argument" and one instance of a vehicle being damaged. The officer testified to some cars attempting to extricate themselves from the morass by somehow being able to wiggle their vehicles around and attempting to drive the wrong way through the snarled traffic thereby creating what he perceived as a safety issue.

At first, there were a limited number of officers on scene. These officers rerouted the vehicles off the interstate in an effort to detour around the blockage. After about an hour and 15 minutes, a supervisory lieutenant arrived at the scene and walked down to speak to the protestors who began to disperse shortly thereafter.

Over the course of the next three weeks, law enforcement viewed video footage from two television stations and various social media outlets in which witnesses and participants posted the experience. From this information, a number of people were identified who took part in the protest

[1] The defense says in its factual representations in its brief that the defendant "found" herself first at a *Black Lives* protest near the county government building some blocks away from the interstate and when protestors began walking down the ramp onto the interstate "she and others with vehicles then drove onto I-25 to shield the protestors from oncoming traffic". The record reflects the defendant acknowledges intentionally blocking the interstate as part of the protest. There is no record regarding her motives in blocking the interstate or whether she was somehow swept into the protest against her will.

on the interstate. Law enforcement then cited a number of people under the obstruction statute referred to above. The defendant was included in those cited and was the first to be actually prosecuted. The defense has advised that there may be as many of 14 such cases pending in El Paso County.

STANDARD OF REVIEW

Appeals from final judgments and decrees of the county courts shall be taken to the district court for the judicial district in which the county court entering such judgment is located. C.R.S. § 13-6-310(1). Appeals shall be based upon the record made in the county court. *Id.* The district court shall review the case on the record on appeal and affirm, reverse, remand, or modify the judgment, except that the district court, in its discretion, may remand the case for a new trial with such instructions as it may deem necessary, or it may direct that the case be tried de novo before the district court. C.R.S. § 13-6-310(2). Further appeal to the supreme court from a determination of the district court in a matter appealed to such court from the county court may be made only upon writ of certiorari issued in the discretion of the supreme court and pursuant to such rules as that court may promulgate. C.R.S. § 13-6-310(4).

Whether a statute is constitutional is an issue that is reviewed de novo on appeal. *Hinojos-Mendoza v. People*, 169 P.3d 662, 688 (Colo. 2007). Statutes are presumed constitutional and a party challenging constitutionality has the burden of showing that the statute is unconstitutional beyond a reasonable doubt. *People v. Mojica-Simental*, 73 P.3d 15, 18 (Colo. 2013). Whenever possible, a statute should be construed in a manner that will not render it unconstitutional. *Powell v. City of Colorado Springs*, 131 P.3d 1129,1134 (Colo. App. 2005).

The court notes that the People's appeal only addresses the issues of whether the statute is an infringement of Ms. Avion's First Amendment rights as applied to her and whether the statute

on its face is unconstitutionally vague. The defense responsive brief, as well as the initial motion filed in the trial court, goes beyond those two issues and requests dismissal on grounds that the statute is overbroad on its face; fails under the Colorado Constitution, even if it survives the First Amendment challenge; and alleges the District Attorney engaged in selective and vindictive prosecution in this case.

Although the county court did not address these matters, they are all constitutional issues which were raised below with some degree of record provided to support each argument. As a matter of judicial economy and efficiency, the court will address each of those issues as requested by the defense on this appeal. In that regard, the court requested the People provide further briefing on the additional issues which were not addressed by the county court and have been re-raised by the defense on this appeal. The People's reply has now been filed.

ANALYSIS

(First Amendment-Public Forum)

This Court agrees with the People that C.R.S. § 18-9-107.[2] ("The Statute") does not infringe on the Defendant's First Amendment rights as applied to her. C.R.S. § 18-9-107 states in pertinent part:

> (1) An individual or corporation commits an offense if without legal privilege such individual or corporation intentionally, knowingly, or recklessly:
>
> > (a) Obstructs a highway, street, sidewalk, railway, waterway, building entrance, elevator, aisle, stairway, or hallway to which the public or a substantial group of the public has access or any other place used for the passage of persons, vehicles, or conveyances, whether the obstruction arises from his acts alone or from his acts and the acts of others …
>
> (2) For purposes of this section, "obstruct" means to render impassable or

[2] The Colorado Statute has been drafted in substantial compliance with section 250.7 of the Model Penal Code which also utilizes the undefined exception of "legal privilege".

to render passage unreasonably inconvenient or hazardous.

This Court disagrees with the county court's finding that the travel lanes of an interstate highway are traditional public forums. A traditional public forum, includes places which "'have immemorially been held in trust for the use of the public and ... have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Lewis v. Colorado Rockies Baseball Club, Ltd*., 941 P.2d 266, 272 (Colo.1997). Thus, public places "historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'" *Id.* A public forum is not created "whenever members of the public are permitted freely to visit a place owned or operated by the Government." *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992). Publicly owned or operated property does not become a "public forum" simply because members of the public are permitted to come and go at will. *U.S. v. Grace,* 461 U.S. 171, 177 (1983).

In *Cuffley v. Mickes*, 44 F.Supp.2d 1023, 1027 (E.D. Mo.1999), the court stated that "the shoulders of interstate highways are not traditional public fora, such as parks and street corners where people have traditionally gathered to present, share and exchange ideas." The court classified them as nonpublic forums. *Id.* In *Crocker v. Beatty*, 995 F.3d 1232, 1242 (11th Cir. 2021), the court stated that "needless to say, I-95's median isn't a public forum of any stripe." If the shoulder and the median of an interstate highway are not public forums, it goes without saying that the travel lanes of an interstate highway would also not be a traditional public forum.

In *State of Mo. ex rel. Missouri Highway and Transp. Com'n v. Cuffley*, 927 F. Supp. 1248, 1257 (E.D.Mo.1996), the court stated:

> This Court must disagree with the Arkansas District Court, for the Court does not find that a state highway right-of-way constitutes a forum which

> has been "devoted to assembly and debate" or which has been used for "purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry*, 460 U.S. at 45, 103 S. Ct. at 954–955. The Court agrees with the Commission that it is difficult to imagine a location less suited for an exchange of ideas than the shoulder of an interstate highway. The forum here is not the traditional park or street corner where people routinely convene to exchange ideas, but instead four, six or eight-lane highways with vehicles often traveling in excess of fifty-five miles an hour. People have never traditionally convened on highway rights-of-way to exchange ideas.

Because whether an area is classified as a traditional public forum is not based simply on the fact that it is open to the public, and because an interstate highway is not a place that has traditionally been used for purposes of assembly or exchanging ideas, it does not fit the definition of a "traditional public forum". An interstate highway would also not be a "designated public forum property" which consists of government property that has been opened to the public as a place for expressive activity ("designated" for expressive activity). *See Lewis* at 272. As such, this court concludes that an interstate highway is a nonpublic forum, or at the very least, public property that "is not by tradition or designation a forum for public communication." *Id*. at 273. Limitations on expressive activities in a non-public forum "need only be reasonable as long as the regulation is not an effort to suppress the speaker's activities due to disagreement with the speaker's views." *Id.* Furthermore, with respect to public property that is not by tradition or government designation a forum for public communication, a state may reserve the use of the property for its intended purposes. *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

In the case of an interstate highway, the purpose is one of travel and the movement of goods and people from place to place. The defendant argues that expressive conduct such as bumper stickers on the back of vehicles represents the exchange of ideas on an interstate highway. However, those people are not "gathering" in the travel lanes of the interstate highway for the

purpose of exchanging ideas, they are in their separate vehicles traveling at high rates of speed for the purpose of traveling from place to place. Also, having a bumper sticker on the back of a vehicle while driving on the interstate is hardly interfering with the highway's intended purpose, nor is it obstructing the interstate in any meaningful way. The statute, which seeks to prohibit intentionally, knowingly or recklessly obstructing public areas (such as an interstate highway) is certainly reasonable to ensure public safety, and the language of the statute does not show any effort to suppress activity due to a disagreement with a particular viewpoint.

The Defendant cites to *Thunderhawk v. County of Morton*, 483 F.Supp.3d 684 (D. N.D. 2020) as an example of a highway being found to be a traditional public forum. However, the highway in that case was a rural highway not a busy interstate highway. Also, the protesters did not seem to be protesting in the travel lanes of that highway causing an obstruction. The protesters in that case utilized the highway's wide curtilage as a place for assembly, and that area had long been open to the public for, among other things, use as a thoroughfare, and that could be (and routinely was) visited safely without impeding or disrupting traffic. In the present case, the protesters were in the travel lanes of the interstate – at a time typically recognized as "rush hour" – and not off to the side. Moreover, no evidence was presented that this area (especially not the travel lanes) has long been open to the public for these types of uses, and they certainly could not be utilized safely without disrupting traffic. Finally, the court in *Thunderhawk* did not ultimately decide the issue of whether the highway in question was a traditional public forum. The court merely found that on a motion to dismiss for failure to state a claim, there was sufficient evidence to plausibly allege that it could be a traditional public forum so as to survive the motion to dismiss.

(First Amendment-Content Neutral)

Even if this court were to assume that the travel lanes of an interstate highway are a

traditional public forum, the statute in this case would still be upheld. As will be discussed in more detail below, this court finds the statute to be content-neutral. In a traditional public forum, content-neutral restrictions of free speech are considered reasonable time, place, and manner regulations if they are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. *Lewis* at 272. Prohibiting intentionally, knowingly or recklessly obstructing areas such as an interstate highway is narrowly tailored. Narrow tailoring does not mean that the regulation must be the least restrictive alternative. *Denver Pub. Co. v. City of Aurora*, 896 P.2d 306, 314 (Colo.1995). In this case, the statute "is not substantially broader than necessary" to promote the significant interest in traffic safety, and thus, is sufficiently narrowly tailored. *See Denver Pub. Co.* at 314-315.

The statute in this case also serves a significant government interest. "We recognize that the City has a significant interest in regulating traffic flow on its streets." *Id.* at 313. The nature of city streets and the safety concerns inherent in pedestrian-automobile contact support the conclusion that the governmental interest at stake is indeed significant. *Id.* The government has the constitutional power to regulate obstructions in the roadway and preventing obstructions in the roadway furthers an important or substantial governmental interest. *Lauderback v. State*, 789 S.W.2d 343, 347 (Tex.App.1990).

If these types of safety concerns are significant on city streets, they would be even more significant on an interstate highway where the speeds involved can make pedestrian-automobile contact exponentially more catastrophic. Finally, there is no evidence in the present case to suggest that ample alternative locations were not available to exercise First Amendment rights other than in the middle of the travel lanes of an interstate highway obstructing the flow of extremely fast-moving traffic. There are plenty of other public areas available for exercising First Amendment

rights which could have been utilized without creating an obstruction and some of those are reflected in the defense brief.

This court disagrees with the county court's finding that the statute is content based. The principal inquiry in determining if a statute is content based against … is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The government's purpose is the controlling consideration. *Ward* at 791. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. *Id*. at 791. Government regulation of expressive activity is content-neutral so long as it is "justified without reference to the content of the regulated speech." *Id*. A restriction is content-neutral when it limits "where some speech may occur," rather than the right to speak. It is not content-neutral when it prohibits or limits the expression of specific viewpoints or topics. *Saint John's Church in Wilderness v. Scott*, 194 P.3d 475, 483 (Colo.App.2008). The government may, by statute or ordinance, impose content-neutral restrictions on communicative activity if the restrictions are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication. *Scott* at 482.

In the present case, the language of the statute does not give preference to any particular message and it does not limit the expression of any specific viewpoint or topic. While the statute can certainly have some effect on speech and assembly, such an effect is incidental when considering the context and goals of the statute when weighed against free speech and assembly rights. The statute does not limit the right to speak, and the purpose of the statute is clearly related to public safety unrelated to the content of expression. The Defendant argues that because the statute was adopted during the turbulent 1960's and 1970's it was "likely" adopted to target

protesters during the Vietnam War and Civil Rights Movement. However, no evidence has been presented to suggest such a purpose other than pure speculation and the timing of historical coincidence.[3]

Even if we were to assume that the statute could have potentially been adopted for such a purpose, no evidence has been presented to suggest that the legislature intended to restrict a particular message, viewpoint, speaker, or group. In *Bischoff v. Florida*, 242 F.Supp.2d 1226, 1235 (M.D. Fla.2003), a similar obstruction statute was found to be content based because on its face, the language "prefers the viewpoints expressed by registered charities and political campaigners by allowing ubiquitous and free dissemination of their views, but restricts discussion of all other issues and subjects." In the present case, no similar language favoring any particular group or viewpoint is present in the statute.

As implied by the county court, the presence of the phrase "legal privilege" does not alone make the statue content based. While "legal privilege" is not specifically defined, within the context of this particular statute it clearly refers to some type of permission or authority. Having "legal privilege" has to do with the circumstances under which a highway can be lawfully obstructed, however, those circumstances do not appear to have anything to do with a specific message, viewpoint or opinion. It would be quite a stretch to read "legal privilege" in the context of the statute to mean that without having a particular viewpoint, message or opinion, you cannot obstruct a highway. The county court apparently assumed that all permitting processes which may

[3] The county court's opinion seems to insert the court's personal opinion about the genesis of the obstruction statute at the bottom of the first page. This opinion was reiterated during oral argument and neither the court or the defense provides any authority or citation for the opinion that the obstruction statute had its origin form "the 1960's and 1970's"..."which was a time of earlier protests over the United States' involvement in the Vietnam War and Civil Rights Movement". The county court also observes that certain amendments have coincided with other social issues such as demonstrations at funerals in the early 2000's. Specifically, *The Right to Peace Act*, which was adopted in May 2006 which caused such activity to be restricted by statute (C.R.S. § 18-9-125). To the extent the county court may be implying that the statute at issue in this case was intentionally designed to quash certain demonstrations on a content basis, this court must decline to find there is any support in the record for such findings.

fall under the privilege exception are de facto, *not* content neutral. There is no record or legal support for such a conclusion as neither the defense or the court identify a specific ordinance or statute which would fail the content neutrality test.

The defendant also uses an example to argue that because law enforcement would have to read a sign indicating that a highway is closed due to construction in order to determine whether construction workers have "legal privilege" to be obstructing the highway, the statute is content based. The defense misconstrues the meaning of content neutrality within a constitutional analysis. A similar argument was made in *Hill v. Colorado* in support of the position that a statute should be found to be content based. The supreme court stated that it has never held that it is improper to look at a statement's content in order to determine whether a rule of law applies to a course of conduct. *Hill v. Colorado*, 530 U.S. 703, 704 (2000). Such an examination of a construction crew's signage in order to determine whether the statute applies does not make the statute itself content based.

(Overbreadth)

This court further finds that the statute is not overbroad. A statute is overbroad if "it sweeps within its reach constitutionally protected, as well as unprotected, activities." *People v. Stotz* 381 P.3d 357, 369 (Colo.App.2016). "A penal statute is ... said to be overbroad if it prohibits activity that is legitimate, in the sense that it cannot be proscribed by exercise of the state's police power." *Stotz* at 369. The proscription of an act is within the state's police power if it is reasonably related to a legitimate governmental interest, such as the protection of the public health, welfare, and safety. *Id.* To succeed on an overbreadth challenge, a litigant must show that the overbreadth of the statute is both real and substantial, judged in relation to the statute's plainly legitimate sweep. *People v. Graves*, 368 P.3d 317, 323 (Colo. 20). Unless the statute reaches a substantial amount

of constitutionally protected conduct, the overbreadth challenge must fail. *Graves* at 324. The "mere fact that one can conceive of some impermissible applications of a statute" is not sufficient to invalidate it on grounds of overbreadth. *Id*. Because its application results in the facial invalidation of a statute, the overbreadth doctrine is "strong medicine" that is employed "only as a last resort." *Id.* at 323.

Contrary to the defendant's contentions, the statute does not prohibit "gathering" nor does it criminalize "mere presence" in certain public areas. Also, despite the Defendant's arguments to the contrary, the statute's plain language does not criminalize First Amendment activities such as protests. The plain language of the statute prohibits only *obstructing* certain public areas – and not only obstructing, but to rise to the level of a violation, one must knowingly, intentionally or recklessly cause the obstruction. In other words, the statute allows for gathering, assembling or protesting in these public areas as long as one is not knowingly, intentionally or recklessly obstructing those areas. First Amendment activities in these areas are plainly permitted by the statute as long as the activities do not rise to the level of preventing others from exercising their rights to use or access these same public areas.

While the First Amendment protects the right to free speech, its protection is not absolute. *People v. Stanley*, 170 P.3d 782, 786 (Colo.App.2007). There is no First Amendment right to obstruct public areas such as a highway, and therefore, knowingly, intentionally or recklessly causing such an obstruction is not constitutionally protected conduct. *See Smith v. State*, 772 S.W.2d 946, 949 (Tex. App.1989) (finding that a similar obstruction statute protects the right of the public to the reasonably convenient use of sidewalks and other passageways without an encroachment upon the First Amendment rights of the individual); *Lauderback* at 347 (Appellant is guaranteed the right to free speech, but not in the middle of a road during traffic); *Ex parte*

Pierce, 342 S.W.2d 424, 528-529 (Tex. 1961) (Constitutional protection of the rights of free speech and free assembly does not license interference with and obstruction of public ways or of entrances to and exits from places of business); *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 160 (1939) (A person cannot exercise their First Amendment liberty by taking their stand in the middle of a crowded street, contrary to traffic regulations, and maintain their position to the stoppage of all traffic); *Cox v. State of La*., 379 U.S. 536, 554 (1965) (The control of travel on the streets is a clear example of governmental responsibility to insure the maintaining of public order, and a restriction in that relation, designed to promote the public convenience in the interest of all cannot be disregarded by the attempted exercise of a civil right which, in other circumstances, would be entitled to protection. A person cannot, for example, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly.

Because knowingly, intentionally or recklessly causing an obstruction is not constitutionally protected conduct, it cannot be said that one can have a "legal privilege" to cause such an obstruction because they are exercising their First Amendment rights. Also, because the statute only seeks to prohibit the knowing, intentional or reckless obstruction of certain public area, it does not sweep within its reach constitutionally protected activities. The conduct prohibited by the statute is within the state's police powers because it is reasonably related to a legitimate safety interest. Even assuming the statute does under some circumstances reach some constitutionally protected conduct, it would only incidentally do so and therefore, the overbreadth challenge must fail.

(Vindictive Prosecution)

This court disagrees with the defendant's argument that there is proof the District Attorney

engaged in selective prosecution. A vindictive prosecution is one in which the state seeks to penalize a defendant for exercising a constitutional right. *People v. Butler*, 224 P.3d 380, 383 (Colo. App. 2009). A defendant alleging vindictive prosecution bears the burden of proving "1) actual vindictiveness or 2) a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness." *U.S. v. P.H.E., Inc.*, 965 F.2d 848, 860 (10th Cir. 1992). The defendant argues that the District Attorney is only prosecuting *Black Lives Matter* protesters under the statute, but not protesters with other viewpoints. However, the defendant does not provide any evidence other than argument without sufficient support. The defendant cites to a news article discussing "pro-Trump" protests and that the article does not mention any arrests. The fact that the article does not specifically mention any arrests does not mean that none were made, or that no protesters other than *Black Lives Matter* protesters have ever been arrested under this statute or of all of the circumstances surrounding the pro-Trump protest and how, if at all, the circumstances are similar to the one before the court. The article does not indicate that those particular protesters were protesting in the travel lanes of Interstate 25, or that they were intentionally obstructing the interstate (or any other public area). The defendant has not provided any evidence to suggest that the District Attorney is using the statute to specifically target only persons with views similar to those of the defendant.

(**Colorado Constitution)**

This court also disagrees with the defendant's argument that the statute should be declared unconstitutional under the Colorado Constitution. While the case law acknowledges that Colorado courts have declared the free speech protections of the Colorado Constitution to be more broad than those provided in the First Amendment to the United States Constitution, there are few cases that provide guidance as to the increased state protections. The Defendant cites to *Bock v.*

Westminster Mall Co., 819 P.2d 55 (Colo. 1991) to argue that even if the travel lanes of Interstate 25 are not an appropriate forum for free speech under the U.S. Constitution, it should be protected under the Colorado Constitution. In *Bock*, the court expanded the zone of free speech to a private shopping mall. Whereas the mall in *Bock* would likely be considered a private forum under traditional First Amendment analysis because it was owned by a private company, our court treated it as public because the mall received public benefits. In the present case, there is no issue related to whether a privately-owned space should be open to First Amendment activities. This court cannot find, even under the expanded protections provided by the Colorado Constitution, that the travel lanes of an interstate highway would be considered a traditional public forum. Even if they can be considered a traditional public forum under the Colorado Constitution, the statute would still be upheld as the statute is content-neutral and is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication.

The defendant also cites to *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc*., 697 P.2d 348 (Colo.1985) to argue that even if the statute is not overbroad under the U.S. Constitution it should be found to be overbroad under the Colorado Constitution. However, in *People ex rel. Tooley*, the court found the statute in question overbroad under the U.S. Constitution so there was not a need to analyze the statute in terms of the Colorado Constitution. The court reasoned that because the statute in question was overbroad under the U.S. Constitution it would obviously also be overbroad under the Colorado Constitution's expanded protections. In the present case, as discussed previously, because the statute only prohibits knowingly, intentionally or recklessly obstructing certain public areas such as highways, it does not prohibit constitutionally protected conduct. The type of conduct prohibited by the statute would not be constitutionally protected under the U.S. or Colorado Constitutions. Further, because the conduct prohibited is not

constitutionally protected, one cannot claim to have "legal privilege" to obstruct a highway based on the exercise of free speech rights under either constitutional analysis.

(Vagueness)

The defense alleged, and the county court found, that the obstruction statute is unconstitutionally vague. The defense asserts that the statute violates the due process clause of the Fourteenth Amendment to the United States Constitution.[4]

In addressing vagueness, as with other constitutional challenges, a statute is presumed to be constitutional, and the party challenging its validity has the burden of proving unconstitutionality beyond a reasonable doubt. *People v. Rosburg*, 805 P.2d 432, 439 (Colo. 1991).

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. However, "a provision is not constitutionally vague simply because it could have been drafted with greater precision". *Board of Education of Jefferson County School District v. Wilder*, 960 P.2d 695, 703 (Colo. 1998). In fact, the legislature and the courts are often joined in a delicate balancing act because the enactment must accomplish two common but diametrically opposed purposes – to be sufficiently specific to give fair warning of prohibited conduct, yet at the same time be sufficiently general to permit application of the proscribed standards of conduct to varied circumstances and changing times. *Exotic Coins, Inc. v. Beacom,* 699 P.2d 930, 943 (Colo. 1985). Overly vague laws offend the constitution because they fail to provide fair notice of what conduct is prohibited. They also invite arbitrary enforcement. *Loonan v. Woodley*, 882 P.2d 1380, 1389 (Colo. 1994). A criminal statute may be vague because "men of

[4] In Colorado, an unacceptably vague statute would also violate the due process clause of Article II, Section 25 of the Colorado Constitution. *See People by and through the City of Longmont v. Gomes*, 843 P.2d 1321 (Colo. 1993).

common intelligence must generally guess at its meaning" *People v. Weeks*, 591 P.2d 91 (Colo 1979). To be unconstitutional, the statute must be "vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all". *Coates v. City of Cincinnati*, 402 U.S. 611,614 (1971). If the statute fairly describes the conduct forbidden, and men of common intelligence can readily understand its meaning and application, it will be upheld. *People v. Gonzales,* 534 P.2d 626 (1975).

There is varying tolerance for imprecision in a statute based upon the nature of the enactment being challenged. For example, issues involving economic regulation or civil penalties or those with a scienter requirement are likely to have a lesser standard of review while those involving criminal penalties and those threatening to inhibit the exercise of constitutionally protected rights which are likely to see a more elevated stricter scrutiny. *Parrish v. Lamm*, 758 P.2d 1356,1366 (Colo. 1988); *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498, (1982).

In the *Wilder* case, *supra*, which dealt with a teacher being dismissed for alleged vague standards concerning undefined "controversial learning resources", our supreme court, in citing the United States Supreme Court's test in *Flipside*, determined that showing of sexually explicit material was so obviously a "controversial learning resource" for which the teacher had not received requisite pre-approval, that the firing was upheld. Because the school policy did not directly impinge upon constitutionally protected conduct the court chose to forgo a challenge to the potential facial ambiguity of the policy. As the court determined, "[a] plaintiff who engages in some conduct that is *clearly proscribed* by a statute cannot complain of the vagueness of the law as applied to the conduct of others" (emphasis added). The standard in *Wilder* was that the teacher must establish that the vagueness must be proven as applied to him. While the policy

might in other circumstances be vague as applied to others and, in fact, be facially vague, the court limited its analysis to this particular teacher.

It is not reasonable for the defendant in this case to believe that because she was exercising her right to protest a significant public issue, that she also had a commensurate right to shut down an interstate highway. This is simply not a reasonable expectation or exercise of the First Amendment. See, *Fuastin v. City and County of Denver, Colo.*, 423 F.3d 1192,1201 (10th Cir. 2005) (Denver's unwritten policy of not allowing the hanging of signs on interstate overpasses because of concern over distraction of drivers upheld over an overbreadth and vagueness challenge).

Our supreme court has addressed a number of vagueness challenges to criminal statutes where the standard has not been as forgiving. These cases mostly involve various permutations of criminal "harassment" statutes and ordinances. The cases are illustrative of a higher standard of review for criminal enactments even when they do not necessarily implicate First Amendment concerns. The case of *People v. Norman*, 703 P.2d 1261 (Colo. 1985) is a fairly typical case in which the statute was deemed impermissibly vague. The proscribed conduct or acts that "alarm or seriously annoy" … "which serve "no legitimate purpose" were deemed vague in their totality. The prohibition in *Norman* was deemed by the court to prohibit "conduct, not communication" and the court determined that "In terms of due process analysis, ...the distinction makes no difference". *Norman* at 1267. The *Norman* court deemed the language as providing unfettered prosecutorial discretion and was not crafted with sufficient specificity that ordinary citizens could understand what was criminal and what was not.

The case of *People by and Through City of Longmont v. Gomez*, 843 P.2d 1321 (Colo. 1993), our supreme court conducted its own historical summary of the reasons it upheld or

overturned various harassment laws. While the issue of overbreadth and vagueness sometimes overlap, the cases cited therein are highly illustrative. The overarching theme is a determination whether there is a readily identifiable objective standard for measuring the proscribed conduct. Basically, something one can "hang their hat on" in a sufficiently narrow way so it is unlikely you could have people prosecuted for mistakenly benign conduct such as simply expressing an opinion that causes someone else "distress". What is clear from these cases is that the objective standard must be readily determinable by the specific language of the enactment and there can be no guesswork by either the citizen in its interpretation, by law enforcement, prosecutors, or the courts in its application. The *Longmont* case also makes clear that just because an enactment requires a mental state of actual specific intent, does not make it immune from scrutiny under the void for vagueness standard, at 1325.

Words of common usage in a statute can help overcome a vagueness challenge ("deceit" and "economic reprisal" while not specifically defined were deemed words for which the plain and ordinary meaning can be determined by a reasonable person. *People v. Janousek*, 871 P.2d 1189 (Colo. 1994). Similarly, "obscene" communications were properly defined to uphold a vagueness challenge in *People v. Weeks*, 591 P.2d at 94, as was "indecent exposure" identified with requisite specificity in *People v. Randall*, 711 P.2d 698 (Colo. 1985). The word "repeatedly" is a word of such common understanding that its meaning is not vague *People ex rel. VanMeveren v. County Court in and for Larimer County*, 551 P.2d 716 (Colo. 1976). Whereas the words, "that in fact harasses, threatens or abuses another" was deemed vague and subject to arbitrary interpretation. *Longmont* at 1325. An "obstruction" ordinance which prohibits positioning oneself "in such a manner as to obstruct, impede, interfere, hinder or delay the reasonable movement of vehicular or pedestrian traffic" was not void for vagueness as it used terms that are "widely used

and well understood". *Langford v. City of St. Louis, Missouri*, 3 F.4th 1054, 1059 (8th Cir 2021).

The particular Colorado statute at issue in this case is materially similar to those in some other states. There does not appear to have yet been a vagueness challenge in those states or in Colorado to the "privilege" language even though the statute was litigated on grounds in which defendants attempted to argue that they were legally privileged to obstruct a public location or roadway by way of certain statutes or ordinances.

In the Colorado case of *Andrews v. People*, 800 P.2d 607 (Colo. 1990), the obstruction statute was used to prosecute anti-nuclear protesters who obstructed a roadway into a nuclear facility. While not addressing the defense as a privilege, the issue on appeal was whether the protestors should have been entitled to raise a "choice of evils" defense in which the right to protest the evil of nuclear war took precedence over the right to maintain an unobstructed highway and access to the facility. The court declined to grant the choice of evils defense. No challenge was made on vagueness grounds. In the Pennsylvania case of *Commonwealth v. Jackson*, 2019 WL 1075750, a materially similar obstruction statute (including the privilege exception) was decided on appeal based solely on the defense assertion of a statutory privilege with no discussion of the constitutionality of the otherwise undefined privilege exception. In the case of *Lauderback v. Texas*, 789 SW 2d 343 (Tex. App. 1990) a similar obstruction statute did go into some analysis about the meaning of the undefined term "privilege". Once again, constitutionality was not raised, but the court did determine that the defendant's argument for the privilege exception was not applicable when she relied upon an ordinance allowing one to walk in the roadway when there were no sidewalks. She also relied upon an ordinance providing handicap access. The court found that neither enactment amounted to a "privilege" under the circumstances of that case while leaving open the possibility that they might be applicable in another case.

The county court judge in this matter determined that the statute is unconstitutionally vague because the statute is not content neutral and "fails to provide fair notice to what conduct is prohibited or permitted. The criminal liability for intentionally, knowingly, or recklessly obstructing traffic depends upon the reason for the action." (Opinion p.2).

The court also determined "Furthermore, the vagueness of 'legal privilege' makes the statute and the obstruction to be susceptible to arbitrary and selective enforcement, especially when the statute is not content neutral."

The court does not clearly discuss how it determined that the statute in this case was not content neutral or the significance of such a finding in the court's analysis. The court, however, did observe that some persons are removed from the statute's reach by virtue of a legal privilege and that, "apparently removes some persons based upon the content of their action or the manner of their action".

It is not perfectly clear how the court drew that conclusion, but it appears that the county court is assuming (as this court determines below) that privilege must be based upon a form of permit or governmental authorization. While this court agrees with that reasonable interpretation, the manner in which the county court reached the vagueness conclusion is somewhat circular. It appears the court found that the statute is void for vagueness while at the same time finding the statute is capable of discriminatory application (not content neutral). The court determined "privilege" should be defined as a permit, license, or some other form of government permission while at the same time concluding that any process to determine a permit or other authorization, must be *de facto* non-content neutral. To not put too fine a point on it, either the statute is not content neutral (i.e. subject to discriminatory application based upon content) because one is able to precisely define the discriminatory power of the government in its language, or it is vague.

However, it is uncertain how it can be both at the same time under the particular facts and statute in this case.

Based upon the above review, the court must respectfully conclude that the language does not render the statute unconstitutionally vague. The word 'privilege', while not specifically defined, is materially different than a vaguely subjective term subject to malleable and effervescent societal or highly personal standards as seen in the unconstitutional harassment statutes discussed above. The slippery constitutionally dubious slope found in a harassment statute which criminalizes "annoying" conduct that has "no legitimate purpose" is practically devoid of meaning. The umbrage our supreme court takes at the objectionably vague words in some Colorado harassment statutes is distinct from an obstruction of roadway statute which utilizes the word, "privilege" as an exception. Context is important and it is the critical factor which saves this statute from vagueness.

As the Arizona appeals court noted in *Mack v. Dallas*, 235 Ariz. 64 (Ariz. App. 2014), there is only one reasonable and common sense meaning of the term privilege *within the context* of this particular statute. While the term "privilege" has different meanings in different contexts under Colorado law (*e.g.*, the physician-patient privilege; the privilege against self-incrimination, etc.) those privileges clearly do not apply to this statute and no reasonable mind would think they do. There should be no doubt that any "privilege" must be unique to the highly limited authority to utilize and possibly obstruct a roadway and that such can only be done when there is a specific governmental sanction to do so. A similar obstruction statute in New Jersey which included no definition of the privilege exception was also upheld based upon a common-sense analysis of statutory context. The New Jersey court also determined that legal privilege could only refer to prior governmental authorization to engage in speech or assembly which coincidentally obstructs

a roadway. *State v Wishratsky*, 258 N.J. Super 67,609 A.2d 79 (1990).

The average and ordinary citizen is aware that roadways, and interstates in particular, are not venues that are routinely (or in the case of an interstate highway, rarely) obstructed to advance a particular cause or message. Ordinarily, with the exception of heavy traffic, construction or an accident, the reasonable expectation is free, fast, and open travel not punctuated by delays to account for people milling in the street to advance one cause or another.

It is commonly known that such organized obstruction only takes place rarely and under the rather exceptional circumstance of having a license, permit or some other governmental sanctioned approval through an ordinance or a statute that permits the conduct.

These are precisely the kinds of privileges that have been asserted throughout the country in the cases cited above by defendants who have been charged under a similar statutory scheme to ours – whether it be limited permission to unload a vehicle or a limited privilege to walk into the street when the government has not benefited the public with a sidewalk. Protests, road races, festivals do happen on occasion, but only as sanctioned by those with proper authority to do so.[5]

In the case of an interstate highway, the average citizen would be hard put to even identify one situation where an interstate has been intentionally and legally obstructed for anything but approved road work, road improvements or the occasional tragedy of an accident. While it could also be utilized under a privilege theory, the stand-alone defense of choice of evils may also be available to particular defendants if the facts are appropriate. While unsuccessful in the Rocky Flats nuclear protest case discussed above, one can think of a myriad of instances in which a real

[5]With very little effort, one can find the means by which one secures a permit for organized gatherings which close down streets in Colorado Springs through the City's Parks, Recreation and Cultural Services website. https://coloradosprings.gov/parks/page/special-event-faq. The website makes clear that a Citywide Special Events Permit Application may be filed in order to close streets, take place in public locations outside City Park or Open Space, where there are 10,000 participants or if there is a beer garden or high-risk activities)

"choice of evils" can be made which might legally close down a road, public area or even an interstate highway.

For the reasons determined above, the court also finds that this statute is also not subject to potential arbitrary and discriminatory enforcement. Beyond the statute being quite specific as to the mental state of the actor and the definition of "obstruction", the authorities responsible for monitoring the safe passage on streets and highways are likely even more aware of the unique exceptions that might allow someone to legally obstruct a roadway, highway, or interstate. If there is an attempt to discriminate in enforcement by virtue of message or the messenger, there are remedies available through the courts to address appropriate constitutional challenges as they may arise.

In this case, the defendant cannot make a case that this statute is vague as to her particular circumstance or vague in all of its applications. *See Wilder* at 703. The mere possibility of a hypothetical vagueness issue is not enough to meet the beyond a reasonable doubt finding necessary to render this commonsense public safety statute unconstitutionally vague.

Accordingly, the finding of unconstitutional vagueness of the statute is reversed, and the case is remanded back to the county court for further proceedings consistent with this order.

SO ORDERED THIS 2ND DAY OF NOVEMBER 2021.

BY THE COURT:

G. DAVID MILLER
District Court Judge