IN THE SUPREME COURT OF THE STATE OF WASHINGTON

state of washington, Respondent, v. helen d. immelt, Petitioner.	NO. 83343-5 EN BANC Filed October 27, 2011

STEPHENS, J.—Helen Immelt sounded a car horn at length in front of a neighbor's house in the early morning hours. She was arrested for violating a Snohomish County noise ordinance that includes amongst its prohibited noise disturbances horn honking for a purpose other than public safety, or originating from an officially sanctioned parade or other public event. She challenges the horn ordinance as overbroad and in violation of free speech protections. We agree that the ordinance is overbroad and reverse Immelt's conviction.[1]

[1] Immelt makes a number of other claims challenging the constitutionality of the ordinance at issue. Because we find the ordinance must be invalidated on overbreadth grounds, we do not address her other arguments.

Facts and Procedural History

The Snohomish County code bans "sound that is a public disturbance noise." Snohomish County Code (SCC) 10.01.040. The code defines "public disturbance noise" to include, among other things, "[t]he sounding of vehicle horns for purposes other than public safety." SCC 10.01.040(1)(d) (horn ordinance). A violation of SCC 10.010.040 is an infraction unless two violations of the ordinance are committed within a 24-hour period, in which case the second violation is criminalized as a misdemeanor.

Although the facts of this case are not critical in an overbreadth challenge, *see City of Seattle v. Webster*, 115 Wn.2d 635, 640, 802 P.2d 1333 (1990), we offer them by way of background. Immelt lived in a cul-de-sac neighborhood governed by restrictive covenants. On May 12, 2006, Immelt received a letter from the homeowners' association indicating that she had violated a covenant prohibiting residents from keeping chickens. Immelt learned the complaint was lodged by her neighbor, Mr. Vorderbrueggen.

A little before 6:00 a.m. the next day, Immelt borrowed a friend's car and repeatedly honked the car's horn in front of Vorderbrueggen's house for approximately 5 to 10 minutes. Her actions awakened several neighbors. Vorderbrueggen called the police. Sergeant David Casey of the Snohomish County Sheriff's Office arrived around 7:00 a.m. and spoke with Immelt about the noise complaint. He then went to take Vorderbrueggen's statement.

While Sergeant Casey was at Vorderbrueggen's residence, Immelt drove past and made three long car horn blasts. Sergeant Casey followed in his patrol car, stopped Immelt, and arrested her.

Snohomish County charged Immelt by amended complaint with a violation of the local noise ordinance barring the sounding of a horn for purposes other than public safety, SCC 10.01.040(1)(d). A district court jury convicted Immelt, and her conviction was affirmed by both the review administrative law judge and the Court of Appeals. *State v. Immelt*, 150 Wn. App. 681, 208 P.3d 1256 (2009). Immelt petitioned this court for review, raising a variety of claims, including claims that the horn ordinance violated her state and federal constitutional rights. We granted review. *State v. Immelt*, 167 Wn.2d 1008, 220 P.3d 209 (2009).

Analysis

First Amendment protections apply equally to statutes and local ordinances. *Lovell v. City of Griffin*, 303 U.S. 444, 450, 58 S. Ct. 666, 82 L. Ed. 949 (1938). The free speech protections of article I, section 5 of the Washington Constitution also extend to local ordinances. *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 511, 104 P.3d 1280 (2005). The interpretation of constitutional provisions and legislative enactments, including municipal ordinances, presents a question of law, which we review de novo. *City of Spokane v. Rothwell*, 166 Wn.2d 872, 876, 215 P.3d 162 (2009); *Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 523, 219 P.3d 941 (2009) (citing *State v. Chenoweth*, 160 Wn.2d 454, 462, 158 P.3d 595

(2007)). Generally, we presume that legislative enactments are constitutional. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). The party challenging an enactment bears the burden of proving its unconstitutionality. *Voters Educ. Comm. v. Pub. Disclosure Comm'n*, 161 Wn.2d 470, 481, 166 P.3d 1174 (2007) (quoting *State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005), *overruled in part on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)). However, in the free speech context, "the State usually 'bears the burden of justifying a restriction on speech.'" *Id*. at 482 (quoting *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 114, 937 P.2d 154, 943 P.2d 1358 (1997)).

"[O]ur article I, section 5 analysis of overbreadth follows the analysis under the First Amendment." *Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 804, 231 P.3d 166 (2010). A law is overbroad if it "sweeps within its prohibitions" a substantial amount of constitutionally protected conduct. *City of Tacoma v. Luvene*, 118 Wn.2d 826, 839, 827 P.2d 1374 (1992). "A statute or ordinance will be overturned only if the court is unable to place a sufficiently limiting construction on a standardless sweep of legislation." *Id*. at 840.

Immelt claims the horn ordinance is overbroad because it sweeps into its prohibitions constitutionally protected speech. Thus, we must determine whether the horn ordinance actually implicates free speech; some burden on speech must exist before the protections of the First Amendment or article I, section 5 may be invoked. *See State v. Halstien*, 122 Wn.2d 109, 122-23, 857 P.2d 270 (1993)

(noting that the "first task in overbreadth analysis is to determine if a statute reaches constitutionally protected speech or expressive conduct" (citing *Luvene*, 118 Wn.2d at 839; *Webster*, 115 Wn.2d at 641)).

This question does not require us to determine whether Immelt's particular actions amounted to protected speech. An overbreadth challenge allows "'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965)). The question is whether the horn ordinance impermissibly burdens protected expression. Conduct such as horn honking may rise to the level of speech when the actor intends to communicate a message and the message can be understood in context. *See First Covenant Church of Seattle v. City of Seattle***,** 120 Wn.2d 203, 216-17, 840 P.2d 174 (1992) (quoting *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)).

Chief Justice Madsen's dissent incorrectly believes the court must examine Immelt's particular conduct in order to decide this overbreadth challenge. *See, e.g.*, dissent (Madsen, C.J.) at 10. In *Virginia v. Hicks*, 539 U.S. 113, 115-16, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003), the United States Supreme Court considered an overbreadth challenge to a policy prohibiting conduct. There, the individual challenging the policy did not "contend that he was engaged in constitutionally

protected conduct when arrested." *Id*. at 118. The *Hicks* Court did not find it necessary to first consider whether the particular conduct present in the case constituted speech. Instead, it noted that "[t]he First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges." *Id*. The policy reasons for such an exception arise "out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Id*. at 119.

> Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech . . . harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.

Id. (citation omitted). Given these policy concerns, an overbreadth challenge such as the one presented here does not require a showing that the specific conduct of the individual challenging the law constitutes speech. Chief Justice Madsen's dissent properly notes that the overbreadth doctrine attenuates as the sanctioned behavior moves from pure speech toward conduct. Dissent (Madsen, C.J.) at 12-13 (citing *Broadrick*, 413 U.S. at 615). But *Broadrick*'s discussion of the attenuation of the overbreadth doctrine occurs in the context of its requirement that the overbreadth of a statute be substantial before it may be invalidated. *Broadrick*, 413 U.S. 615-16. As noted below, the reach of this ordinance is substantial, as it sweeps into its scope many instances of protected expression through horn honking. These instances are

not the type of speculative predictions cautioned against by *Broadrick*. *See id*. at 615. Rather, this ordinance, on its face, prohibits legitimate expressions of speech conveyed by a horn honk.

A moment's reflection brings to mind numerous occasions in which a person honking a vehicle horn will be engaging in speech intended to communicate a message that will be understood in context. Examples might include: a driver of a carpool vehicle who toots a horn to let a coworker know it is time to go, a driver who enthusiastically responds to a sign that says "honk if you support our troops," wedding guests who celebrate nuptials by sounding their horns, and a motorist who honks a horn in support of an individual picketing on a street corner. Thus, we reject the Court of Appeals' conclusion that horn honking is a type of conduct that does not involve speech. *Immelt*, 150 Wn. App. at 687. Horn honking does constitute protected speech in many instances, regardless of whether it would constitute protected speech in Immelt's particular case

We acknowledge that there is authority from other jurisdictions suggesting horn honking is never expressive conduct worthy of free speech protections, but we find these cases unpersuasive. *See, e.g.*, *Weil v. McClough*, 618 F. Supp. 1294, 1298 (S.D.N.Y. 1985) (rejecting an overbreadth challenge to a local ordinance that prohibited horn honking except to provide warning of imminent danger); *State v. Compas*, 290 Mont. 11, 17, 964 P.2d 703 (1998) (holding that the defendant's conviction for honking her car horn to protest a local recreational vehicle park did

not violate her rights to free expression); *Meaney v. Dever*, 326 F.3d 283, 287-88 (1st Cir. 2003) (expressing misgivings that horn honking constitutes expressive conduct but assuming arguendo that it does and rejecting free speech claims on other grounds). In *Meaney*, the government action stemmed not from an ordinance but from Meany's suspension from the local police force as punishment for his horn-blowing activities. *Id.* at 284-86. *Campas* did not involve an overbreadth challenge. These cases are of little relevance here.

Even *Weil*, which did involve an overbreadth challenge to an ordinance prohibiting horn honking, is distinguishable. There the court found the ordinance was a reasonable time, place, and manner restriction, which precluded an overbreadth challenge. *Weil*, 618 F. Supp. at 1298. Although Snohomish County argues here that the horn ordinance is a reasonable time, place, and manner restriction, it fails to develop this argument. *See* Suppl. Br. of Resp't at 7. And it is dubious that this ordinance is a proper time, place, and manner restriction where it prohibits horn honking in a content-based manner, i.e., horn honking is permissible for official parades and other public events but not to express support for the lone person holding a "support our troops" sign on a street corner.[2] We therefore decline

[2] Snohomish County also argues that its ordinance regulates only the nonspeech elements of horn honking, thus justifying "incidental limitations on First Amendment freedoms." Suppl. Br. of Resp't at 8-9 (citing *United States v. O'Brien*, 391 U.S. 367, 376-77, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)). To the contrary, the ordinance draws no distinction between the speech and nonspeech elements of horn honking, but rather broadly prohibits the use of a horn to communicate in all but a few circumstances. Therefore, we cannot say that it meets the *O'Brien* test as being "no greater than is essential to the furtherance of [a substantial governmental] interest." *O'Brien*, 391 U.S. at 377.

to follow the lead of other jurisdictions that have questioned the expressive value of horn honking. While it does not involve spoken words, horn honking may be clearly a form of expressive conduct.

Having concluded that some horn honking may constitute protected speech, our overbreadth analysis requires us to consider whether the horn ordinance at issue sweeps into its prohibitions instances of protected honking. It is clear from the face of the ordinance that it does. By its terms, it categorically prohibits horn-honking for any purpose other than public safety, unless it is a sound "originating from officially sanctioned parades and other public events." SCC 10.01.050(1)(*l*). While it is not entirely clear what constitutes a public event, there is no basis to believe it includes the examples cited above: the carpool driver, the wedding guest, the troop supporter, or the individual honking upon passing a picketer on the street corner.

Determining that the horn ordinance proscribes some protected speech activity does not end our inquiry. To violate the First Amendment, the horn ordinance must prohibit a *substantial* amount of protected activity.

> The concept of "substantial overbreadth" is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 800, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Id*. at 801.

The purpose of the overbreadth doctrine is to "strike a balance between competing social costs." *United States v. Williams*, 553 U.S. 285, 292, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) (citing *Hicks*, 539 U.S. at 119-20).

> On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional . . . has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.

Id. In short, we must weigh the amount of protected speech proscribed by the ordinance against the amount of unprotected speech that the ordinance legitimately prohibits.

In undertaking this analysis, we first emphasize that local governments maintain a legitimate interest in protecting residents from excessive and unwelcome noise. *Ward v. Rock Against Racism*, 491 U.S. 781, 796, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); *Kovacs v. Cooper*, 336 U.S. 77, 83, 69 S. Ct. 448, 93 L. Ed. 513 (1949) (observing that the "police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community"). Additionally, local governments can lawfully prohibit some expressive conduct. *See City of Seattle v. Huff*, 111 Wn.2d 923, 926-28, 767 P.2d 572 (1989) (holding that an ordinance prohibiting harassing telephone calls withstands free speech challenges because it is reasonable in light of the purpose served by the forum and is viewpoint neutral). In

short, a properly tailored ordinance prohibiting disturbing horn honking that is intended to annoy or harass would likely survive scrutiny.[3]

The horn ordinance here does not survive scrutiny. It is substantially overbroad, "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. at 292. It prohibits a wide swath of expressive conduct in order to protect against a narrow category of public disturbances.

Nor can we place "a sufficiently limiting construction" on the standardless sweep of this ordinance. *Luvene*, 118 Wn.2d at 840. Relying on *Luvene* and *O'Day v. King County*, 109 Wn.2d 796, 749 P.2d. 142 (1988), Snohomish County asks us to construe the horn ordinance "to proscribe only unprotected conduct." Suppl. Br. of Resp't at 16. Justice J.M. Johnson's dissent believes we can but, unlike in *Luvene* and *O'Day*, the ordinance here gives us no basis to do so. In *Luvene*, we read an intent element into a potentially overbroad loitering ordinance based on the language of the ordinance; specifically, it prescribed only loitering for the "'purpose'" of engaging in drug-related activity. *Luvene*, 118 Wn.2d at 842. Consistent with prior case law, we construed "purpose" to impose a mens rea

[3] This is not to say that annoying or harassing expressive conduct falls entirely outside the ambit of protected speech, as the Court of Appeals suggested. *Immelt*, 150 Wn. App. at 687. It is a mistake to focus on the content of expressive conduct, i.e., whether it is annoying or harassing, rather than its nonspeech elements, which may be appropriately regulated. *See O'Brien*, 391 U.S. at 377. Even criminal harassment statutes must be circumscribed to exclude protected expression. *See, e.g., State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (recognizing the "true threats" doctrine in the context of a antiharassment statute and noting that "[t]he First Amendment prohibits the State from criminalizing communications that bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole").

element. *Id*. Similarly, in *O'Day*, we narrowly construed a nude-dancing prohibition in light of its several exceptions for nonobscene expression, including dramatic works, dance, and exhibitions, as well as educational purposes. *O'Day*, 109 Wn.2d at 806. Given these exceptions, we found it clear that the government intended to proscribe only obscene, constitutionally unprotected expression. *Id*. Here, in contrast, the language of the horn ordinance provides no basis for a sufficiently limiting construction to avoid an overbreadth problem. Its exceptions for public safety and officially sanctioned parades or other public events cannot reasonably be construed to encompass myriad instances of protected expression that occur outside of public events.[4]

Conclusion

We need not decide whether Immelt's particular conduct would constitute protected speech. For purposes of this overbreadth challenge, the ordinance under which Immelt was convicted sweeps too broadly in banning protected forms of expressive conduct involving horn honking. It therefore fails constitutional scrutiny. We reverse Immelt's conviction.

[4] Justice J.M. Johnson's dissent suggests that "other public events" as discussed in the statute need not be officially sanctioned events, and thus could include horn honking in support of political and religious causes or community events. Dissent (J.M. Johnson, J.) at 10-11. Setting aside the question of whether this is a reasonable reading of the statute, it fails to save it from an overbreadth challenge. Even the broadest notion of "public events" would not include the lone troop supporter, the carpool driver, the wedding guest, the driver passing a picketer, or similar instances of protected expression.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:
Justice Mary E. Fairhurst

Richard B. Sanders, Justice Pro Tem.

Justice Gerry L. Alexander

Justice Tom Chambers

Justice Susan Owens