No. 83343-5

J.M. JOHNSON, J. (dissenting)—Both the majority opinion and Chief Justice Madsen's dissent fail to properly analyze the constitutional overbreadth challenge to Snohomish County Code (SCC) 10.01.040 and .080(3) (horn ordinance). I write separately to correct these analytical mistakes. Further, because the horn ordinance does not violate Helen Immelt's free speech rights, I respectfully dissent.

A. Overbreadth

Reasonably construed, the county's horn ordinance is not unconstitutionally overbroad. The analysis of an overbreadth claim under article I, section 5 of the Washington Constitution parallels the overbreadth analysis under the First Amendment to the United States Constitution. *Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 804, 231 P.3d 166 (2010). Under the First Amendment's overbreadth doctrine, "a statute is

facially invalid if it prohibits a *substantial amount* of protected speech." *United States v. Williams*, 553 U.S. 285, 292, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) (emphasis added). The overbreadth analysis involves three steps. First, a court must "'construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.'" *United States v. Stevens*, ___ U.S. ___, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435 (2010) (quoting *Williams*, 553 U.S. at 293). Second, after construing the statute, a court must determine whether it "criminalizes a *substantial amount* of protected expressive activity." *Williams*, 553 U.S. at 297 (emphasis added). In determining whether the statute proscribes a *substantial amount* of expressive activity, a court should consider its prohibitions "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id*. at 292. Third, if the statute is overbroad, a court considers whether to "impose a limiting construction . . . only if it is 'readily susceptible' to such a construction." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988)). The overbreadth doctrine is "'strong

medicine,'" which courts should not casually prescribe. *Williams*, 553 U.S. at 293 (internal quotation marks omitted) (quoting *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999)).

Neither the majority opinion nor Chief Justice Madsen's dissenting opinion properly follows these analytical steps. The majority opinion errs by failing to recognize that the noise ordinance at issue is susceptible to a narrowing construction. Because it is, I would hold that it is not constitutionally overbroad. Chief Justice Madsen's dissenting opinion mistakenly suggests that the court must determine whether Immelt's own conduct constitutes protected speech before engaging in the overbreadth analysis. Because such an approach confuses an *overbreadth* challenge with an *as-applied* challenge, I analyze Immelt's constitutional claims separately.

1. *Construing the Horn Ordinance*

The first step in conducting an overbreadth analysis is to determine whether the horn ordinance actually implicates free speech. *See State v. Halstien*, 122 Wn.2d 109, 122, 857 P.2d 270 (1993). By its express language, the First Amendment's protections apply only to "speech." *Texas*

v. Johnson, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989). However, conduct can become "'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Id*. (quoting *Spence v. Washington*, 418 U.S. 405, 409, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974)). When determining whether *conduct* rises to the level of symbolic "speech," a court considers two factors: (1) whether the individual who engaged in the conduct intended to convey a particularized message and (2) whether there was a great likelihood that those observing his conduct understood his particularized message. *Id*.

At this point in the analysis, a court would normally analyze Immelt's own conduct to determine whether her horn honking rose to the level of symbolic "speech." *See Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others . . . ."). However, the overbreadth doctrine 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.'" *Id*. at 612 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965)). Thus, the pertinent question for overbreadth analysis is not whether Immelt's *own* conduct rises to the level of symbolic "speech" but whether *any* conduct proscribed by an ordinance triggers First Amendment protections. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000) ("An overbreadth challenge is facial, and will prevail even if the statute could constitutionally be applied to a litigant.").

With these principles in mind, I turn to the county's horn ordinance, which contains several relevant provisions. The horn ordinance prohibits county residents from causing "public disturbance noise." SCC 10.01.040. The horn ordinance contains a general definition of the term "public disturbance noise." SCC 10.01.020(25). In addition to this general definition, the horn ordinance enumerates several activities that result in per se "public disturbance noises." SCC 10.01.040(1). Among these enumerated categories is a provision regarding horn honking that proscribes "[t]he sounding of vehicle horns for purposes other than public safety." SCC

10.01.040(1)(d).

A very important part of the horn ordinance is the express exemptions from the aforementioned prohibitions. The horn ordinance contains per se exemptions including an exemption for "[s]ounds originating from officially sanctioned parades and other public events." SCC 10.01.050(1)(*l*). A resident can also engage in activities that result in a per se "public disturbance noise" if he first obtains a conditional use permit. SCC 10.01.040(3). A single violation of the horn ordinance is a civil infraction, and a second violation within a 24-hour period is a misdemeanor. SCC 10.01.080(3)(a).

The horn ordinance implicates free speech rights.[1] On its face the horn ordinance prohibits a driver from honking her horn except for public safety purposes. Absent a narrowing construction, a driver who chose to express her support for a political candidate, a religious cause, an antiwar rally, or a cheerleaders' carwash would run afoul of the ordinance – even where she intended her conduct to express a message that third party observers readily

[1] I recognize the diversity of opinions concerning the speech implications of horn-honking prohibitions. *Compare Weil v. McClough*, 618 F. Supp. 1294, 1298 (S.D.N.Y. 1985), *and State v. Compas*, 290 Mont. 11, ¶ 27, 964 P.2d 703 (1998), *with Goedert v. City of Ferndale*, 596 F. Supp. 2d 1027, 1035 (E.D. Mich. 2008), *and City of Eugene v. Powlowski*, 116 Or. App. 186, 192, 840 P.2d 1322 (1992); *see also Meaney v. City of Dever*, 326 F.3d 283, 287-88 (1st Cir. 2003).

perceived. *See Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 409). The horn ordinance prohibits protected expressive activity. I must, therefore, proceed with the remainder of the overbreadth analysis.

2. *The Substantial Amount Requirement*

The second step in the overbreadth analysis is to determine whether the challenged statute or ordinance prohibits a *substantial* amount of protected activity. *See L.A. City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-01, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984); *Williams*, 553 U.S. at 292.

I agree with the majority's accurate exposition of the substantial amount requirement. *See* majority at 9-10. The horn ordinance at issue presents a close call, and it is only in light of the narrowing construction of the exceptions included that I find it constitutional.[2] I agree with the majority "that local governments maintain a legitimate interest in protecting residents from excessive and unwelcome noise." Majority at 10; *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).

[2] My survey of other local ordinances indicates that other municipalities have chosen better language to prohibit the noise targeted by Snohomish County's horn ordinance without running the risk of curtailing protected free expression. *See, e.g.*, Bellevue City Code 9.18.042(B); Edmonds City Code 5.30.130(B); Seattle Municipal Code 25.08.500(B); Spokane Municipal Code 10.08.020(D)(1).

Likewise, I agree with the majority that local governments can lawfully prohibit conduct like Immelt's that is designed simply to annoy, harass, and intimidate. *See* majority at 10; *see also Colten v. Kentucky*, 407 U.S. 104, 108-09, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972); *City of Seattle v. Huff*, 111 Wn.2d 923, 930, 767 P.2d 572 (1989). However, the majority and I disagree about the implications of these principles for the horn ordinance. The horn ordinance legitimately proscribes a vast array of conduct that does not rise to the level of constitutionally protected speech. Further, in light of the narrowing construction below, the statute does not prohibit horn honking associated with core protected speech, such as showing support for political or religious causes. I would hold that, in light of the narrowing construction below, the horn ordinance does not improperly burden protected speech when viewed in the context of its plainly legitimate sweep. *See Williams*, 553 U.S. at 292.

3. Narrowing the Construction of the Horn Ordinance

My overbreadth determination is contingent on my narrowing construction of the statute. Courts should impose a narrowing construction on an ordinance only if it is readily susceptible to such a construction. *Reno*,

521 U.S. at 884. However, if an ordinance is susceptible to a constitutional interpretation, this type of constitutional construction is the preferred course. *See United States v. Grace*, 461 U.S. 171, 175, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983) (invalidating, only as applied to sidewalks, a federal statute prohibiting display of devices designed to "'bring into public notice any party, organization, or movement'" at the United States Supreme Court (quoting former 40 U.S.C. § 13k (1949))); *see also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985) (invalidating a state moral nuisance statute only insofar as the "word 'lust' is to be understood as reaching protected materials").

I construe the horn ordinance to provide a very broad exception for "[s]ounds originating from officially sanctioned parades and other public events." SCC 10.01.050(1)(*l*). In my view, the words "officially sanctioned" only qualify "parades" and not "events." The phrasal adjective "other public" serves as the sole modifier for the noun "events." Under this construction, the horn ordinance does not prohibit signs soliciting horn honks in support of political, religious causes, antireligious causes, and community events. My determination that the horn ordinance is not overbroad is based

on my reading of the "other public events" exception to allow county residents to exercise their protected speech rights. If local authorities attempted to enforce the horn ordinance against a resident exercising his or her constitutionally protected rights to free speech, his or her appropriate remedy is an as-applied First Amendment challenge. Given this narrowing construction of the horn ordinance, Immelt's overbreadth challenge fails.

B. The Horn Ordinance As Applied to Immelt

Because I would hold that the horn ordinance is not overbroad, I briefly analyze why Immelt's other claims fail. Generally, "'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Stevens*, 130 S. Ct. at 1584 (quoting *Ashcroft v. Am Civil Liberties Union*, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002)). However, courts "cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). Conduct designed simply to inconvenience or annoy is not protected speech. *Colten*, 407 U.S. at 108-09 (affirming

conviction under statute prohibiting conduct done "'to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof'" (quoting former Ky. Rev. Stat. § 437.016(1)(f) (1968))). In accord with the First Amendment, article I, section 5 of the Washington Constitution does not provide additional protection for this type of harassment. *See Huff*, 111 Wn.2d at 930 (rejecting claims that ordinance prohibiting harassing telephone calls violated Washington Constitution article I, section 5).

Immelt's violation of the horn ordinance was not constitutionally protected speech. Her primary intent was to annoy and harass her neighbor, Mr. Vorderbrueggen, and Sergeant Casey and not to express speech. This type of conduct is not protected by the First Amendment or article I, section 5. *See Colten*, 407 U.S. at 108-09; *see also Huff*, 111 Wn.2d at 930.

C. Vagueness

Closely related to the overbreadth doctrine is the doctrine of vagueness.[3] "Vagueness doctrine is an outgrowth not of the First

[3] I analyze Immelt's remaining constitutional challenges under the federal constitution. Under our jurisprudence, when a right is protected by both state and federal constitutions, the state-based protections must be specifically invoked, argued, and analyzed. *See, e.g.*, *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 18 n.12, 84 P.3d 859 (2004) (citing *State v. Smith*, 148 Wn.2d 122, 131, 59 P.3d 74 (2002); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)). Because Immelt does not provide any *Gunwall* analysis of her constitutional claims, I restrict my analysis to the federal constitution.

Amendment, but of the Due Process Clause of the Fifth Amendment." *Williams*, 553 U.S. at 304.

> "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or it is so standardless that it authorizes or encourages seriously discriminatory enforcement."

Holder v. Humanitarian Law Project, ___ U.S. ___, 130 S. Ct. 2705, 2718, 177 L. Ed. 2d 355 (2010) (quoting *Williams*, 553 U.S. at 304). However, a higher level of scrutiny applies to vagueness challenges in the free speech context. *Id*. at 2719.

Unlike an overbreadth analysis, vagueness concerns the particular facts at issue. *Id*. As a rule, "'[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Id*. (alteration in original) (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)). This particular rule "makes no exception for conduct in the form of speech." *Id*. "[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And he certainly cannot do

so based on the speech of others." *Id*.

Immelt's vagueness challenge to the horn ordinance fails. She clearly failed to honk her horn for a public safety purpose, and she did not honk her horn at a public event or officially sanctioned parade. Immelt honked her horn to harass her neighbor and Sergeant Casey. Her conduct is proscribed by the horn ordinance and is not constitutionally protected.

D. Prior Restraint

The horn ordinance is not a prior restraint on Immelt's free speech. Following the United States Supreme Court, this court previously defined a "prior restraint" as:

> "[A]dminstrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.' M[elville B.] Nimmer, Nimmer on Freedom of Speech[: *A Treatise on the Theory of the First Amendment*] § 4.03, p. 4-14 (1984). . . . Temporary restraining orders and permanent injunctions–*i.e.*, court orders that actually forbid speech activities–are classic examples of prior restraints."

In re Marriage of Suggs, 152 Wn.2d 74, 81, 93 P.3d 161 (2004) (alterations in original) (quoting *Alexander v. United States*, 509 U.S. 544, 550, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993)). The First Amendment's prohibition on prior restraints finds its roots in the English common law regarding the

requirement that a publisher submit his materials for prepublication censorship before licensing. *Alexander*, 509 U.S. at 554 n.2. Though the prior restraint doctrine now expands beyond its original licensing context, it does not go so far as to encompass all subsequent punishments on potentially expressive activity. *See id*. at 553-54. The horn ordinance legitimately punishes unprotected noise disturbances and does not properly fall under our prior restraint jurisprudence. The appropriate context for Immelt's challenge is under our overbreadth doctrine. Immelt attempted such a challenge, and I would hold that she failed.

Conclusion

I would hold that, under the appropriate narrowing construction, recognizing the express exceptions for expressive horn use, the horn ordinance does not violate the First Amendment. As applied to Immelt, the horn ordinance legitimately prohibited her harassing conduct. This court's overbreadth jurisprudence controls Immelt's challenges. As construed, the horn ordinance is not overbroad. For these reasons, I would affirm Immelt's conviction and thus respectfully dissent.

AUTHOR:

Justice James M. Johnson

WE CONCUR: