No.83343-5

MADSEN, C.J. (dissenting)—Helen Immelt blew her car horn for *10 minutes* in front of a neighbor's home between 5:30 and 6:00 a.m. in evident anger and retaliation and to irritate and annoy the neighbor, and then repeated the horn blowing an hour later in an encounter with another neighbor. The majority says that the statute prohibiting this conduct is facially unconstitutional.

The majority is able to reach this conclusion because it fails to consider whether the conduct of blowing a car horn is speech and, in particular, whether Ms. Immelt's conduct constitutes symbolic speech. The majority claims that the facts here make no difference in the analysis and immediately launches into an overbreadth analysis. However, an overbreadth analysis is the exception, not the rule. The challenged ordinance's horn-honking provision regulates conduct not commonly associated with expression, and merely because it is possible to think up possible impermissible applications of the ordinance does not mean that an overbreadth analysis is required,

much less that the regulation is facially unconstitutional.

The proper course in this case is to examine Ms. Immelt's own conduct, leading to the conclusion that her horn honking was not sufficiently imbued with communicative elements to raise any First Amendment issue. This conclusion follows from the United States Supreme Court's analysis when conduct is claimed to implicate the First Amendment, which is as follows: First, if only conduct is involved, then the First Amendment does not come into play (to determine whether conduct and not speech is involved, the United States Supreme Court examines the particular conduct in the context in which it occurs). Second, if both speech and nonspeech elements are combined in a course of conduct, "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas v. Johnson*, 491 U.S. 397, 406, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989). If the "conduct was expressive," a court must "decide whether the . . . regulation is related to the suppression of free expression." *Id*. If it is not, then the "less stringent standard" of *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), controls, which applies when assessing whether regulations of noncommunicative conduct violate free speech protections. *Johnson*, 491 U.S. at 403. But the first step, under these United States Supreme Court decisions, is to examine the challenger's particular conduct to determine whether protected speech is at issue.

Rather than consider whether Ms. Immelt's conduct is even protected speech, the majority simply assumes without analysis that the ordinance regulates speech and then

invalidates on overbreadth grounds the ban on blowing a horn other than for public safety reasons. Under First Amendment precedent the conduct at issue here has no communicative elements and is not protected speech, and the challenged law regulates noise, not expression. This does not mean that a proper as-applied challenge could not be brought in a case where horn honking sufficiently imbued with communicative elements is at issue.

The majority is also out of step with the great weight of authority. Anti-noise statutes and ordinances have been routinely upheld in the face of overbreadth and vagueness challenges, and in particular, regulations of horn honking have been upheld by many courts considering the issue. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); *Gaughan v. City of Cleveland*, 2007 WL 29175 (6th C.A. 2007); *Meaney v. Dever*, 326 F.3d 283, 287-88 (1st Cir. 2003); *Weil v. McClough*, 618 F. Supp. 1294, 1296 (S.D.N.Y. 1985); *Village of Kelley's Island v. Joyce*, 146 Ohio App. 3d 92, 765 N.E.2d 387 (2001); *State v. Compas*, 290 Mont. 11, ¶¶ 20-21, 25, 964 P.2d 703 (1998); *People v. Holt*, 271 Ill. App. 3d 1016, 1027, 649 N.E.2d 571, 208 Ill. Dec. 515 (1995).

Unfortunately, the majority places this state's law on the outer fringe of responsible decision making. Rather than following the United States Supreme Court's analysis for determining whether the First Amendment is even implicated under the facts here, the majority merely accepts the premise that a handful of proposed hypothetical horn honking circumstances renders the ordinance unconstitutional. I cannot agree and

therefore dissent.

Under other facts, it is possible that the ordinance might be held to be unconstitutional as applied. However, it is not unconstitutional in this case, either on its face or as applied.

Discussion

1. Immelt's horn honking is not speech under the *Spence-Johnson* test.

As mentioned, because this case involves conduct, not verbal or written communication, the first issue that the court should examine is whether protected speech is at issue. Contrary to the majority's approach, this inquiry does not involve speculating about possible factual scenarios where honking a car horn might convey a message, but instead should focus on whether Ms. Immelt's horn honking itself constitutes speech.

Conduct may be sufficiently imbued with elements of communication to come within the protection of the First Amendment. *Johnson*, 491 U.S. at 404. However, for conduct to be considered protected speech, a court must examine the conduct that actually occurred within the context of its occurrence. There must be both the intent to convey a particularized message and a great likelihood that the message will be understood by those who observe the conduct.

In *Spence v. Washington*, 418 U.S. 405, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974), the conduct at issue was display of an upside down American flag with a peace symbol attached. The Court began its analysis by stating that it was "necessary to determine" whether the conduct "was sufficiently imbued with elements of communication." *Id*. at

409. The Court identified three considerations: the nature of the individual's activity, combined with the factual context and environment in which the activity was undertaken. *Id*. at 409-10. The court examined the conduct and said that it had long recognized the communicative connotations of flags and had little doubt that the individual had communicated through the use of symbols. The context was a protest over expansion of the Vietnam War and the killings at Kent State University. As to environment, the display was on private property and involved the individual's own flag. The Court then concluded: "An *intent to convey a particularized message* was present, and in the surrounding circumstances *the likelihood was great that the message would be understood by those who viewed it*." *Id*. at 410-11 (emphasis added).

In *Johnson,* as mentioned, the Court noted that the protection of the First Amendment does not end at the written or spoken word, and "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Id*. at 404 (quoting *Spence*, 418 U.S. at 409). However, the Court also reiterated another important principle, i.e., that it "ha[d] rejected 'the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaged in the conduct intends thereby to express an idea.'" *Id*. (quoting *O'Brien*, 391 U.S. at 376).

Johnson involved a conviction of an individual for desecration of a venerated object after he burned the American flag in protest against re-nomination of Ronald Reagan as a presidential candidate. Reiterating the test from *Spence,* the Court said that

"[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a *particularized message* was present, *and* [*whether*] *the likelihood was great that the message would be understood by those who viewed it.*'" *Id*. (second and third alterations in original) (quoting *Spence*, 418 U.S. at 410-11) (emphasis added).

The *Spence-Johnson* test may not, however, be applied so narrowly as to withdraw from the protection of the First Amendment conduct that is unquestionably within the First Amendment. *Hurley v. Irish-American Gay & Lesbian Bisexual Group of Boston*, 515 U.S. 557, 569, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). The conduct at issue in *Hurley* was marching in a parade, and the Court found the First Amendment implicated because "[n]ot many marches . . . are beyond the realm of expressive parades."[1] *Id*. The Court stated that some conduct found to be within the protection of the First Amendment shows that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[2] *Id*. (citation omitted). Put another

[1] In *Hurley*, plaintiffs, who were gay, lesbian, and bisexual descendants of Irish immigrants, successfully argued that their exclusion from a St. Patrick's Day parade violated state public accommodations law. Defendant organizers of the parade unsuccessfully appealed. The United States Supreme Court held that application of the public accommodations law so as to effectively require the organizers "to alter the expressive content of their parade" violated the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 572-73.

[2] Verse and most likely music as well are clearly speech, not symbolic speech, but all three examples are, as the Court said, unquestionably within the scope of the First Amendment.

way, in terms the Court later used, marching in a parade is conduct that is "inherently expressive."[3] *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 67, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006).[4]

As courts have observed, it is important to bear in mind the Court's caution in *Hurley* when applying the *Spence-Johnson* test. Thus, the Second Circuit stated that for conduct to be sufficiently imbued with communicative elements requires that a "court must find, at the very least, an intent to convey a '*particularized message*' *along with a great likelihood that the message will be understood by those viewing it*." *Zalewska v. County of Sullivan, New York*, 316 F.3d 314, 319 (2d Cir. 2003) (emphasis added) (quoting *Johnson*, 491 U.S. at 404; *Spence*, 418 U.S. at 410-11).

With this analysis in mind, I turn to the question whether Ms. Immelt's horn honking constituted symbolic speech or merely conduct. In *Spence*, as in *Johnson* and other cases raising the issue, the Court specifically examined the particular conduct of the

[3] The Court in *Rumsfeld*, which postdates the other cases providing explanations for what constitutes speech, said that "we have extended First Amendment protection only to conduct that is inherently expressive." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006). If this is a new test for when conduct equals speech, it is a more demanding standard than the *Spence-Johnson* test. Horn honking would never be speech, it would seem. However, the Court may have been explaining that after assessing speech under the *Spence-Johnson* analysis, the conduct that was found to be speech turned out to be "inherently expressive," given that the Court cited *Johnson* for its statement and that the conduct in both *Spence* and *Johnson* involved symbolic speech in connection with the flag. And, while the court did say that the activity before it was not inherently expressive, it also considered how an observer would (or would not) understand the conduct that was regulated. *Id.*

[4] One author proposes that some activity invokes the First Amendment as symbolic speech because the activity, while not in and of itself speech, is so closely entwined with speech as to be inseparable from it, with marching being in this category. James M. McGoldrick, Jr. *Symbolic Speech: A Message from Mind to Mind*, 61 Okla. L. Rev. 1, 13 (2008). *Hurley* would fit in this category.

person seeking First Amendment protection when deciding whether the conduct was sufficiently expressive to constitute protected speech. *Spence*, 418 U.S. at 408-09; *Johnson*, 491 U.S. at 404 ("[i]n deciding whether *particular conduct* possesses sufficient communicative elements to bring the First Amendment into play").

In *Colten v. Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972), as another example, the United States Supreme Court upheld a state court decision denying First Amendment protection to conduct designed merely to annoy or harass, based on its assessment of the particular conduct of the challenger and the regulation at issue. In *Colten*, an individual was convicted of disorderly conduct on the basis of his failure to leave a congested roadside where a friend in another car was being ticketed. The defendant was asked at least five times to leave. *Id*. at 107-08. The state statute under which he was convicted was construed by the state court to be violated by conduct done with the predominant intent to cause a public inconvenience, annoyance or alarm, with this intent established either by the lack of a bona fide intention to exercise a constitutional right or the fact that the interest in exercising the right was insignificant in comparison to the inconvenience, annoyance, or alarm caused by the defendant's conduct. *Id*. at 108-09. The United States Supreme Court determined that the defendant could be asked to move on as he had no constitutional right to observe issuance of a traffic ticket or to engage the officer issuing the ticket in conversation. *Id*. at 109.

The Court rejected the defendant's overbreadth claim, observing that as the statute was construed an individual could not be convicted merely for expressing unpopular or

annoying ideas and the defendant's "own conduct was not immune under the First Amendment and *neither is his conviction vulnerable on the ground that the statute threatens constitutionally protected conduct of others*." *Id.* at 111.

With regard to horn-honking in particular, the court in *Meaney*, 326 F.3d at 288, observed that horn honking is "not an expressive act *a fortiori*, and thus does not implicate the First Amendment unless context establishes it as such."

Thus, this court should consider Ms. Immelt's particular conduct—her horn honking—in determining whether speech is even at issue in this case. When her particular conduct is examined, the appropriate conclusion is that speech is not at issue in this case.

The record shows that Ms. Immelt honked her horn on two occasions to express her displeasure with neighbors she believed to be opposed to her having chickens at her residence in violation of neighborhood covenants. The first incident occurred between 5:30 and 6:00 a.m. outside a neighbor's house and the second occurred about an hour later the same day in response to a hand movement of another neighbor, the specific nature of which was disputed.

Initially, there is nothing in Ms. Immelt's conduct that is "inherently expressive" such as burning or defacing the nation's flag in protest, nor was the conduct so associated with expressive communication as to constitute speech, such as marching in a parade.

Ms. Immelt concedes that the day before the horn honking she had yelled and cursed at a neighbor in a dispute over a complaint about her chickens and had engaged in

a confrontation with the neighborhood association president that degenerated into a shouting match attracting other neighbors. She honked her horn for 10 minutes the next morning beginning at 5:50 a.m., and about an hour later honked again at another neighbor. Immelt was effectively disturbing the peace of her neighbors in retaliation for the neighborhood association's notice to her that she was not permitted to keep chickens at her home. Immelt made a lot of noise to irritate her neighbors and, in a word, that is what the honking was. Noise—loud noise.

But to come within the protection of the First Amendment, it is not enough that Ms. Immelt retaliated with loud noise, or even that she may have intended her horn honking to express the idea that she was unhappy with her neighbors. Surely if Ms. Immelt had thrown a rock through her neighbor's window this court would not mistake her conduct for protected speech. *See, e.g.*, *O'Brien*, 391 U.S. at 376 ("speech" does not occur whenever the person engaging in the particular conduct intends thereby to express an idea); *Johnson*, 491 U.S. at 404 (same). The honks may have been intended in some part to express her emotions—anger, hostility, frustration—but they do not meet the *Spence-Johnson* test for determining what conduct constitutes speech. The honks did not convey *a particularized message* and *were not likely to be understood as conveying a particular message*. Rather, they were sounds made to annoy or harass, and not speech within the protection of the First Amendment.

The majority does not examine Ms. Immelt's particular conduct at issue in the context in which it occurred. But under the *Spence-Johnson* analysis, context must be

taken into account. General assumptions about horn honking are inappropriate. Nonetheless, without regard to Ms. Immelt's *particular* horn honking, the majority concludes that a range of hypothetical horn honking qualifies as symbolic speech that is regulated by the ordinance, and therefore an overbreadth analysis is proper. I disagree with the majority's ill-considered approach.

Where conduct is concerned, the Court has made it very clear that when an overbreadth challenge is made, it must be closely scrutinized to assure that the challenge is properly adjudicated. In *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), the Court explained, with respect to facial overbreadth challenges:

> [T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, *attenuates as* the otherwise unprotected *behavior* that it forbids the State to sanction *moves* from "pure speech" *toward conduct* and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech *to some unknown extent, there comes a point where that effect—at best a prediction*—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

(Emphasis added.) Accordingly, and "[t]o put the matter another way," as the Court said, "the overbreadth of a stature must not only be real, but substantial as well, *judged in relation to the statute's plainly legitimate sweep*." *Id*.

"[T]he core point [of *Broadrick* is that] the Court will be hostile to facial

condemnation of statutes whose central focus is prohibition of tangible harms unrelated to the content of the expression generated by the production of those harms." Henry Paul Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1, 28. The Ninth Circuit has observed, "[t]he lesson we take from *Broadrick* and its progeny is that a facial freedom of speech attack must fail unless, at a minimum, the challenged statute 'is directed narrowly and specifically at expression or conduct commonly associated with expression.'" *Roulette v. City of Seattle*, 97 F.3d 300, 305 (9th Cir. 1996) (quoting *City of Lakewood v. Plain Dealer Publ'g Co*., 486 U.S. 750, 760, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988)).

"[T]he 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 for it to be facially challenged on overbreadth grounds." *Id*. at 801. The overbreadth analysis from *Broadrick* and its progeny is not applicable every time a challenger raises the possibility that a statute could be applied under conditions where speech might be implicated.

Here, an overbreadth analysis is inappropriate. The challenged regulation simply is not concerned with expression or conduct associated with expression. Under *Broadrick* this case does not present a proper facial overbreadth challenge even if there is some speech element involved. The statute's effect of deterring protected speech is at

best, a prediction, and the majority's speculation unnecessarily prevents the government from enforcing the ordinance in circumstances where conduct admittedly in its power to proscribe is at issue.

This does not mean that an individual could not assert an as-applied claim, and indeed, this is the appropriate claim if an individual is in fact charged with or convicted of violating the ordinance by honking his or her horn in political protest, for example.

Instead of an inappropriate overbreadth analysis, the majority should examine Ms. Immelt's own conduct and decide whether it is speech. As explained, in the cases in which the United States Supreme Court has determined whether conduct involves speech, the Court has examined the specific conduct of the individual claiming First Amendment protection. Here, such an examination effectively ends the First Amendment inquiry.[5]

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[5] The majority and Justice J.M. Johnson's dissent maintain that it is unnecessary to consider whether Ms. Immelt's own conduct is protected speech before turning to her overbreadth claim. Majority at 5; dissent (J.M. Johnson, J.) at 3. But as explained, the court should not engage in an overbreadth inquiry. Further, neither the challenged ordinance provision nor Ms. Immelt's own conduct involve the spoken or written word, or conduct traditionally imbued with expressive import. Thus, first determining whether any "speech," i.e., expressive conduct, occurred so as to implicate the First Amendment is the appropriate inquiry. This is exactly how the United States Supreme Court has approached similar issues.

In *Johnson*, 491 U.S. at 403, the Court observed that Mr. Johnson was convicted of desecrating the flag as a result of his having burned it. He was not convicted based on having uttered any words. Faced with facts implicating conduct rather than words, the Court held that it was therefore necessary to determine, first, whether Johnson's act of burning the flag was expressive conduct permitting him to invoke the First Amendment:

> Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words. This fact somewhat complicates our consideration of his conviction under the First Amendment. We must *first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction.* See, *e.g.*, *Spence* v. *Washington*, 418 U.S. 405, 409–411[, 94 S. Ct. 2727, 41 L. Ed. 2d 842] (1974).

Johnson, 491 U.S. at 402-03 (emphasis added). As the Court explained, the First Amendment literally pertains only to "speech," but the Court had recognized that its protection is not confined

2. Even if the horn honking was expressive conduct, the horn honking statute is constitutional under the *O'Brien* test.

Even assuming that some expressive element is involved, the result should be the

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to only the spoken or written word, but may extend to expressive conduct:

> The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "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)], we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," *Spence*, *supra*, at 409[, 94 S. Ct., at 2730].

Johnson, 491 U.S. at 404. Again referring to the necessity of determining whether conduct even implicates the First Amendment, the Court stated:

> In deciding whether particular conduct possesses sufficient communicative elements <u>*to bring the First Amendment into play*</u>, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." 418 U. S., at 410–411.

Johnson, 491 U.S. at 404 (alterations in original) (emphasis added). If the conduct is expressive, then the court must decide what standard applies to determine the constitutionality of the regulation at issue, as explained next in my opinion. *See Johnson*, 491 U.S. at 403.

Thus, under the circumstances in this case, the court should first examine Ms. Immelt's specific conduct to determine whether the First Amendment is even implicated by her conduct, just as the Court examined Mr. Johnson's specific conduct in *Johnson*. If her conduct is not expressive conduct for purposes of First Amendment protection, then we should not address her First Amendment claims at all, regardless of whether in another instance horn honking might constitute expressive conduct.

This is not a matter of confusing an overbreadth challenge with an "as applied" challenge, contrary to the dissent's mistaken view, dissent (J. Johnson, J.) at 3, but a matter of whether it is appropriate to consider the First Amendment claims at all.

Virginia v. Hicks, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003), cited by the majority, does not require a contrary approach. The overbreadth doctrine was designed as a "departure from traditional rules of standing." *Broadrick*, 413 U.S. at 613. The Court observed in *Hicks* that the state of Virginia petitioned for certiorari after the Virginia Supreme Court had already invalidated the challenged policy on overbreadth grounds. Under those circumstances, the Court's jurisdiction to review the First Amendment issue on the *merits* was clear. *Hicks*, 539 U.S. at 120 (citing *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 619, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989)). The Court left "for another day the question whether our ordinary rule that a litigant may not rest a claim to relief on the legal rights or interests of third parties would exclude a case such as this from initiation in federal court." *Id*. at 121 (citation omitted).

same. In *Johnson*, the Court explained the proper analysis when a challenger claims that his or her conviction for engaging in particular conduct is in violation of the First Amendment. First, as explained above, the Court said it must determine whether the conduct was expressive conduct. Then,

> [i]f [the] conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. See, *e. g.*, *United States* v. *O'Brien*, 391 U. S. 367, 377, 88 S. Ct. 1673, 1679, 20 L. Ed. 2d 672 (1968); *Spence*, *supra*, at 414, n.8, 94 S. Ct., at 2732, n.8. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. See *O'Brien*, *supra*, at 377[, 88 S. Ct., at 1679]. If it is, then we are outside of *O'Brien*'s test, and we must ask whether this interest justifies [the] conviction under a more demanding standard.

Johnson, 491 U.S. at 403. As explained in *O'Brien*, when

> "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 376-77. Examination under this test shows that that even if there is a speech element to the horn honking, the ordinance does not impermissibly regulate speech.

The county ordinance is aimed at noise. Horn honking falls within the statute's legitimate aim to proscribe "public disturbance noise," defined as any sound that

"endangers or injuries the safety or health of humans or animals, or endangers or damages personal or real property, or annoys, disturbs or perturbs any reasonable person of normal sensitivities," Snohomish County Code (SCC) 10.01.020(25), or is a sound specifically listed in SCC 10.01.040(1) or 10.01.040(2). (Horn honking is listed in SCC 10.01.040(1)(d).) The purpose of the noise ordinance "is to minimize the exposure of citizens to the physiological and psychological dangers of excessive noise and to protect, promote and preserve the public health, safety and welfare. It is the express intent of the county to control the level of noise in a manner which promotes the use, value and enjoyment of property; sleep and repose; commerce; and the quality of the environment." SCC 10.01.010(1).

Under the *O'Brien* analysis, *first*, the county has authority to regulate public disturbance noise. *Second*, the county has a "'substantial interest in protecting its citizens from unwelcome noise.'" *Ward*, 491 U.S. at 796 (quoting *Taxpayers for Vincent*, 466 U.S. at 806).

Third, this interest is unrelated to the suppression of free expression. The "principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'" *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763, 114 S. Ct. 2516, (1994) (quoting *Ward*, 491 U.S. at 791). Government may not regulate speech on the basis of its hostility or favoritism towards the message that is expressed. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

"Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)).

The ordinance is not concerned with speech or content of speech, and its purpose is to protect citizens from public disturbance noise. It is, quite simply, an anti-noise ordinance.

Finally, any incidental restriction on First Amendment freedoms is no greater than necessary to control the exposure of citizens to the physiological and psychological dangers of excessive noise. The ordinance permits horn honking for the purpose of warning of danger, which is the obvious reason why horns are necessary parts of vehicles. Significantly, RCW 46.37.380 mandates that every motor vehicle operating on the highway shall be equipped with a horn in good working order, capable of being heard from at least 200 feet away, and states that "[t]he driver of a motor vehicle shall when reasonable necessary to insure safe operation give audible warning with his or her horn but *shall not otherwise use such horn when upon a highway*." (Emphasis added.) This state statute recognizes that horns in automobiles have a legitimate safety purpose, but then expressly directs that they shall not be used for any other purpose on the highway. The constitutionality of the statute is not before the court, but I believe that in light of *O'Brien*, it would easily pass a First Amendment challenge if one were brought.

Assuming that there is a speech component to Ms. Immelt's horn honking, the

ordinance is constitutional under the *O'Brien* test.

I would hold that Ms. Immelt's horn honking was not speech under the *Spence-Johnson* test, that there is no basis for considering hypothetical horn honking to be speech, and that in any event, even if Ms. Immelt's horn honking is presumed to be expressive, under the *O'Brien* test the statute does not impermissibly regulate speech. For these reasons, I do not agree with the majority's overbreadth analysis in this case.

3. Immelt's remaining challenges are meritless.

There is no merit to Ms. Immelt's prior restraint claim.[6] Her conduct did not constitute speech. Also, her prior restraint challenge is inappropriate because at issue is an ordinance of general application that prohibits certain conduct, not censorship of speech.

Next, Ms. Immelt raises both facial and as-applied void-for-vagueness claims. "To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.' *Kolender v.*

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[6] We recently turned to federal case law for the definition of a prior restraint. The United States Supreme Court's definition is:

> "[A]dministrative 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, 80-81, 93 P.3d 161 (2004) (alteration in original) (quoting *Alexander v. United States*, 509 U.S. 544, 550, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993)).

Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L. Ed. 2d 903 (1983). The void-for-vagueness doctrine embraces these requirements." *Skilling v. United States*, __ U.S. __, 130 S. Ct. 2896, 2927-28, 177 L. Ed. 2d 619 (2010); *see State v. Watson*, 160 Wn.2d 1, 6, 154 P.3d 909 (2007).

Ms. Immelt is not entitled to assert a facial challenge. '"[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,'" and this "rule makes *no exception for conduct in the form of speech*." *Holder v. Humanitarian Law Project*, __ U.S. __, 130 S. Ct. 2705, 2719, 177 L. Ed. 2d 355 (2010) (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)) (emphasis added). The ordinance plainly prohibits horn honking for reasons other than public safety, and declares it to be a misdemeanor to honk a horn twice within 24 hours in contravention of this prohibition. Ms. Immelt's conduct is clearly proscribed.

She also raises an as-applied challenge. However, her conduct falls squarely within the ordinance's prohibition, as explained. Her as-applied challenge is without merit as well.

Conclusion

The majority's decision rests upon an incorrect analytical approach and speculation. For the reasons stated, I dissent. Ms. Immelt's horn honking was not speech and the ordinance is not subject to facial invalidity on either overbreadth or vagueness grounds. I would uphold the anti-horn honking provision of the ordinance and would

affirm Ms. Immelt's conviction.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Charles W. Johnson