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NO. 60991-2-I

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

v.

HELEN D. IMMELT,

Appellant-Petitioner.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. A defendant learned that a neighbor had complained to homeowners' association about her keeping chickens in violation of a restrictive covenant. In retaliation the defendant honked her car horn continuously for over six minutes in front of the neighbor's home at 6 a.m. on a Saturday morning. After being warned about doing so, she did it again, and was arrested for violating a county noise ordinance.

Was the ordinance unconstitutionally vague as applied to her, when the ordinance forbade sounding car horns for purposes other than public safety, and the defendant's horn-honking was clearly not done for safety purposes?

2. Was the defendant's conduct "speech," such that she could claim the ordinance unconstitutionally overbroad on its face, when her sounding her car horn did not convey a particularized message on a topic of political concern or public interest, but instead was merely to harass or annoy?

## **II. STATEMENT OF THE CASE**

Appellant Helen Immelt lived in a cul-de-sac in a development governed by restrictive covenants. 1 TRP 94-95, 137; 2 TRP 204-05, 257-58, 270-73, 304, 393 (1 CP 181-82; 2 CP 224,

292-93, 345-46, 358-61, 392; 3 CP 481).<sup>1</sup> Sometime on or before May 12, 2006, she received a letter from her homeowners' association that the covenants forbade her continuing to keep chickens in her back yard. 1 TRP 139-40, 152-55; 2 TRP 216-17, 340 (2 CP 226-27, 239-42, 304-05; 3 CP 428). On the afternoon of May 12, 2006, she yelled and cursed at a neighbor, Tara Knudson, demanding to know who was behind the letter. 1 TRP 98-103 (1 CP 185-90). Ms. Knudson, who knew nothing about it, was frightened and called police. 1 TRP 98-104 1 CP 185-91).

The defendant went across the street to confront another neighbor, Jeremy Brumbaugh, the president of the homeowners' association. That conversation became heated and attracted three other neighbors, Tina Creed, John Vorderbrueggen, and Mike Menalia. 1 TRP 140-44, 164-65; 2 TRP 211, 213-14, 220, 224, 273-76 (2 CP 227-31, 251-52, 299, 301-02, 309, 312, 361-64). It came out that Vorderbrueggen was the one who had complained about the chickens. 1 TRP 166; 2 TRP 228, 234, 340 (2 CP 253, 316, 322; 3 CP 428).

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<sup>1</sup> Citations to the verbatim record of proceedings are by RP volume as well as by Clerk's Papers (the appellant having filed the entire transcript in the trial court as an attachment to briefing there, and then designating it). Citations both to RP and CP are furnished for ease of the reviewer.

Shortly before 6:00 am the next morning, Saturday, May 13, Vorderbrueggen awoke to the sound of a car horn honking. 1 TRP 171; 2 TRP 206 (2 CP 258, 294). He looked out and saw a car he had seen for some weeks parked in the defendant's driveway now parked in front of his house. 2 TRP 206, 215 (2 CP 294, 303). The horn blowing continued for six minutes or more. 1 TRP 145-47, 175; 2 TRP 241, 261 (2 CP 232-34, 262, 329, 349). Jeremy Brumbaugh woke up to it, too. Looking out, he could see the defendant parked in front of Vorderbrueggen's house. 1 TRP 145-46, 172 (2 CP 232-33, 259). Mike Menalia, already awake, heard the honking start at 5:54 a.m. Looking out, he saw the defendant. 1 TRP 259-62, 281, 287 (2 CP 347-50, 369, 375). Tara Knudson heard the honking but could not see who it was. 1 TRP 113, 115, 125-26 (1 CP 200; 2 CP 202, 212-13). The defendant then drove all along the cul-de-sac, still honking. 2 TRP 207 (2 CP 295). Vorderbrueggen saw her lower her window and wave at him. 2 TRP 207, 215 (2 CP 295, 303).

Vorderbrueggen called police. 2 TRP 207, 210-11 (2 CP 295, 298-99). He got a call from the defendant, saying she just wanted to make sure he was up at six. 2 TRP 216 (2 CP 304). She also said something about chickens. Id.

Deputy David Casey of the Snohomish County Sheriff's Office responded and went to talk to the defendant about the noise complaint. 2 TRP 242-44, 310-13 (2 CP 330-32, 398-400; 3 CP 401). The defendant yelled at the officer, called him a liar, and said he just hated chickens. 2 TRP 314-19, 339, 341 (3 CP 402-07, 427, 429). She told the deputy the horn didn't work or that it went off by itself, but declined to let him check the car. 2 TRP 316-17, 343 (3 CP 404-05, 431). Deputy Casey warned her not to do that again or he'd have to arrest her. 2 TRP 317-18, 343 (3 CP 405-06, 431).

Deputy Casey then went to get Vorderbrueggen's statement. 2 TRP 319 (3 CP 407). While there, he heard three long horn blasts as the defendant drove away. 2 TRP 245-47, 320-23, 346-49 (2 CP 333-35; 3 CP 408-11, 434-37). Vorderbrueggen and Brumbaugh heard it, too. 1 TRP 177-80; 2 TRP 249 (2 CP 264-65, 337). Deputy Casey rushed outside where he encountered Mike Menalia walking alongside the road, who said the defendant had angrily honked at him. 2 TRP 246-48, 264-67, 295-96, 299, 320-23 (2 CP 334-35, 352-55, 383-84; 3 CP 408-11). He admitted he had blown her a kiss. 2 TRP 266-67 (2 CP 354-55).

Deputy Casey followed the defendant and pulled her over. 2 TRP 299-300, 325, 351 (2 CP 387-88; 3 CP 413, 439). He reminded her he had warned her about honking the horn again. 2 TRP 326 (3 CP 414). The defendant told him that she didn't do it; that the horn went off by itself; and/or that she had done so in response to Menalia "flipping her off." 2 TRP 326-27, 360-61 (3 CP 414-15, 448-49). Deputy Casey arrested the defendant. 2 TRP 328-29, 363 (3 CP 416-17, 451). An unnamed City of Monroe officer arrived to impound the vehicle. 2 TRP 326, 331, 351 (3 CP 414, 419, 439).

The defendant screamed at Deputy Casey on the way to jail. 2 TRP 332-33, 369 (3 CP 420-21, 457). The deputy suggested she might want to remain silent. 2 TRP 333 (3 CP 421).

The owner of the car the defendant had used testified the horn buttons sometimes stick and sometimes don't work, but the horn never goes off by itself. 2 TRP 417, 419, 424-25 (3 CP 505, 507, 512-13). The defendant did not testify. 3 TRP 441 (3 CP 530).

The defendant was charged by amended complaint in Snohomish County District Court, Evergreen Division, with violation of the county noise ordinance, SCC 10.01.040 and 10.01.080(3)

(text furnished in argument below). See district court docket at 1 CP 10-18. Pretrial motions to dismiss were denied. 1 CP 10-18 (docket); see also 1 TRP 37-38 (1 CP 124-25). The matter proceeded to a three-day jury trial on December 6-8, 2006; the defendant, who acted pro se, was convicted. 1 CP 10-18 (docket); see also 1 CP 65 (verdict); 3 TRP 495-96 (3 CP 584-85) (same).

The Snohomish County Superior Court on RALJ appeal affirmed the conviction. 1 CP 7-8. The defendant then sought discretionary review in this Court. By commissioner's order of May 16, 2008, review was granted.

### **III. ARGUMENT**

#### **A. APPELLANT-PETITIONER HAS NOT MET HER BURDEN TO SHOW THE SNOHOMISH COUNTY ORDINANCE IS UNCONSTITUTIONAL.**

##### **1. The Challenged Ordinance.**

Per Snohomish County Code (SCC)10.01.040,

[i]t is unlawful for any person to cause, or for any person in possession of property to allow to originate from the property, sound that is a public disturbance noise.

SCC 10.01.040(1)(d) defines as a "public disturbance noise," among other things, "the sounding of vehicle horns for purposes other than public safety."

SCC 10.01.080(3) classifies violations of the public disturbance noise ordinance as infractions unless two are committed in a 24-hour period; in which case the second violation is criminalized as a misdemeanor. In relevant part, the ordinance provides:

**(3) Public Disturbance Enforcement.** Any person found to be in violation of the provisions of section SCC 10.01.040 governing public disturbance noise . . . shall be deemed to have committed a civil infraction as established in Chapter 7.80 RCW and for each violation shall be subject to a civil penalty of \$50; provided that penalties for an additional separate violation of a like nature by the same person within a one year period shall be \$100; and provided further that any second violation within a 24 hour period shall constitute a misdemeanor punishable by incarceration for a period not to exceed 90 days and/or monetary fine not to exceed \$1,000.

RCW 10.83.080(3). The appellant contends this ordinance cannot withstand constitutional scrutiny, either as applied to her (as unconstitutionally vague), or on its face (as an overbroad regulation of protected speech).

## **2. Standard of Review; Burden On Challenger.**

The constitutionality of a statute or ordinance is an issue of law that this Court reviews de novo. State v. Watson, 160 Wn.2d 1, 5-6, 154 P.3d 909 (2007). In so doing, the reviewing court starts with the presumption that the statute or ordinance is constitutional.

Kitsap County v. Mattress Outlet, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005); Brown v. City of Yakima, 116 Wn.2d 556, 559, 807 P.2d 353 (1991). If a statute or ordinance is susceptible to several different interpretations, the court will construe it so as to be constitutional. Dep't of Natural Resources v. Littlejohn Logging, Inc., 60 Wn. App. 671, 677, 806 P.2d 779 (1991). The presumption in favor of a law's or ordinance's constitutionality is overcome only in exceptional cases. Seattle v. Eze, 111 Wn.2d 22, 28, 759 P.2d 366 (1988). In general, it is the challenger's burden to prove beyond a reasonable doubt that the statute or ordinance is unconstitutional. State v. Watson, 160 Wn.2d at 5-6 (examining failure-to-register-as-sex-offender statute); City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990) (examining Spokane's nuisance ordinance).

### **3. The Ordinance Is Constitutional As Applied To The Defendant.**

It is unquestionably true that citizens must be afforded fair warning of proscribed conduct. Rose v. Locke, 423 U.S. 48, 49, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975). A statute purporting to define prohibited conduct can be "void for vagueness" if persons of "common intelligence" must guess as to its meaning, and differ in

how to apply it. Seattle v. Eze, 111 Wn.2d at 26 (upholding “disorderly bus conduct” ordinance). A vagueness claim requires the challenger to demonstrate beyond a reasonable doubt that the statute either (1) fails to sufficiently define the offense so that ordinary people can understand what conduct is proscribed, or (2) fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992) (examining school-zone “enhancement” to drug-trafficking sentences); Spokane v. Douglass, 115 Wn.2d at 178.

Under the first prong, “[t]he due process clause of the Fourteenth Amendment to the United States Constitution requires statutes to provide fair notice of the conduct they proscribe.” Watson, 160 Wn.2d at 6. To meet this standard, “the language of a penal statute ‘must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.’” Watson, 160 Wn.2d at 6-7 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). “A statute fails to provide the required notice if it ‘either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’” Watson, 160 Wn.2d at 7 (quoting

Connally, 269 U.S. at 391); Seattle v. Eze, 111 Wn.2d at 26 (same).

Under the second prong, “the due process clause requires that a penal statute provide adequate standards to protect against arbitrary, erratic, and discriminatory enforcement.” Douglass, 115 Wn.2d at 180. A statute is unconstitutionally vague on this ground if it “contain[s] *no standards* and allow[s] police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case.” Douglass, 115 Wn.2d at 181 (quoting State v. Maciolek, 101 Wash.2d 259, 267, 676 P.2d 996 (1984)) (emphasis added). The statute must “provide ‘minimal guidelines ... to guide law enforcement.’” Douglass, 115 Wn.2d at 181 (quoting State v. Worrell, 111 Wn.2d 537, 544, 761 P.2d 56 (1988)).

The defendant attacks both prongs, arguing that the language in SCC 10.01.040(1)(d), defining a “public disturbance noise” as including “the sounding of vehicle horns for purposes other than public safety,” is so vague that citizens cannot agree on what it means; and law enforcement is left without guidance, other than the whim of the individual officer, on how to enforce it. BOA 10-13. The Court should reject these arguments.

As to the first prong, “[s]ome measure of vagueness is inherent in the use of language,” Watson, 160 Wn.2d at 7 (quoting Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 740, 818 P.2d 1062 (1991)). We “do not require ‘impossible standards of specificity or absolute agreement.’” Watson, 160 Wn.2d at 7. “[V]agueness in the constitutional sense is not mere uncertainty,” and “a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his [or her] actions would be classified as prohibited conduct.” Watson, 160 Wn.2d at 7. “[A] statute meets constitutional requirements ‘[i]f persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement.’” Watson, 160 Wn.2d at 7, 154 P.3d 909 (quoting Douglass, 115 Wn.2d at 179).

As for the second prong, determinations by law enforcement are not made in a vacuum; rather, the question is whether the terms are “inherently subjective in the context in which they are used.” Worrell, 111 Wn.2d at 544. The mere fact that a statute may require some degree of subjective evaluation by a police officer to determine whether the statute applies does not mean the statute is unconstitutionally vague. Am. Dog Owners Ass'n v. City of Yakima,

113 Wn.2d 213, 216, 777 P.2d 1046 (1989). “Under the due process clause, the enactment is unconstitutional only if it invites an inordinate amount of police discretion.” Douglass, 115 Wn.2d at 181 (citing Am. Dog Owners Ass'n, 113 Wn.2d at 216).

Moreover, “[i]f the statute does not involve First Amendment rights, then the vagueness challenge is to be evaluated by examining the statute as applied under the particular facts of the case.” Coria, 120 Wn.2d at 163; accord, Douglass, 115 Wn.2d at 181-82. By this analysis, the statute is tested for unconstitutional vagueness by inspecting the actual conduct of the party challenging the statute and not by examining hypothetical situations at the periphery of the statute’s scope. Weden v. San Juan County, 135 Wn.2d 678, 708, 958 P.2d 678 (1998); Douglass, 115 Wn.2d at 182-83.

The defendant’s actual conduct was to honk her horn at 6 a.m. on a Saturday morning for six-plus minutes for no “public safety purpose;” after she was warned about it, she did it again. There was no lack of notice, and there was nothing for her to guess at. There was no conceivable “public safety purpose” in play, and appellant cites none. Similarly, defining the use of car horns as a “public disturbance noise” if not for “purposes of public safety” is

sufficiently clear, as a standard, to avoid arbitrary enforcement. The defendant's as-applied challenge (BOA 10-13) fails. The trial court and the RALJ court correctly so found.

The defendant argues the ordinance is infirm because "public safety purpose" is undefined. But the fact that a particular term in an ordinance is undefined does not automatically render the enactment unconstitutionally vague. See, e.g., Douglass, 115 Wn.2d at 180. Statutes and ordinances are not void for vagueness merely because all of their possible applications cannot be specifically anticipated. Seattle v. Eze, 111 Wn.2d at 27; State v. Maciolek, 101 Wn.2d at 265. Some imprecision in the language of a statute will be tolerated. Robinson v. United States, 324 U.S. 282, 286, 65 S.Ct. 666, 89 L. Ed. 2d 944 (1945); State v. Smith, 111 Wn.2d 1, 10, 759 P.2d 372 (1988).

Nor is the legislative language imprecise. Any motorist can tell the difference between a warning honk triggered by traffic safety concern, and sounding a horn in anger for several minutes early on a weekend morning when no traffic safety concern is present. This is not a situation where "a person of ordinary intelligence could not reasonably understand" what is prohibited. See Douglass, 115 Wn.2d at 179. Similarly, this affords sufficient guidance to law

enforcement on what to cite for, and what not to: horn-honking “for purposes other than public safety,” does not invite “an inordinate amount of police discretion.” Douglass, 115 Wn.2d at 181 (citing Am. Dog Owners Ass'n, 113 Wn.2d at 216. This is especially true when the prohibited conduct must occur twice in a 24-hour period before officers can issue a criminal citation for it. This is hardly unfettered discretion. Viewed “as applied” to the defendant’s conduct, this ordinance is constitutional.

**4. Because The Defendant Did Not Engage In Speech, She Cannot Claim The Ordinance Is Overbroad.**

The defendant also argues that she was engaged in “speech” which she alleges the ordinance unconstitutionally prohibits, contrary to the First Amendment and the Washington Constitution. BOA 7-10. She adds that the ordinance is overbroad on its face even if her “speech” is not protected. BOA 9.

“A statute is overbroad if its prohibitions extend beyond proper bounds and violate the First Amendment’s protection of free speech.” City of Seattle v. Eze, 111 Wn.2d at 31. The overbreadth doctrine may invalidate a law on its face only if the law is “substantially overbroad.” City of Houston v. Hill, 482 U.S. 451, 459, 107 S.Ct. 2502, 2508, 96 L.Ed.2d 398 (1987); State v. Motherwell,

114 Wn.2d 353, 370-71, 788 P.2d 1066 (1990); City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989).

The First Amendment protects only “speech.” Courts have rejected the view that that any conduct can be self-labeled as “speech” whenever the actor intends to express an idea, as the defendant seeks to do here. At the same time, conduct may be sufficiently imbued with elements of communication to fall within the First Amendment’s protection. Texas v. Johnson, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L. Ed. 2d 342 (1989) (flag-burning is protected “speech”); United States v. Grace, 461 U.S. 171, 176, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (same, for leafleting and picketing); Spence v. State v. Washington, 418 U.S. 405, 409-410, 94 S.Ct. 2727, 41 L. Ed. 2d 842 (1974) (same, for exhibiting upside-down US flag) United States v. O’Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L. Ed. 2d 672 (1968) (burning draft card may be “speech,” but is not protected). There must be an intent to convey a *particularized* message and there must be a great likelihood that the message would be understood. Johnson, 491 U.S. at 404 (emphasis added). “Conduct is expressive when the actor intends to communicate a particular message by his actions and that message will be understood by those who observe it because of

the surrounding circumstances.” City of Seattle v. McConahy, 86 Wn. App. 557, 567, 937 P.2d 1133 (1997) (citing Spence, 418 U.S. at 410-11):

To analyze whether conduct is “speech,” much less protected speech, requires looking to the conduct that actually occurred, and the context in which it occurred. Texas v. Johnson, 491 U.S. at 402 n.3, 405; Spence v. Washington, 418 U.S. at 406, 414. Horn-honking is not expressive conduct or “speech” per se, and thus does not implicate the First Amendment unless the *context in which it is done* establishes it as such. Meaney v. Dever, 326 F.3d 283, 287-88 (1<sup>st</sup> Cir. 2003) (examining sounding truck horn continuously while passing outside city hall during mayor’s inauguration, and finding it not “speech”) (emphasis added). And horn-honking done simply for the purpose of annoying or harassing others, or disturbing their piece, is not “speech,” and not constitutionally protected at all. State v. Compas, 290 Mont. 11, 964 P.2d 703, 706 (1998).

In Compas, a defendant sounded loud continuous blasts while passing a new RV park and campground she considered an eyesore. She was convicted of disorderly conduct and appealed. The Supreme Court of Montana rejected her claim that her horn-

honking was protected "speech," done to protest the location of the RV park. It found instead that her conduct was simply calculated to harass and annoy and thus was not constitutionally protected.

The same result obtains here. Appellant Immelt was unhappy at Vorderbrueggen's having complained to the homeowner's association about her keeping chickens. She retaliated by honking her horn for over six minutes outside his house at 6 a.m. on a Saturday morning. This was not to convey a political purpose, as burning a flag or a draft card unmistakably are. See Compass, 964 P.2d at 706 (horn-honking there not done to protest unlawful act of government to that government). Nor was there any intent here to "convey a particularized message." See Johnson, 491 U.S. at 404. This was, as in Compass, simply a vengeful angry response. It was to annoy and harass. Like in Compass, it was not protected "speech;" indeed, it was not speech at all. There is no constitutional protection for what the defendant did.

The defendant argued below that her sounding her horn was specifically to protest the homeowners'-association ban on keeping chickens. But there was no testimony below to support this. In her first encounter with police, at her front door, she said the horn didn't

work or that it went off by itself. 2 TRP 316-17, 343 (3 CP 404-05, 431). Later, when the same officer stopped her, she first denied honking the horn a second time, then said the horn went off by itself; and finally that she had done so in response to a neighbor making an obscene gesture. 2 TRP 326-27, 360-61 (3 CP 414-15, 448-49). There was nothing, in all of this, expressing an idea, and certainly not a political one. Moreover, it was Vorderbrueggen's house she stopped and honked in front of, not Brumbaugh's (the president of the homeowners' association). At most she can point to accusing Deputy Casey of hating chickens, 2 TRP 314-19, 339, 341 (3 CP 402-07, 427, 429), and saying "something" about chickens to Vorderbrueggen when she called him, after honking, 2 TRP 216 (2 CP 304). But it was not the phone call that comprised the prohibited conduct, but the early-morning continuous horn blowing that preceded it. And it does not establish her early-morning horn-honking was constitutionally protected "speech."

The defendant cites, and relies heavily upon, City of Eugene v. Powlowski, 116 Or. App. 186, 840 P.2d 1322 (1992) (interpreting Oregon constitution). There, motorists honked for one side or the other during competing anti-war demonstrations during the first Gulf War, and were cited for violating a municipal ordinance that

prohibits honking an automobile horn for purposes other than as a reasonable warning. The Oregon Court of Appeals held honking there to be “speech” because “defendants honked their automobile horns to demonstrate support or disapproval of a political issue or a matter of public concern.” Powlowski, 840 P.2d at 1324. Once past that threshold, the Oregon court then found the ordinance overbroad on its face, since it would prohibit more than public nuisance (citing the example of a friendly honk as being a violation). Id. The defendant argues that her situation is the same as in Powlowski, and governs the outcome here.

Powlowski interprets only article 1, section 8 of the Oregon constitution.<sup>2</sup> It does not purport to interpret article 1, section 5 of our constitution,<sup>3</sup> nor the First Amendment.<sup>4</sup>

But more importantly, the Powlowski court first determined the horn-sounding there was in fact “speech,” because the expressive conduct there was to “demonstrate support or disapproval of a political issue or a matter of public concern.”

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<sup>2</sup> “No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.”

<sup>3</sup> “Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.”

<sup>4</sup> “Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

Powlowski, 116 Or. App. at 189, 840 P.2d at 1324. It only then proceeded to overbreadth analysis. The defendant assumes the same for her conduct here – that it was “speech” – but skips over the required analysis to get there. But, as noted earlier, whether conduct constitutes “speech” first requires looking to the conduct that occurred, and the context in which it occurred. Texas v. Johnson, 491 U.S. at 402 n.3, 405; Spence v. Washington, 418 U.S. at 406, 414; Meaney v. Dever, 326 F.3d at 287-88; compare Compass, 964 P.2d at 706 (sounding horn was to harass and annoy, not to protest zoning or siting decision, therefore not “speech”) with Powlowski, 840 P.2d at 1324 (sounding horn was to express opinion on political issue or matter of public concern). The defendant’s sounding her horn repeatedly early on a Saturday morning had no political or public-interest content at all. Like Compass, and unlike Powlowski, her conduct *was not* “speech.” That being so, she cannot complain further. Analysis can end there.

The defendant argues that this doesn’t matter. BOA 9-10. She cites to the line of cases that hold overbreadth challenges are facial: If a ordinance impermissibly burdens protected “speech,” a challenge to it will prevail even if the individual litigant’s activity lies

within the permissible scope of the ordinance, such that the enactment could be constitutionally applied to him or her. Broadrick v. Oklahoma, 413 U.S. 601, 611-12, 93 S.Ct. 2908, 37 L. Ed.2d 830 (1973) (upholding prohibition on public employees' engaging in public political activities); State v. Motherwell, 114 Wn.2d 353, 370-71, 788 P.2d 1066 (1990) (subjecting communications in counseling sessions to mandatory reporting requirements not unconstitutional); O'Day v. King County, 109 Wn.2d 796, 802-03, 749 P.2d 142 (1988) (nude and semi-nude dancing is "speech," but nudity can be regulated); State v. Regan, 97 Wn.2d 47, 640 P.2d 725 (1982). (obscene material and film is protected speech; only "patently offensive" obscenity is "speech" subject to regulation). What all these cases have in common is that *they examined some form of "speech,"* or a mixture of conduct and "speech," and then considered whether a statute or ordinance regulating it was overbroad, even if the "speech" in question was not itself protected. None of them embarked on overbreadth analysis after determining that the underlying conduct in question was not speech at all. That is, however, what the defendant would have this Court do. No case supports her proposition that

overbreadth analysis can be triggered by, and premised upon, pure conduct alone.

Lastly, the defendant appears to argue she should prevail because article 1 section 5 of the Washington constitution affords greater protection than the First Amendment. BOA 7. Our Courts have identified one area where this so, that of “prior restraints.” State v. Coe, 101 Wn.2d 364, 374-75, 679 P.2d 3531(984). “Prior restraints” are “official restrictions imposed upon speech or other forms of expression in advance of actual publication.” Coe, 101 Wn.2d at 372 (quoting Emerson, “The Doctrine of Prior Restraint,” 20 Law & Contemp. Probs. 648 (1955)). Unlike the First Amendment, article 1 section 5 rules out prior restraints under any circumstances, leaving the State with only “post-publication sanctions.” Coe at 374 (invalidating contempt of court order for broadcasting tapes after having been ordered not to do so). Immelt’s horn-blowing does not involve “prior restraint,” first and foremost because it was not “speech,” and secondly because there was no prior restraining order in place before she engaged in the conduct that resulted in her being cited. Moreover, the Coe court noted that a valid “manner” restriction on the loudness of “speech” (e.g., a restriction on the use of sound trucks or loud shouting

designed to disrupt rather than communicate) is not a "prior restraint."

The defendant's argument fails under both the First Amendment or the Washington constitution. The trial court and the Superior Court on RALJ appeal did not err when, consistent with other jurisdictions,<sup>5</sup> both upheld the ordinance.

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<sup>5</sup> Anti-noise ordinances elsewhere have been repeatedly upheld as constitutional. State v. Clarksburg Inn, 375 N.J. Super. 624, 868 A.2d 1120 (2005) (loud music from inn; ordinance not void for vagueness, nor subjectively enforced); City of Columbus v. Kendall, 154 Ohio App. 3d 639, 798 N.E.2d 652 (2003) (loud music during water aerobics class; ordinance not unconstitutionally vague); State v. Cornwell, 149 Ohio App. 3d 212, 776 N.E.2d 572 (2002) (loud-music ordinance neither void for vagueness nor facially overbroad); People v. Hodges, 70 Cal. App. 4th 1348, 83 Cal. Rptr. 2d 619 (1999) (ordinance prohibiting loud music from car on public street not void for vagueness); State v. Powell, 250 N.J. Super. 1, 593 A.2d 342 (1991) (same); State v. Dorso, 4 Ohio St. 3d 60, 446 N.E.2d 449 (1983) (same, applied to noise from roller rink). The Supreme Court upheld an anti-noise ordinance in the vicinity of schools even though First Amendment concerns were squarely implicated. Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L. Ed. 2d 222 (1972); see also Madsen v. Women's Health Center, Inc., 512 U.S. 753, 772-73, 114 S.Ct. 2516, 129 L.Ed. 2d 593 (1994) (upholding carefully-crafted injunction, including noise restrictions on bullhorns and car horns, governing protests at family planning centers). But see Lionhart v. Foster, 100 F. Supp. 383 (E. D. La. 1999) (declaring unconstitutional an anti-noise ordinance prohibiting amplified music "in a manner likely to disturb, inconvenience or annoy"); Luna v. City of Ulysses, 28 Kan. App. 2d 413, 17 P.3d 940 (2000) (anti-noise statute prohibiting loud or excessive noise that was "mentally annoying or disturbing" held unconstitutionally vague).

**IV. CONCLUSION**

The judgment and sentence should be affirmed.

Respectfully submitted on December 29, 2008.

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