

60991-2

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No. 60991-2

IN THE COURT OF APPEAL, DIVISION I  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Plaintiff,

v.

HELEN IMMELT, Defendant.

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APPELLANT'S OPENING BRIEF

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## A. ASSIGNMENT OF ERROR

- 1) **Snohomish County Code §'s 10.01.040(1)(d) and 10.01.080 (3) Are Unconstitutionally Vague And Overbroad (On Their Faces And As Applied) Under The Constitution Of The United States And The Constitution of the State Of Washington.**

## B. STATEMENT OF THE CASE

### Substantive Facts

At approximately 6:00 am on Saturday, May 13, 2006, the horn in a vehicle borrowed by defendant began sounding where it was parked in the street. CP 202:1-5; 232:8-16; 294:21-23; 348:11-22).<sup>1</sup> None of the State's witnesses testified that they actually saw Defendant physically honk the horn on that occasion.<sup>2</sup> (CP 202:8-13; 204:9-10; 259:22-260:11; 295:5-8; 378:17-21; 430:5-11) At approximately 7:30 Snohomish County Deputy Sheriff David Casey confronted Defendant at her front door and told her, "Look, if you continue to do this, [arguing with him] I'm going to have to arrest you." (RP 405:18-21) At approximately 8:00, Michael Menalia, a neighbor, walked down the middle of the public street to talk to Casey and Jon Vorderbrueggen who were meeting inside Vorderbrueggen's residence. Menalia made an obscene gesture with his middle finger at defendant or blew her a kiss depending on who's version is accepted. Defendant admittedly sounded her horn in response. (CP 352:15-355:2; 414:25-415:7)

This second alleged horn incident did not occur in Deputy Casey's presence. (CP 437:5-13) Deputy Casey did not know why the horn was honked. (CP 447:12-14)

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<sup>1</sup> As a result of a clerical error, the trial transcript was included as part of the Clerk's Papers in this matter.

<sup>2</sup> The circumstances surrounding the first horn honking incident have no bearing on resolution of this case. Defendant was neither charged, nor convicted of a first offense under the Ordinance. It is the second horn honking incident which gave rise to the criminal charge in this matter.

Deputy Casey “changed [his] mind” and “made up [his] mind” “to arrest [her].” (CP 447:3-24) Deputy Casey placed defendant in handcuffs, placed her in his patrol car and took her to jail. (CP 417:9-10; 418:1-4)

### **Procedural Facts**

On May 13, 2006, Deputy Casey issued defendant a criminal misdemeanor citation for violation of RCW 9A.46.020 (1)(a)(iv) by blowing a car horn and thereby threatening the “mental health” of her neighbors. (CP 10) Formal charges were filed on May 23, 2006 and defendant was arraigned on the above charge on June 5, 2006. (CP 10) Early on, Defendant wrote numerous letters to the prosecutor to no avail advising that the statute for which Defendant was being charged had been declared unconstitutional five years previously in *State v. Williams*, 144 Wash.2d 197 (2001). (CP 116:23) Defendant filed a motion to dismiss (CP 11-12; 127:2-8) which apparently finally got the state’s attention as at the 11<sup>th</sup> hour, the state amended the charge to allege a misdemeanor noise violation under SCC § 1010.01.040.D – made a misdemeanor pursuant to SCC 10.01.080 (3). (CP 13; 110:19-111:7)

On December 8, 2006, Defendant was convicted of sounding her horn for a purpose other than public safety on a second occasion within twenty-four hours (SCC 10.01.040(1)(d) – made a misdemeanor pursuant to SCC 10.01.080 (3)) and sentenced to 10 days in jail with one day credit for time served and a fine of \$1000 with \$500 suspended plus costs of \$243 following a two day jury trial. (CP 16) The Superior Court affirmed the Judgment of the District Court with no explanation or citation of authority. (CP 7-8)

### C. ARGUMENT

Freedom of speech<sup>3</sup> is a preferred right under the Washington Constitution. *State v. Coe*, 101 Wash.2d 364, 679 P.2d 353 (1984). Furthermore, restraint imposed upon a constitutionally protected medium of expression is presumptively unconstitutional. *Fine Arts Guild, Inc. v. Seattle*, 74 Wash.2d 503, 506, 445 P.2d 602 (1968). Article 1, section 5 of the Washington Constitution provides greater protection for speech than do the provisions of the United States Constitution. Unlike the First Amendment, article 1, section 5 categorically rules out prior restraints on constitutionally protected speech under any circumstances. *Coe*, at 374-75, 679 P.2d 353. Regulations that sweep too broadly chill protected speech prior to publication, and thus may rise to the level of a prior restraint. *Coe*, at 373, 679 P.2d 353.

In *City of Eugene v. Moug*, 116 Or.App. 186 (1992) the Oregon Court of Appeal had occasion to address similar provisions of the Oregon constitution as applied to a similar noise ordinance and an instance of horn honking. The Court first noted that, “All speech is constitutionally protected, unless it falls within an historical exception that the guarantee of freedom of expression was not intended to reach. *State v. Robertson*, 293 Or. 402, 412, 649 P.2d 569 (1982).” The Court then noted that “Section 5.005 is not a law that focuses on the content of speech. It is directed against the sound made by a mechanical device. Laws that do not punish speech itself are still scrutinized for overbreadth if they focus on the effect of speech and prohibit the expression used to achieve the effect or if they focus on an effect of speech without reference to expression. *State v. Plowman*, 314 Or. 157, 838 P.2d 558 (1992).” Just as here, the noise ordinance

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<sup>3</sup> Conduct, including horn honking, has frequently been recognized as protected free speech. See, *Texas v. Johnson*, 491 U.S. 397, 404 (1989), *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 772 (1994), *Meaney v. Dever*, 170 F.Supp. 46 (2001) and *Hirsh v. City of Atlanta*, 261 Ga. 22 (1991).

in question prohibited all horn honking. The Court found the ordinance unconstitutionally overbroad holding:

The ordinance restricts all horn honking for any purpose at any time except as a warning. For example, it is broad enough to make honking unlawful if a motorist honked his horn as a friendly greeting to a bystander as he drives by a residence or any other circumstance when honking is used as a form of communication. The ordinance is not limited to those circumstances when, because of noise or abuse, the public interest may be implicated. Because the ordinance regulates far more than the consequences of the conduct that the city argues that it is intended to prevent, it is unconstitutionally overbroad.

SCC 10.01.040(1)(d) provides:

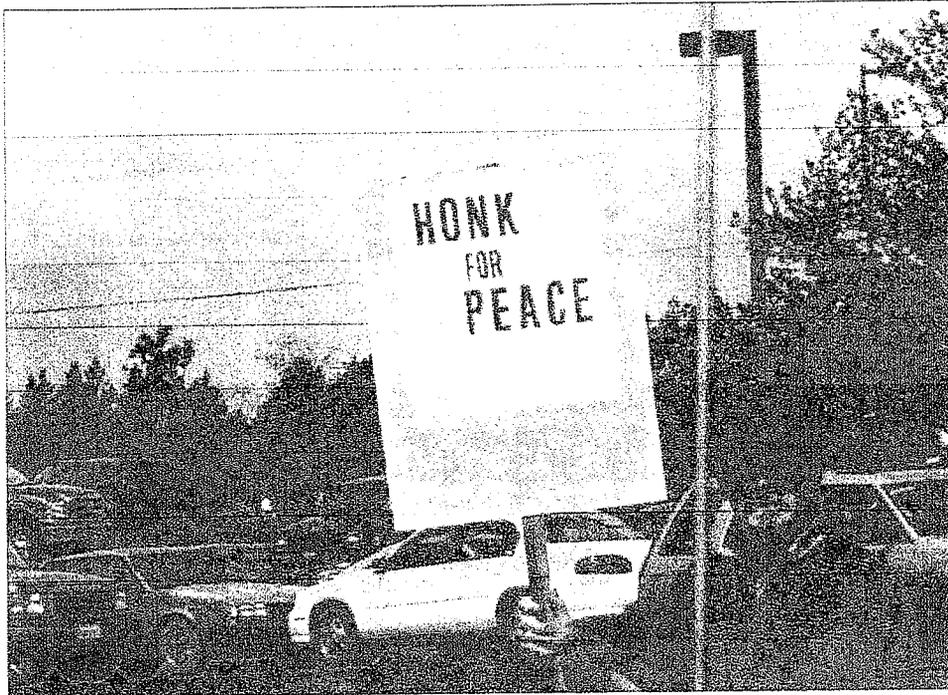
Public Disturbance Noises, Day and Night. Sounds resulting from the following activities, occurring at any hour of the day or night, are determined to be public disturbance noises.

- (1) The sounding of vehicle horns for purposes other than public safety.

Just as with the Oregon ordinance, the provisions of the Snohomish County Code restrict all horn honking “for purposes other than public safety,” an undefined, and un-definable restriction or guide.

To illustrate the reach of the ordinance in question, on Mothers’ Day 2007, on Highway 2 in Monroe by the McDonald’s, an anti-way demonstration was under way.

As luck would have it, one of the demonstrators was carrying the following sign:



Under SCC 10.01.040(1)(d) any person responding to the above invitation would be subject to arrest, prosecution and incarceration. Likewise too, anyone honking their horn at a wedding parade, after a sport's event, at a politician campaigning for election, at a pretty girl, or any of a million instances in which citizens on a daily basis sound their horn to communicate an idea for legitimate reasons other than a "public safety purpose." Such a prosecution would clearly be unconstitutional. "If the County's regulations impermissibly burden protected expression, respondents have standing to challenge the regulations' overbreadth even though "their activity is within the permissible scope of the [ordinance] and even if such constitutional overbreadth can be considered 'harmless error' as applied to them." *State v. Regan*, 97 Wash.2d 47, 52, 640 P.2d 725 (1982); see also *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12, 93 S.Ct. 2908, 2915-16, 37 L.Ed.2d 830 (1973). *O'Day v. King County*, 109 Wash.2d 796, 803 (1988). Therefore, if the Snohomish Ordinances can reach and criminalize protected speech and conduct, it is

constitutionally overbroad even if the defendant's conduct might be proscribable with a properly drafted ordinance.

The ordinance is additionally unconstitutionally vague. In *State v. Williams*, 144 Wash.2d 197 (2001) the Washington State Supreme Court dealt with the interplay between First Amendment concerns and unconstitutionally vague and overbroad criminal statutes as here involved. In *Williams* at 203-204, the Supreme Court held as follows:

Under the Due Process clause of the Fourteenth Amendment, a statute is void for vagueness if either: (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed; or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement.

*City of Bellevue v. Lorang*, 140 Wn. 2d 19, 30 (2000) (quoting *State v. Halstien*, 122 Wn. 2d 109, 117 (1993)(quoting *City of Spokane v. Douglass*, 115 Wn. 2d 171, 178 (1990)).

The purpose of the vagueness doctrine is twofold: "first, to provide citizens with fair warning of what conduct they must avoid and second, to protect them from arbitrary, ad hoc, or discriminatory law enforcement." *Halstien* at 116-117; *Lorang*, at 30 (citing *Grayned v. City of Rockford*, 408 U.S. 104-108 (1972); *State v. Lee*, 135 Wn. 2d 369, 393 (1998); *City of Tacoma v. Luvane*, 118 Wn. 2d 826, 844 (1992). "A statute is unconstitutionally vague if either requirement is not satisfied." *Halstien* at 117-118 (citing *Douglass* at 178). Moreover, "we are especially cautious in the interpretation of vague statutes when First amendment interests are implicated." *Lorang*, 140 Wn. 2d at 31.

In *State v. Boyd*, 137 Wn.App. 910, 917 (2007), the Court discussed the first part of the test as follows:

A statute is indefinite "if persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Glas*, 147 Wn.2d at 421. In analyzing a statute for vagueness, we examine the context of the enactment as a whole, giving the language a "'sensible, meaningful, and practical interpretation'" to determine whether it gives fair warning of the proscribed conduct. *Stevenson*, 128 Wn. App. at 188 (quoting *Douglass*, 115 Wn.2d at 180).

The *Boyd* Court discussed the latter part of the test also at 917:

Alternatively, a statute is unconstitutionally vague if it "invites an inordinate amount of police discretion" by containing terms that are inherently subjective. *Stevenson*, 128 Wn. App. at 188 (quoting *Douglass*, 115 Wn.2d at 181).

As the Court noted in *State v. Maciolek*, 101 Wn.2d 259 (1984) in analyzing ad hoc law enforcement:

What is forbidden by the due process clause are criminal statutes that contain no standards and allow 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. Thus, it is for this reason that we struck down statutes containing inherently subjective terms such as loiter or wander, *Seattle v. Drew*, 70 Wn.2d 405, 423 P.2d 522, 25 A.L.R.3d 827 (1967); *Seattle v. Pullman*, 82 Wn.2d 794, 514 P.2d 1059 (1973); wanders and prowls with unlawful purpose, *Bellevue v. Miller*, Supra; lawful order, *Seattle v. Rice*, 93 Wn.2d 728, 612 P.2d 792 (1980); lawful excuse, *State v. Hilt*, 99 Wn.2d 452, 662 P.2d 52 (1983); *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982). In each case the statutes allowed ad hoc decisions of criminality based on the moment to moment judgment of a policeman.

In the present case, the statute does not define "public safety purpose" so as to give fair warning as to when blowing one's horn is allowed and when it is not. The problem with the ordinance is not so much that it provides no definition of "public safety purpose," it is that such a grouping of words cannot possibly be defined in a manner that comports with the constitutions of either the State of Washington or the United States.<sup>4</sup> Blowing one's horn at a wedding is common practice as is horn honking at fireworks displays, horn honking after football and basketball games, horn honking at politicians as they stand on street corners at election time, horn honking at union strikers and many other such activities. What warning is given by the ordinance when it criminalizes all

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<sup>4</sup> No statute or case attempts to define the term "public safety" with the constitutional clarity required of a criminal statute. In fact, the Attorney General of the State of Illinois opined "The phrase "public safety", however, is not defined in the Special County Occupation Tax for Public Safety Law. Moreover, it is not a phrase which admits of a precise, commonly-recognized definition." Illinois Attorney General Opinions, 97-012 (July 7, 1997). The addition of the word "purpose" does nothing to add to the clarity of the situation.

horn honking including protected speech horn honking? What “sensible, meaningful and practical interpretation” can be given the ordinance that distinguishes between offensive horn honking and protected horn honking that does not amount to legislative fiat by the judiciary? **While it is true that “wherever possible, it is the duty of the Court to construe a statute so as to uphold its constitutionality,” it is also true that “a Court may not read into a statute those things which it conceives the Legislature may have left out unintentionally.”** *Addleman v. Board of Prison Terms*, 107 Wn.2d 503 (1986).

Nor does the statute provide clear, unambiguous guidance to prevent law enforcement officers from arbitrarily enforcing the prohibition. Are there any guidelines provided to law enforcement at all? The ordinance leaves to the unfettered predilections, prejudices, political affiliation, and/or sexual orientation of the constable (or any of a million other factors that influence human behavior) what is or is not offensive. Therefore, the ordinance is “inherently subjective<sup>5</sup>” and cannot pass constitutional muster.

Even as applied to the conduct of the defendant, the ordinance is offensive. Here, defendant admittedly responded to Mr. Menalia’s making an obscene gesture.<sup>6</sup>

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<sup>5</sup> “Justice John Marshall Harlan’s line, “one man’s vulgarity is another’s lyric,” sums up the impossibility of developing a definition of obscenity that isn’t hopelessly vague and subjective. And Justice Potter Stewart’s famous assurance, “I know it when I see it,” is of small comfort to artists, writers, movie directors and lyricists who must navigate the murky waters of obscenity law trying to figure out what police, prosecutors, judges and juries will think.” (Taken from the ACLU website article on Censorship.) The foregoing quotes from famous Supreme Court jurists illustrate the scope of the problem with what is “inherently subjective.” The Snohomish Ordinance’s standard leaves to the discretion of the constable what is lyric and what is vulgarity and citizens are required to rely on the constable’s ability to “see it” before anyone knows what is criminal and what is not. Such is not the standard by which statutes are tested against the constitutions of the United States and the State of Washington.

<sup>6</sup> “The gesture of extending one’s middle finger can be construed as speech because it has a well-known connotation. *See Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir.1997) (citing *Spence v. Washington*, 418 U.S. 405, 411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)) (“Nonverbal conduct constitutes speech if it is intended to convey a particularized message and the likelihood is great that the message will be understood by those who view it, regardless of whether it is actually understood in a particular instance in such a way.”) *Coggin v. State of Texas*, 123 SW3rd 82, 87 fn.2 (2003). If Menalia’s obscene gesture with his

Defendant did so on a public street where also Mr. Menalia was located.<sup>7</sup> There is no doubt that defendant's horn honking at Menalia "conveyed a particularized message" and even less doubt that Menalia fully understood the message that was conveyed. Surely, what is good for the goose – in this case, Mr. Menalia (or Mr. Justice Scalia), is good for the gander – in this case, the defendant.

#### D. CONCLUSION

The Snohomish County Ordinance makes criminal all horn honking other than for "purposes of public safety" without providing any guidance to either citizens, policemen, judges or juries. All are left to define the act as vulgarity or lyric as they see it. Such a standard has no place in constitutional litigation under the US Constitution or the Constitution of the State of Washington and this Court should reverse the defendant's

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middle finger can be classified as protected speech, surely the defendant's "answering communication" is speech as well. See, "How Do You Solve The Problem of Scalia? The Razor-thin Line Between Obscenity and Bad Judgment," Dahlia Lithwick, slate.com, 3/30/06 discussing Justice Scalia's infamous obscene hand gesture to a Boston reporter.

While it is true that Menalia denied making an obscene gesture and claimed that he "blew her a kiss" (CP 352:15-355:2; 414:25-415:7), such a claim is disingenuous under the facts of this case. Mr. Menalia is a construction worker (CP 347:18-348:1; 356:2-22).

<sup>7</sup> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 813, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984).

conviction and remand for entry of an order of dismissal.

Dated this 28th Day of September, 2008.

A handwritten signature in cursive script that reads "Helen Immelt". The signature is written in black ink and is positioned above the printed contact information.

Helen Immelt

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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the United States and State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

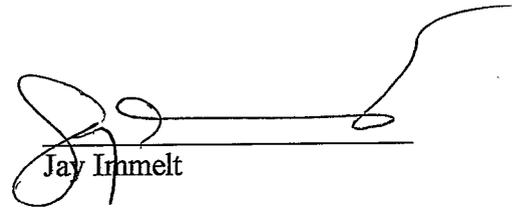
On the date given below I caused to be served in the manner noted a copy of the following upon designated counsel:

Opening Brief

Charles F. Blackman Snohomish County Prosecuting Attorney 3000 Rockefeller Ave. Everett, Wa. 98201	<input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Fax: 425.388.3572 <input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via Email
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DATED this 29th Day of September, 2008, at Fox Island, Washington.

  
Jay Ihmelt