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No. 60991-2-1

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

STATE OF WASHINGTON, Plaintiff,

v.

HELEN IMMELT, Defendant.

PETITION FOR DISCRETIONARY REVIEW TO THE SUPREME COURT
PURSUANT TO RAP 13.4

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IDENTITY OF PETITIONER

Petitioner, Helen Immelt, asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this Petition.

COURT OF APPEALS DECISION

On June 8, 2009 Division One of the Court of Appeals affirmed by published opinion the decision of Superior Court Judge Richard J. Thorpe on a RALJ appeal affirming the District Court Judgment entered in District Court No. C85936 on December 8, 2006. The Opinion Affirming Judgment is found in the Appendix as Exhibit A.

ISSUES PRESENTED FOR REVIEW

- 1) Are Snohomish County Code §'s 10.01.040(1)(d) and 10.01.080 (3) Unconstitutionally Vague And Overbroad On Their Faces And As Applied Under The Constitutions Of The United States and State of Washington In That Said SCC Sections Criminalize Protected Speech?

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).¹ None of the State's witnesses testified that they actually saw Defendant physically honk the horn on that occasion.² (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

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

² The circumstances surrounding the first horn honking incident have no bearing on resolution of this case. Those circumstances involved the selective enforcement of Home Owner's Association Rules against Appellant for having two baby Easter Chicks for her grandson while the Association permitted other homeowner's to conspicuously and continuously violate the same or similar provisions in even more egregious fashion. 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.

according to Casey in response to questioning from the Prosecutor the following occurred:

Q: Okay. So during – how long – how much time has gone by at this point since you arrived at (inaudible)?

A: This is a few minutes. She is just yelling and screaming and I pretty much want this conversation to be over, so I basically ended it after just a few minutes.

Q: Were you finding it to be a very pleasant experience?

A: No, it wasn't. and, you know, I – I 'm not sure what all was going on, but, you know, I – my point was to just get this to stop at that point in time. "Look, don't do this anymore."

And so – that's what I told her. **I said, "Don't do this anymore." And she continued to yell, and I said, "Look, if you continue to do this, I'm going to have to arrest you."** (Emphasis added.)

RP 405:18-21 of the Clerk's Papers

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 which version is accepted.³ 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)

³ The record is susceptible to multiple interpretations on this issue largely due to appellant's lack of expertise in cross-examination. The Court of Appeals at page 6 discussed appellant's three explanations for the horn honking. An experienced attorney would have been able to clarify on cross-examination that this conversation covered both horn incidents and therefore, the multiple explanations. Menalia's conduct in making an obscene gesture at appellant was explicitly conceded by the Prosecutor during the Court of Appeals oral argument. In a written statement to Casey, Menalia denied making an obscene gesture but admitted to blowing appellant a kiss. Clearly had Menalia made a gesture in response to appellant honking the horn, appellant would not have known that or been able to report to Casey any hand gesture as she would have already been past Menalia when the gesture was made. The physical facts doctrine (*Cox v. Polson Logging Company*, 18 Wn.2d 49 (1943)) allows the Court to recognize the impossibility of Menalia's explanation and the likelihood of appellant's explanation. In any event, the Court should allow the record to be supplemented with Menalia's sworn statement to Casey on this issue.

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 11th 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)

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4 (b) provides four considerations utilized by the Supreme Court in determining which cases are appropriate for review under these circumstances. The issues presented in this case touch on all four considerations.

The decision of the Court of Appeals upholding the constitutionality of Snohomish County Code §'s 10.01.040(1)(d) and 10.01.080 (3) is in direct conflict with the decision of the Supreme Court in *State v. Williams*, 144 Wash.2d 197 (2001); *City of Spokane v. Douglass*, 115 Wn. 2d 171, 178 (1990); *State v. Coe*, 101 Wash.2d 364, 679 P.2d 353 (1984); *Fine Arts Guild, Inc. v. Seattle*, 74 Wash.2d 503, 506, 445 P.2d 602 (1968); *State v. Regan*, 97 Wash.2d 47, 52, 640 P.2d 725 (1982); and, *O'Day v. King County*, 109 Wash.2d 796, 803 (1988). This decision is in direct conflict with decisions of the Oregon Courts construing a virtually identical statute and state constitutional provision. See, *City of Eugene v. Moug*, 116 Or.App. 186 (1992); *State v. Plowman*, 314 Or. 157, 838 P.2d 558 (1992); and, *State v. Robertson*, 293 Or. 402, 412, 649 P.2d 569 (1982). The decision is also contrary to the decisions of the U.S. Supreme Court in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) and *Spence v. Washington*, 418 U.S. 405 (1974).

In addition to being contrary to binding precedent in the State of Washington and persuasive precedent in the State of Oregon construing a virtually identical statute and constitutional provision, the decision of the Court of Appeals raises significant state and federal constitutional questions and issues of great public import under RAP 13.4 (b) (3) and (4) as discussed hereafter.

Greater protection afforded under the Washington Constitution

Freedom of speech 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 this case, appellant submits that the criminalization of all horn honking other than for a public safety purpose constitutes an impermissible prior restraint under the Washington Constitution.⁴

Facial Overbreadth⁵

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.

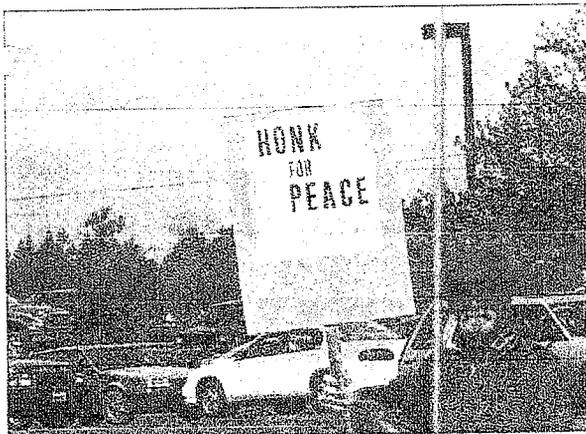
⁴ At page 8 and 9 of the Court of Appeals opinion the Court asserts that appellant failed to address the six criteria set forth in *State v. Gunwall*, 106 Wn.2d 54 (1986) and therefore the Court declined to analyze the State Constitutional issues. In *State v. Johnson*, 128 Wn.2d 431 (1996) the Court determined that it was not necessary to reanalyze those issues where they had been previously analyzed on a particular asserted constitutional right. In this case, the right to be free of prior restraints on expressive conduct and activities has been previously analyzed by the Court and therefore, the Court of Appeals should have addressed those issues.

⁵ For inexplicable reasons, the opinion of the Court of Appeals failed to even address appellant's clearly stated facial overbreadth challenge to the 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. “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).

Although appellant argues that the ordinance is overbroad even as applied to her own particular conduct as discussed below, appellant first asserts that the ordinance is facially overbroad because it criminalizes all horn honking other than for a public safety purpose. Therefore, the Court of Appeals was in error in failing to analyze whether the ordinance could reach protected speech activities.

To illustrate the impermissible reach of the ordinance on Mothers’ Day 2007, on Highway 2 in Monroe by the McDonald’s, a peace demonstration was under way and one of the demonstrators carried 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. The Ordinance does not embody reasonable time, place and manner restrictions – it restricts all horn honking, anywhere at any time. In *Goedert v. City of Fernadale*, 596 F.Supp.2d 1027 (E.D. Mich. 2008), 2008 WL 928315 (E.D. Mich.), the Court dealt with precisely this situation and found the statute overly broad.⁶ *Goedert* laid waste to the notion that the honking of a horn was not expressive conduct – a knee jerk reaction cited *ad nauseum* by Court after Court including this Court of Appeals without critical thought or inquiry.⁷ The honking of a car horn *ipso facto* is expressive conduct⁸, for how could honking a horn be anything other than expressive conduct? To understand the concept in context, for there to be a violation of the Snohomish Ordinance or the statute involved in *Goedert*, a police officer first had to determine the intent and meaning of the horn honk. The Ordinance in this case and the statute in *Goedert* both make honking a horn for a traffic safety purpose permissible. Why? Because honking a horn expresses a message of warning and thus conveys speech. Therefore, to determine whether or not there was a violation, the officer has to discern the message that was being conveyed. If the message was a traffic warning, there would be no violation. If the content of the message conveyed by the horn honk was something other than a traffic warning, the honk would be illegal. In this case, the second horn

⁶ GR 14.1 permits the citation of unpublished cases where the issuing jurisdiction permits such citation. FRAP 32.1 permits citation to unpublished federal court opinions. A copy of the referenced opinion is attached as Exhibit B to the Appendix.

⁷ Opinion of the Court of Appeals at page 7, *Meaney v. Dever*, 326 F.3rd 283, 288 (1st Cir. 2003) citing *Texas v. Johnson*, 491 U.S 397, 404-406 (1989), “[Horn blowing] is not an expressive act a fortiori, and thus does not implicate the First Amendment unless context establishes is as such.”

⁸ At page 5-7 of the Court of Appeals opinion, the author, Mr. Justice Grosse asserts that appellant’s horn honking neither conveyed a particularized message and nor was the message understood by those that heard it. This stance is in stark contrast to the very statements made by Mr. Justice Grosse during oral argument that not only did he believe that a message was being conveyed, but that he believed the witnesses clearly understood the message as well.

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) Deputy Casey "changed [his] mind" and "made up [his] mind" "to arrest [her]." (CP 447:3-24) The truth is that Casey was going to arrest appellant and that the horn honking was merely a pretext to justify what otherwise would have been an unlawful arrest. It defies all logic and common sense to claim that the honking of a car horn is incapable of being speech and is not an expressive act. As noted by the Court in *Goedert* at 1032 :

For Ferndale to now claim that a honk is simply a honk, incapable of conveying speech is disingenuous. If a honk is incapable of conveying speech, then Ferndale would not be able to discern which honks are unlawful under their "Honk Statute," making the ordinance impossible to apply to motorists. Ferndale's application of the statute, however, is evidence of the ability of the vehicle's horns to convey speech. The "Honk Statute," as written, provides for an inference that a honk may convey speech, that of "warning."

In simple point of fact, not only is the honking of a car horn an expressive act and speech, the restrictions of the Snohomish Ordinance and the statute in *Goedert* are impermissible content based restrictions. As further held by the Court in *Goedert* at 1033,

To determine whether a restriction is content-based, the courts look at whether it "restrict(s) expression because of its message, its ideas, its subject matter, or its content." *Consolidated Edison Co. of New York v. Public Serv. Comm. of New York*, 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980). The Ordinance is content-based as any message, other than a warning, delivered by the "honk" sign or horn honking violates the Ordinance.

.... In this case, honking a vehicle's horn is not banned completely, only the honking for reasons other than traffic warning is deemed unlawful. The content of the message contained within the honk must be determined by the police before issuing citations, therefore the regulation, as applied to the honking motorists, may also be properly classified as a content-based policy.

Nor was the *Goedert* court alone in its analysis. 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 a similar 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 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.

While both the Goedert and Moug decisions involved horn honking during peace demonstrations, they did not need to in order to find both restrictions to be constitutionally over broad. In *Broadrick v. Oklahoma* at 612, the Supreme Court held that:

Litigants, therefore, are permitted to challenge a statute not because their own right of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others

not before the court to refrain from constitutionally protected speech or expression.

So too, in this case. While a more precisely drawn statute might pass constitutional scrutiny and might properly support a conviction in this case, such a statute is not before the Court. The ordinance at issue criminalizes all horn honking including horn honking that clearly would be protected under the First Amendment. Therefore, on its face, the statute is constitutionally overly broad.

Vagueness

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.⁹ 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. The Goedert Court at 1035 clearly noted instances of selective lack of enforcement of the statute similar to those described above. What warning is given by the ordinance when it criminalizes all 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.

⁹ 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.

Therefore, the ordinance is “inherently subjective¹⁰” 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.¹¹

Defendant did so on a public street where also Mr. Menalia was located.¹² Nor does the statute provide clear, unambiguous guidance to prevent law enforcement officers from arbitrarily enforcing the prohibition. Therefore, the statute, on its face and as applied is unconstitutionally vague and the Supreme Court should accept review of this case.

¹⁰ “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.

¹¹ “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 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).

¹² “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).

CONCLUSION

It must be remembered that appellant was convicted not of honking a car horn at 6:00 AM, but for honking her horn at Mr. Menalia some hours later after he gave appellant the finger. That is the conduct the Court is required to examine to determine if a violation of the statute occurred and if that statute was constitutional. All that went on before is surplussage that only serves to obfuscate the real issues. While the events that preceded the Menalia honk may make for a humorous Court of Appeals opinion and provide fodder for newspapers and internet bloggers, they provide nothing to a serious discussion and analysis of the issues here presented.

The serious issues presented that the Supreme Court should accept for review is whether an ordinance that criminalizes all horn honking including protected horn honking is facially overbroad. Additionally, whether an ordinance that provides no guidance to either citizen or constable as to what is prohibited and allows for arbitrary and selective enforcement is vague on its face or as applied. Appellant respectfully submits that this case should be accepted for review.

Dated this 7th Day of July, 2009.


Helen Immelt

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 60991-2-1
)	
Respondent,)	DIVISION ONE
)	
v.)	PUBLISHED OPINION
)	
HELEN D. IMMELT,)	
)	FILED: June 8, 2009
Appellant.)	

Grosse, J.—A duly enacted ordinance proscribing the honking of a horn for other than public safety reasons is entitled to a presumption of constitutionality. Horn honking per se is not free speech. Here, the context in which the defendant repeatedly honked her car horn did not constitute speech as there was no particularized message. The RALJ court is affirmed.

FACTS

Helen Immelt lives on a cul-de-sac in a development governed by restrictive covenants. On May 9, 2006, the neighborhood homeowners' association sent Immelt a letter informing her that the covenants prohibited her from keeping chickens in her backyard. On the afternoon of May 12, Immelt yelled and cursed at her neighbor, Tara Knudson, demanding to know if she was behind the association's letter. Unaware of the letter and feeling threatened by Immelt's accusations, threats and demeanor, Knudson notified the police. After leaving Knudson's house, Immelt confronted Jeremy Brumbaugh, the president of the homeowners' association, regarding the letter. A shouting match ensued attracting three neighbors. One of those neighbors, John

EXHIBIT A

Vorderbrueggen, admitted that it was he who had complained to the association about Immelt's chickens.

At 5:50 a.m. the next day, Immelt parked in front of the Vorderbrueggen house and honked her horn for approximately 10 minutes. Vorderbrueggen was awoken by the incessant horn honking. He recognized the car as one that had been parked in Immelt's driveway. Vorderbrueggen called 911. He observed the car drive away and then return to the front of his house. He saw Immelt driving and she waved to him as she drove by. Immelt later called him, mentioned her chickens and said she wanted to make sure he was up for that 6:00 a.m. wake-up call. At about 8:00 a.m., Vorderbrueggen heard horn honking again. The sound was similar to the horn he had heard earlier that morning.

Brumbaugh was also awoken by Immelt's horn honking. He looked across the street and saw Immelt in her car. Another neighbor, Michael Menalia, testified that he saw Immelt in a parked car which had its horn blaring. He observed Immelt drive away from in front of Vorderbrueggen's house and then around the cul-de-sac while still honking the horn. The horn honking only stopped when Immelt got out of her car. At approximately 8:00 a.m., Menalia observed a police car at a neighbor's driveway. As he started to walk toward that neighbor, he saw Immelt get into her car and drive down the street. When Immelt saw Menalia, she started honking the horn again. Menalia then smiled, blew a kiss, and waved at Immelt. He denied making any obscene gesture.

Sergeant David Casey testified that he responded to a call that came into the

police station at 6:03 a.m. He did not arrive in the neighborhood until approximately 7:00 a.m. After interviewing and asking for a statement from Vorderbrueggen, Sargeant Casey went to Immelt's house and requested that she cease honking her horn. Immelt became heated and claimed the car's horn did not work. At the same time, she claimed that it went off all by itself. Sargeant Casey requested that Immelt show him the car and the horn problem, but she declined to do so. Sargeant Casey informed Immelt that if she continued to blow the horn, he was going to have to arrest her. After assuring himself that Immelt understood, Sargeant Casey returned to Vorderbrueggen's to obtain his statement. Vorderbrueggen was still writing his statement when Sargeant Casey observed Immelt pull out of her driveway. As the car passed, he heard the car horn sound three long blasts. Sargeant Casey left, validated Immelt's horn honking with Menalia, and pulled Immelt over to arrest her. Immelt again denied honking her horn, but after being advised that someone had witnessed her honking, she said that she honked in response to Menalia's making an obscene gesture at her.

Immelt did not testify in her defense. After a three-day jury trial, Immelt was convicted of violating the county noise ordinance, Snohomish County Code (SCC) 10.01.040 and .080(3). She appealed contending, inter alia, that the noise ordinance was unconstitutional as it was vague, overbroad, and interfered with her right to free speech. A commissioner of this court granted discretionary review for the limited purpose of determining whether the ordinance under which Immelt was prosecuted is constitutionally valid.

ANALYSIS

Immelt contends that SCC 10.01.040(1)(d) and .080(3) are unconstitutionally vague and overbroad, both facially and as applied, under both the United States and Washington State Constitutions, because they criminalize protected speech. The purpose of Snohomish County's noise control 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.^[1]

It is unlawful for any person to cause or allow sound that is a public disturbance noise.²

"Public disturbance noise" means any sound which, because of its random or infrequent occurrence, is not conducive to measurement under the quantitative standards established in SCC 10.01.030; and endangers or injures 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, or is specifically included in those listed in SCC 10.01.040(1) or 10.01.040(2).^[3]

A public disturbance noise includes, "[t]he sounding of vehicle horns for purposes other than public safety."⁴ It is a civil infraction to violate SCC 10.01.040 and a misdemeanor to commit a second infraction within a 24 hour period.⁵

The same rules of statutory construction apply to the interpretation of municipal ordinances as apply to the interpretation of state statutes.⁶ The constitutionality of an

¹ SCC 10.01.010(1).

² SCC 10.10.040.

³ SCC 10.01.020(25).

⁴ SCC 10.10.040(1)(d).

⁵ SCC 10.01.080(3).

⁶ City of Puyallup v. Pacific NW Bell Tel. Co., 98 Wn.2d 443, 448, 656 P.2d 1035 (1982).

ordinance is one of law, which is reviewed de novo.⁷ A duly enacted ordinance is presumed constitutional, requiring the party challenging it to demonstrate that it is unconstitutional beyond a reasonable doubt.⁸

Although the First Amendment protects only “speech,” conduct may be sufficiently imbued with elements of communication to fall within the ambit of the First Amendment.⁹ Courts, however, have rejected the view that any conduct can be labeled speech whenever the actor intends to express an idea.¹⁰ For such conduct to be considered protected speech the actor must have the intent to convey a particularized message in circumstances where it is likely that the message would be understood.¹¹ To determine whether conduct is speech, one must look at the conduct that actually occurred and the context in which it occurred.¹² “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.”¹³ Horn honking per se is neither expressive conduct nor speech. Therefore, such conduct does not implicate the First Amendment unless the context in which it occurred establishes it as such.¹⁴ Horn honking which is done to annoy or harass others is not speech.¹⁵

⁷ State v. Abrams, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008).

⁸ Kitsap County v. Mattress Outlet/Gould, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005).

⁹ Texas v. Johnson, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

¹⁰ Johnson, 491 U.S. at 404; Spence v. State of Washington, 418 U.S. 405, 409-10, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974).

¹¹ Johnson, 491 U.S. at 404.

¹² City of Seattle v. McConahy, 86 Wn. App. 557, 567, 937 P.2d 1133 (1997).

¹³ McConahy, 86 Wn. App. at 567 (citing Spence, 418 U.S. at 410-11).

¹⁴ Meaney v. Dever, 326 F.3d 283, 287-88 (1st Cir. 2003) (sounding truck horn continuously while passing outside city hall during mayor’s inauguration is not speech).

¹⁵ State v. Compas, 290 Mont. 11, 964 P.2d 703, 706 (1998) (conviction for disorderly

Here, Immelt was unhappy with Vorderbrueggen for complaining to the homeowners' association about her chickens. She honked her horn repeatedly at 6:00 a.m. while in front of his house to retaliate. After being explicitly warned by a police officer not to do it again, she drove down the street and honked her horn three long times when she saw another neighbor involved with the association's decision. Nothing in the record indicates that this conduct was done for any reason other than for purposes of harassment.

Immelt's argument that the first sounding of her horn was to protest the homeowners' association's actions and the second instance was in response to a neighbor making an obscene gesture is not supported by the record. The first horn honking incident occurred in front of the neighbor who had reported her covenant violation to the association, not in front of the home of the president of the homeowners' association. When stopped by Sergeant Casey, Immelt offered three different and contradictory explanations: (1) she did not do it, (2) the horn sounded by itself, and (3) she did it in response to a neighbor (Menalia) making an obscene gesture. But Menalia testified and denied making any obscene gesture as alleged. Rather, he testified that his wave and blown kiss were in response to Immelt's repeatedly honking her horn at him as she drove by.

Immelt relies on City of Eugene v. Powlowski,¹⁶ to support her position. The Oregon Court of Appeals struck down an ordinance banning the use of a horn for

conduct upheld where defendant sounded loud continuous blasts when passing a recreational vehicle park and campground that she considered an eyesore).

¹⁶ 116 Or. App. 186, 840 P.2d 1322 (1992).

purposes other than as a reasonable warning as violating the Oregon Constitution.¹⁷ But Powlowski is distinguishable. There, the court found the horn honking was in fact speech since the context there demonstrated “support or disapproval of a political issue or a matter of public concern.” But only after determining that the threshold question, whether the conduct constituted speech was met, did the court examine the constitutionality of the ordinance. “[Horn blowing] is not an expressive act *a fortiori*, and thus does not implicate the First Amendment unless context establishes it as such.”¹⁸ Here, the conduct does not amount to speech.

Void for Vagueness

Immelt contends that the ordinance is void for vagueness, facially and as applied, because it does not define “public safety purpose.” The due process clause of the Fourteenth Amendment requires that citizens be afforded a fair warning of proscribed conduct.¹⁹ In order to succeed in her vagueness claim, Immelt must prove that the ordinance either (1) fails to sufficiently define the offense so that people of “common intelligence” can understand what conduct is proscribed, or (2) fails to provide ascertainable standards of guilt to protect against arbitrary enforcement.²⁰

Under the first prong, Immelt argues that a person of common intelligence cannot agree on what the sounding of a vehicle horn for purposes other than public safety would mean. But “[s]ome measure of vagueness is inherent in the use of

¹⁷ State v. Hagel, 210 Or. App. 360, 149 P.3d 1286 (2006) (following Powlowski in striking down a similarly worded statute).

¹⁸ Meaney, 326 F.3d at 288 (citing Johnson, 491 U.S. at 404-06).

¹⁹ City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 692 (1990).

²⁰ Douglass, 115 Wn.2d at 178-79.

language.”²¹ In Weil v. McClough,²² the court held that there was an element of expression in the defendant’s honking of his horn in a New York City traffic jam, but the Weil court also noted that simply because such “conduct has a communicative element, [it] does not make a statute prohibiting or limiting that conduct *per se* unconstitutional.”²³ The Weil court held the contested New York ordinance reasonably related to two significant governmental interests—reducing noise and maximizing the utility of car horns. Here, the ordinance clearly proscribes the honking of horns for purposes other than public safety. Persons of ordinary intelligence can comprehend the term “public safety.”

The Fourteenth Amendment due process clause requires a penal statute to provide adequate standards to protect against arbitrary, erratic, and discriminatory enforcement.²⁴ The mere fact that a police officer has to exercise a degree of subjective evaluation to determine whether an ordinance applies does not make that ordinance unconstitutionally vague.²⁵ Here, the police officer warned Immelt not to honk her horn again. Shortly after his warning, Immelt drove down the street and for no apparent reason connected to public safety honked her horn several times. Further, the ordinance requires that the conduct must occur twice within a 24 hour period before a criminal citation can be issued. Under the particular facts here, there was not an

²¹ State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 309 (2007).

²² 618 F. Supp 1294 (S.D.N.Y 1985).

²³ Weil, 618 F. Supp at 1296 (alteration in original) (citing Cox v. State of Louisiana, 379 U.S. 536, 555, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965)).

²⁴ Douglass, 115 Wn.2d at 180.

²⁵ American Dog Owners Ass’n v. City of Yakima, 113 Wn.2d 213, 216, 777 P.2d 1046 (1989).

“inordinate amount of police discretion.”²⁶

Although Immelt contends the ordinance is unconstitutional under Washington’s Constitution, she does not assert any argument as to why article I, section 3 of the state constitution is more protective here than the federal constitution. Furthermore, she has not addressed the criteria set forth in State v. Gunwall.²⁷ Accordingly, we limited our analysis to the federal constitutional law issue.

The RALJ court is affirmed.

Grosse, J.

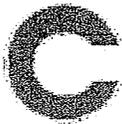
WE CONCUR:

Cox, J.

Ajda, J.

²⁶ Douglass, 115 Wn.2d at 181 (citing American Dog Owners Ass’n, 113 Wn.2d at 216).

²⁷ 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).



United States District Court,
E.D. Michigan,
Southern Division.
Nancy GOEDERT, an individual, Reverend Harry T.
Cook II, an individual, Victor Kittila, an individual,
James Grimm, an individual, and Brian C. Price, an
individual, Plaintiffs,
v.
CITY OF FERNDALE, a municipal corporation,
Defendant.
Case No. 07-11515.

April 4, 2008.

Background: Political protesters sued city, seeking a declaration as to the validity of an ordinance banning the use of signs encouraging motorists to honk their vehicle horns during demonstrations to convey a message other than a warning, and banning the honking of vehicle horns during demonstrations to convey a message other than a warning. The parties cross-moved for summary judgment.

Holding: The District Court, Denise Page Hood, J., held that the ordinances violated the First Amendment.

Plaintiff's motion granted.

West Headnotes

[1]  **Automobiles 48A 329**

48A Automobiles
48AVII Offenses
48AVII(A) In General

48Ak329 k. Signals and Signaling Devices.
Most Cited Cases

Constitutional Law 92  **1841**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(D) Noise and Sound Amplification
92k1841 k. Motor Vehicles. Most Cited

Cases
Honking of horns to convey a message other than a warning was "speech" protected by the First Amendment; the message discerned from passing motorists who honked in close proximity to political protesters was understood by those in the vicinity. U.S.C.A. Const.Amend. 1.

[2]  **Constitutional Law 92 1497**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General
92XVIII(A)1 In General
92k1497 k. Conduct, Protection Of.

Most Cited Cases
First Amendment protects "speech," which includes expressive conduct in its meaning. U.S.C.A. Const.Amend. 1.

[3]  **Constitutional Law 92 3851**

92 Constitutional Law
92XXVII Due Process
92XXVII(A) In General
92k3848 Relationship to Other
Constitutional Provisions; Incorporation
92k3851 k. First Amendment. Most

Cited Cases

First Amendment's protection of speech extends to the states and their subdivisions through the Fourteenth Amendment. U.S.C.A. Const.Amend. I, 14.

[4] Constitutional Law 92  **1497**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1497 k. Conduct, Protection Of.

Most Cited Cases

To determine whether particular conduct is communicative enough to be protected by the First Amendment, courts must consider two elements: (1) whether an intent to convey a particularized message was present, and (2) whether the likelihood was great that the message would be understood by those who viewed it. U.S.C.A. Const.Amend. I.

[5] Constitutional Law 92  **1845**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(K) Protests and Demonstrations in General
92XVIII(K)1 In General
92k1845 k. In General. Most Cited

Cases

Disorderly Conduct 129  **112**

129 Disorderly Conduct
129k112 k. Signs and Displays; Gestures. Most Cited Cases
Signs encouraging motorists to honk their vehicle horns during demonstrations to convey a message other than a warning were protected "speech" for First Amendment purposes, despite claim that the signs were directed at inciting the lawless action of non-traffic hazard warning-related honking. U.S.C.A. Const.Amend. I.

[6] Constitutional Law 92  **1737**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1736 Traditional Public Forum in General
92k1737 k. In General. Most Cited

Cases

Right of the government to limit expressive activity is limited in places that have been traditionally devoted to assembly and debate, such as streets, parks and sidewalks. U.S.C.A. Const.Amend. I.

[7] Constitutional Law 92  **1759**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1759 k. Streets and Highways. Most Cited Cases

Intersection of two streets in the heart of a city was properly characterized as a "public forum" for a First Amendment analysis. U.S.C.A. Const.Amend. I.

[8] Automobiles 48A  **316**

48A Automobiles
48AVII Offenses
48AVII(A) In General
48Ak316 k. Creation and Definition of Offenses: Constitutional and Statutory Provisions. Most Cited Cases

Constitutional Law 92  **1841**

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and

Press

92XVIII(J) Noise and Sound Amplification
92k1841 k. Motor Vehicles. Most Cited

Cases

City ordinance banning the honking of vehicle horns during demonstrations to convey a message other than a warning was a content-based restriction for purposes of a First Amendment analysis; the content of the message contained within the honk had to be determined by the police before they issued citations. U.S.C.A. Const.Amend. 1.

[9] Automobiles 48A



316

48A Automobiles

48AVII Offenses

48AVII(A) In General

48Ak316 k. Creation and Definition of Offenses; Constitutional and Statutory Provisions. Most Cited Cases

Constitutional Law 92



18-41

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(J) Noise and Sound Amplification

92k1841 k. Motor Vehicles. Most Cited

Cases

Constitutional Law 92



18-45

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(K) Protests and Demonstrations in General

92XVIII(K)1 In General

92k1845 k. In General. Most Cited

Cases

Disorderly Conduct 129



101

129 Disorderly Conduct

129k101 k. Constitutional and Statutory

Provisions. Most Cited Cases

Disorderly Conduct 129



112

129 Disorderly Conduct

129k112 k. Signs and Displays; Gestures. Most Cited Cases

City ordinances banning the use of signs encouraging motorists to honk their vehicle horns during demonstrations to convey a message other than a warning, and banning motorists from doing so, violated the First Amendment; even if the city's interest in promoting the safety of its citizens was a compelling state interest, the honk ordinance was not "necessary" to achieve that interest, nor was the honk regulation necessary to limit noise, and in any event the ordinances were not the least restrictive means of preventing excessive noise, or alleviating safety concerns. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92



1038

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)4 Burden of Proof

92k1032 Particular Issues and Applications

92k1038 k. Freedom of Speech, Expression, and Press. Most Cited Cases

Constitutional Law 92



1506

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1506 k. Strict or Exacting Scrutiny; Compelling Interest Test. Most Cited Cases
For purposes of a First Amendment analysis, the government has the burden of showing that there is evidence supporting its proffered justification for a restriction on speech; mere speculation of harm does not constitute a compelling state interest. U.S.C.A.

Const. Amend. 1.

*1028 Michael J. Steinberg, American Civil Liberties Union Fund of Michigan, Thomas F. Cavalier, Melonie L.M. Stothers, Barris, Sott, Deborah A. Choly, Detroit, MI, for Plaintiffs.

Paul Daniel Christ, Hafeli, Staran, Bloomfield Hills, MI, for Defendant.

**ORDER GRANTING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

DENISE PAGE HOOD, District Judge.

I. INTRODUCTION

Plaintiffs have filed a Motion for Summary Judgment to declare the City of Ferndale's application of their Ordinance to ban the use of signs encouraging motorists to honk their vehicle horns during demonstrations to convey a message other than a warning, and banning the honking of vehicle horns during demonstrations to convey a message other than a warning, as unconstitutional regulations of Plaintiffs' free speech under the First Amendment of the United States Constitution. Plaintiffs seek a permanent injunction enjoining the City of Ferndale from enforcing its Policy, and nominal damages for the deprivation of their constitutional rights.

The City of Ferndale also filed a Motion for Summary Judgment, claiming that the Plaintiffs' Complaint should be dismissed on Summary Judgment, asserting that the City has a substantial interest that is constitutionally protected in their application of the "Honk Statute."

II. STATEMENT OF FACTS

Plaintiffs challenge the City of Ferndale's suppression of automobile horns as a form of expression. The City has enforced an ordinance to prohibit the display of signs asking motorists to "honk" their horns to express their support for the demonstrators, and prohibiting motorists from honking their horns for that purpose. Plaintiffs allege that the City's prohibition *1029 violates the First Amendment's guarantee of freedom of speech.

In support for peace in Iraq, Plaintiffs Nancy

Goedert, Victor Kittila, and Jim Grimm have participated in a Vigil on the corner of Woodward Avenue and Nine Mile Road in the City of Ferndale on Monday evenings. The Vigil has been conducted at that location for nearly five years. At one point, Vigil participants began to display signs stating "Honk for Peace" and later "Honk if You Want Bush Out." Over the years, hundreds of motorists have communicated their agreement with the demonstrators by honking their horns as they passed by the Vigil. Plaintiffs characterize the honks in support of the Vigil as citizens electing to join in a conversation among the citizens on perhaps the most pressing public issue of the day.

For the first three and a half years of the Vigil, there were no traffic problems or accidents associated with the Vigil. Ferndale changed its approach towards the Vigil in June of 2006, when Police Captain Timothy Collins witnessed the same intersection crowded with health care reform demonstrators. Demonstrators were on every corner of the intersection, the sidewalks, and alongside the median. A concerned Captain Collins felt that the demonstrators were unruly and were causing a safety hazard by leaning into traffic with their signs, and he felt that the honking of vehicle horns was a distraction that could lead to safety problems. The next morning, Captain Collins discovered a Michigan Statute, M.C.L. 257.706(a), which provides that "the driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use the horn when upon a highway." This "Honk Statute," like the rest of Michigan's Motor Vehicle Code, has been incorporated into Ferndale's ordinances. (See Pl. Mot. Summ. Judgment, at 6; Ferndale Code of Ordinances § 18-5.) Captain Collins also located a disturbing the peace ordinance that he felt was applicable. Pl. Mot. Summ. Judgment, Exhibit 8, p. 20: 2-10.

Captain Collins then contacted the City Attorney's Office to ascertain whether both statutes could be enforced against the demonstrators. The City Attorney's Office approved the enforcement of the statutes against those at the Vigil, and the decision to apply them to ban the use of the word "honk" on any signs at the Vigil. After receiving a warning from the Ferndale police department, Plaintiff Kittila revised his sign to read "Ferndale Cops Say: Don't HONK if you want BUSH OUT." Plaintiff Nancy Goedert was

holding a similar sign that read "POLICE SAY DONT HONK for PEACE." On July 3, 2006 Plaintiff Kittila was arrested for holding his sign, while two weeks later, on July 17, 2007 Nancy Goedert was ticketed by the City for violation of the "Honk Statute." On October 9, 2006, Officer Carroll stopped and ticketed a motorist who honked in support of the Vigil, Plaintiff Brian Price.

III. STANDARD OF REVIEW

Under Fed.R.Civ.P. 56, summary judgment is to be entered if the moving party demonstrates there is no genuine issue as to any material fact. The Supreme Court has interpreted this to mean that summary judgment should be entered if the evidence is such that a reasonable jury could find only for the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party has "the burden of showing the absence of a genuine issue as to any material fact." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); see also *1030 Lenz v. Erdmann Corp., 773 F.2d 62 (6th Cir.1985). In resolving a summary judgment motion, the Court must view the evidence in the light most favorable to the non-moving party. See Duchon v. Cajon Co., 791 F.2d 43, 46 (6th Cir.1986); Bouldis v. United States Suzuki Motor Corp., 711 F.2d 1319 (6th Cir.1983). But, as the Supreme Court wrote in Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986):

[T]he plain language of Rule 56(c) mandates the entry to summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

To create a genuine issue of material fact, the

nonmovant must do more than present "some evidence" of a disputed fact. "If the [nonmovant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50, 106 S.Ct. 2505 (citations omitted). Accordingly, a nonmovant "must produce evidence that would be sufficient to require submission to the jury of the dispute over the fact." Mathieu v. Chinn, 828 F.Supp. 495, 497 (E.D.Mich.1993) (citations omitted).

IV. APPLICABLE LAW & ANALYSIS

A. Signs and Honks are Speech

[1] The two Ordinances relied on by Ferndale to ban the display of the "honk signs," as well as the honking of vehicle horns are Ordinance 12-63, and Ordinance 18-5.

Section 12-63 of the Ferndale Code states:

It shall be unlawful for any person to disturb, tend to disturb, incite or aid in disturbing the public peace by loud, violent, tumultuous, offensive, or obstreperous conduct, or to make or participate in making any unreasonable noise or disturbance riot or breach the peace, or to engage in any illegal or unreasonable act, and no person shall knowingly permit any such conduct upon any premises owned or possessed by him or under his control.

Section 18-5 of the Ferndale Code states:

The Michigan Vehicle Code, 1949 PA 300, MCL 257.1 to MCL 257.923 and all future amendments and revisions to the Michigan Vehicle Code when they are effective in the State of Michigan, are adopted by reference.

[2][3][4] The First Amendment protects "speech," which includes expressive conduct in its meaning. United States v. Grace, 461 U.S. 171, 176, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983). This protection extends to the states and their subdivisions through the Fourteenth Amendment. Lovell v. City of Griffin, 303 U.S. 444, 450, 58 S.Ct. 666, 82 L.Ed. 949 (1938); Gitlow v. New York, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). To determine whether particular conduct is communicative enough to be

protected by the First Amendment, courts must consider two elements: (1) "whether an intent to convey a particularized message was present," and *1031 (2) "whether the likelihood was great that the message would be understood by those who viewed it." Texas v. Johnson, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

Here, there is no question that the Vigilers intended to convey a particularized message with their signs: that of peace, ending the war in Iraq, and advocating the end of President Bush's presidency. As such, the use of the signs containing "honk" during the demonstration is considered expression. United States v. Grace, 461 U.S. 171, 176, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (finding the display of a sign with a written message on it expressive conduct protected by the First Amendment). Next, it is clear that those who drove past the signs understood what specific message the Vigilers were presenting. Motorists driving by the Vigil have honked their vehicle horns to show support for the message of the demonstrators. See Plaintiff's Motion for Summary Judgment, Ex. 3, ¶ 7. The Vigil "became a conversation between the Vigilers and the motorists, whereby the Vigilers were showing signs with their message of peace and the motorists were honking their horns to show their support for that same message of peace." Pl. Mot. Summary Judgment, at 4.

Ferndale cites Weil v. McClough to call into question whether honking may constitute speech. Weil v. McClough, 618 F.Supp. 1294 (S.D.N.Y., 1985). The court in Weil, however, found that horn-honking was expressive, as it was the plaintiff's way of "seeking to advise the traffic officer of the massive traffic jam." Weil, 618 F.Supp. at 1296. Ferndale also cites Meanev v. Dever, another case dealing with the question of whether horn honking constitutes speech. Meanev v. Dever, 326 F.3d 283, 288 (1st Cir.2003). The Supreme Court, however, has held that some conduct that has a communicative element should be treated like other forms of expression under the First Amendment. See Texas v. Johnson, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Johnson held that "[horn blowing] is not an expressive act *a fortiori*, and thus does not implicate the First Amendment unless context establishes it as such." *Id.* In Meanev, the court found in dicta that the plaintiff's blowing of an air horn did not qualify as

speech under Johnson because the audience would not have understood it as such, due to their distance from the air horn. Meanev, 326 F.3d at 287. In this case, the message discerned from the passing motorists who honked in close proximity to the Vigilers is understood by those in the vicinity, and, is properly classified as speech under Johnson.

[5] Ferndale claims that the honk signs are not protected speech because the signs were directed at inciting the lawless action of non-traffic hazard warning related honking. The City relies principally on Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). In that case, Brandenburg, a member of the Ku Klux Klan, spoke at a rally where he advocated violence to further the white-supremacist goals of the Klan. Brandenburg was convicted under Ohio's Criminal Syndicalism Statute, which barred advocating or teaching violence as a means of accomplishing social change as well as assembling with others for that purpose. *Id.* Later decisions of the Supreme Court, however, have "fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447, 89 S.Ct. 1827.

*1032 It is unclear if Brandenburg may be so narrowly read to include only incitement to violence, as Plaintiff suggests. See Morse v. Frederick, 551 U.S. 393, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (Brandenburg finding cited in case involving student displaying sign encouraging drug use). However, the present case does not seem to be within its scope. Violation of the "honk ordinance" in question in this case is a mere civil infraction, hardly the same kind of "lawlessness" addressed in Brandenburg. The lawlessness addressed in cases following Brandenburg is not akin to the encouragement honking for a peaceful cause, as is the case here. See U.S. v. Dellinger, 472 F.2d 340, 355 (7th Cir.1972); U.S. v. McDermott, 29 F.3d 404, 406 (8th Cir.1994). Brandenburg's scope does not cover the honk signs in this case, nor does it defeat the protestors' claims that the holding of the signs is protected speech.

While Defendant Ferndale claims that the sounding of a horn is incapable of being speech, the honks

nevertheless convey a particularized message that is understood by those who hear it. (Pl. Mot. Summ. Judgment, Ex. 3, ¶ 7.) In fact, the Ferndale police ticketed the motorists purely based upon exactly that, the “particularized message” the motorist is trying to convey. Motorist Brian Price was ticketed by Officer Carroll for the message he tried to convey through use of his horn. (Pl. Mot. Summ. Judgment, Ex. 7, p. 24:13-25.) For Ferndale to now claim that a honk is simply a honk, incapable of conveying speech is disingenuous. If a honk is incapable of conveying speech, then Ferndale would not be able to discern which honks are unlawful under their “Honk Statute,” making the ordinance impossible to apply to motorists. Ferndale’s application of the statute, however, is evidence of the ability of the vehicle’s horns to convey speech. The “Honk Statute,” as written, provides for an inference that a honk may convey speech, that of “warning.”

B. Woodward and 9 Mile is a Traditional Public Forum

[6] Plaintiff argues that Woodward and 9 Mile is properly characterized as a traditional public forum for First Amendment Analysis. The right of the government to limit expressive activity is limited in places that have been traditionally devoted to assembly and debate. Perry Ed. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). A street has been consistently held to be a public forum. “At one end of the spectrum are streets and parks which ‘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.’” Id., quoting Hague v. CIO, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). Sidewalks are also traditional public forums for purposes of First Amendment protection. Grace, 461 U.S. at 179, 103 S.Ct. 1702.

[7] Woodward and 9 Mile is in the heart of downtown Ferndale. (Pl. Mot. Summ. Judgment, Ex. 14, p. 50.) It is one of the busiest intersections in Ferndale, second only to Woodward and Eight Mile in the volume of traffic. (Pl. Mot. Summ. Judgment, Ex. 9, pp. 80:16-81:1.) There is typically significant traffic noise during the time of the Vigil. The intersection of 9 Mile and Woodward is properly

characterized as a public forum for a First Amendment analysis.

C. Ferndale’s Ordinance is a Content Based Restriction

[8] Plaintiff claims Ferndale’s “Honk Statute” is a content based restriction, while Defendant claims the statute is content neutral. (Pl. Mot. Summary Judgment, *1033 at 12.) To determine whether a restriction is content-based, the courts look at whether it “restrict(s) expression because of its message, its ideas, its subject matter, or its content.” Consolidated Edison Co. of New York v. Public Serv. Comm. of New York, 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980). The Ordinance is content-based as any message, other than a warning, delivered by the “honk” sign or horn honking violates the Ordinance. A sign simply encouraging peace in Iraq would not be an issue, while a sign encouraging motorists to honk for peace in Iraq would violate the ordinance. Signs with the word “honk” contained in it are treated differently than other signs, and, therefore, the regulation is content-based.

In this case, honking a vehicle’s horn is not banned completely, only the honking for reasons other than traffic warning is deemed unlawful. The content of the message contained within the honk must be determined by the police before issuing citations, therefore the regulation, as applied to the honking motorists, may also be properly classified as a content-based policy. (Pl. Mot. For Summary Judgment, Ex. 8, pp. 21:18-23:7.)

D. Constitutional Standard

[9] Having determined that the signs encouraging the honking of vehicle horns, as well as the honking of the horns are speech, and that the City of Ferndale’s regulation of the two are content based, Ferndale must “show that (its ordinance) is *necessary* to serve a *compelling state interest* and that it is *narrowly drawn* to achieve that end.” King Enter., Inc. v. Thomas Township, 215 F.Supp.2d 891, 910 (E.D.Mich.2002). Ferndale must satisfy the test for both, the regulation of the display of honk signs, as well as the regulation of non-traffic related honking.

E. The City of Ferndale’s Purported Interests in Regulating Horn Honking

1. Safety

[10] The City must come forward with evidence showing that honking a vehicle horn other than to convey a warning causes a safety hazard. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1038 (7th Cir.2002) (Court found that although ordinance prohibiting peddling of books near stadium was content neutral, ordinance was not narrowly tailored to achieve city's legitimate interest in protecting citizenry and ensuring safety of sidewalks, and that the ordinance substantially burdened more speech than necessary.) "The government has the burden of showing that there is evidence supporting its proffered justification." *Id.* "Mere speculation of harm does not constitute a compelling state interest." *Consolidated Edison*, 447 U.S. at 543, 100 S.Ct. 2326.

Even if the City's interest in promoting the safety of its citizens is a compelling state interest, Ferndale has not shown that the honk ordinance is "necessary" to achieve that interest. The burden is on the City of Ferndale, and the City has not come forward with any evidence correlating a single honk expressing support for a demonstration with safety problems. The Vigil began nearly five years ago, and thousands of expressive honks have been made in support. Not a single accident has occurred as a result of the Vigil. Ferndale has not provided a single study or report showing that horn-honking or holding "honk" signs causes traffic safety problems. (Pl. Mot. For Summary Judgment, Ex. 9, pp. 66:15-25, 69:1-12, 70:11-18, 76:6-9; Ex. 16 Interrogatory Nos. 5, 7, 9, 10.)

It is important to note that the conditions surrounding the health care rally *1034 that led to the initial concern of the Ferndale Police Department involved protestors on all four street corners, the sidewalks, and the median at Woodward and 9 Mile. (Pl. Mot. Summary Judgment, Ex. 8, pp. 17:24-20:18.) Some of the health care demonstrators were even reaching into traffic. *See Id.* The noise of the honks was much greater than any honking Captain Collins had heard at the Vigil. (*See Id.*, p. 20:10-13.) It is clear that the safety concerns implicated by the health care rally are of a different kind than that found at the peace Vigils.

2. Excessive Noise

Ferndale's ban on "honk" signs and the honking at the Vigil cannot be justified on the ground that it prevents "excessive" noise. Horn honking is consistent with the normal noise level of Woodward and 9 Mile Road during rush hour of a week day, or busy weekend shopping day, as it is in the heart of downtown Ferndale. (Pl. Mot. Summary Judgment, Ex. 14, pp. 50:22-51:22.) The intersection and adjacent streets are the sites of many boisterous organized events, such as the Woodward Dream Cruise ^{FNI} and the Gay Pride Fest, where music on bandstands blare across the streets. The Dream Cruise, an event heavily promoted by Ferndale, generates widespread complaints from Ferndale citizens. (Pl. Mot. Summary Judgment, Ex. 14, p. 64:13-17.) Numerous noisy night clubs and restaurants are also located in the area of the intersection.

^{FNI} The Woodward Dream Cruise is "the world's largest one-day celebration of car culture," attracting more than 1 million visitors and "more than 40,000 muscle cars, street rods, custom, collector and special interest vehicles." (*See* [http:// www.woodwarddreamcruise.com/About.html](http://www.woodwarddreamcruise.com/About.html).)

Assuming arguendo that noise regulation may be deemed a "compelling state interest," the City of Ferndale has not produced evidence that the honk regulation is "necessary" to limit the noise. While a Vigil held at midnight on a subdivision street that encouraged horn honking would seem to clearly be excessive noise for the circumstance, scattered honks on a busy intersection during rush hour do not rise to the level of "excessive." The maximum level for a residential/commercial area between 7:00 a.m. and 10:00 p.m., which would apply to the Vigil, is 75 decibels. Ferndale Code § 2-100(a). Sound levels are to be determined by a sound meter. Ferndale Code § 2-101. Ferndale has never measured the decibel level at the Vigil with a sound meter, and has failed to determine if the horn-honking there has exceeded the permissible level. Ferndale has simply failed to provide any meaningful support for their position that banning individual honks during rush hour on 9 Mile and Woodward is necessary to serve its interest in noise reduction.

F. Narrow Tailoring of Policy

Ferndale has not adopted the least restrictive means of preventing excessive noise, or alleviating safety concerns. King Enter., Inc. v. Thomas Township, 215 F.Supp.2d 891 (E.D.Mich.2002.) A single honk violates Ferndale's regulation, and, as explained above, Ferndale has not offered evidence that a single honk can be classified as excessive noise, or as contributing to traffic concerns.

Captain Collins' concern initially grew out of observing a health care rally, which involved more people than the normal attendance of the Vigil. While this Court understands that the City of Ferndale has a legitimate interest in preventing such "hornet's nests" of noise from occurring, the prohibition of individual honks does not pass the "narrow tailoring" prong of First Amendment inquiry.

*1035 An example for how a narrowly tailored honk ordinance would look like may be found in Ferndale's own noise ordinance, which confines prohibited noise to any "excessive or unnecessary loud noise of a high volume or intensity which is clearly audible and which disturbs, annoys, or endangers the calm, comfort, quiet, repose, health, peace or safety of others beyond the immediate vicinity of the disturbance." Ferndale Code of Ordinances § 2-98. The Noise Ordinance also specifies the maximum permissible sound levels at 75 decibels. Ferndale Code § 2-100(a). Ferndale is free to determine whichever means they would choose, however, there must be narrow tailoring of the regulation to the compelling state interest in order to survive First Amendment scrutiny.

The City of Ferndale selectively enforces the application of the "Honk Statute." Ferndale permits non-traffic related expressive horn-honking throughout the year for several events. For example, celebratory honking is tolerated following certain sporting events, the annual "dream cruise" event, as well as after weddings. (Pl. Mot. Summary Judgment, Ex. 14, pp. 55:21-22; 56:5-11.) Ferndale's willingness to grant exemptions for such events permits the inference that they may grant exemptions for other events, such as the peace Vigil.

V. CONCLUSION

For the reasons stated above, The City of Ferndale has failed to show that application of its "Honk

Statute" to the Vigilers is necessary to serve any articulated compelling state interest. Ferndale has also failed to satisfy the narrow tailoring prong of First Amendment content-based restriction on speech scrutiny.

Accordingly,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment (**Docket No. 14**) is **GRANTED**.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (**Docket No. 12**) is **DENIED**.

IT IS DECLARED that Ferndale's Honk Ordinance, as applied to the Vigilers, as well those who honk in support of the Vigilers, is in Violation of the First Amendment and unconstitutional

IT IS FURTHER ORDERED that nominal damages in the amount of \$1 are awarded to Plaintiffs.

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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:

Petition for Discretionary Review

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 type="checkbox"/> Via Email
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DATED this 8th Day of July, 2009, at Arlington, Washington.



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