No. 20-124412-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

CITY OF WICHITA, KANSAS,
Plaintiff/Appellee,

v.

GABRIELLE GRIFFIE,
Defendant/Appellant,

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION (ACLU) OF KANSAS

Appeal from the District Court of Sedgwick County, Kansas
Honorable Eric Williams, Judge
District Court Case No. 2021-CR-000739-MC

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TABLE OF CONTENTS AND AUTHORITIES

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Kansas (ACLU of Kansas) is a non-profit and non-partisan organization dedicated to preserving and advancing the civil rights and legal freedoms guaranteed by the United States Constitution and the Bill of Rights, and the Kansas Constitution and Kansas Bill of Rights. The ACLU of Kansas has approximately 9,000 members in Kansas. Defense and preservation of First Amendment rights is central to the ACLU's longstanding mission.

ARGUMENTS AND AUTHORITIES

This case concerns the reach and application of a broad local city ordinance and corresponding state statute, both of which impermissibly criminalize protected constitutional conduct. Gabrielle Griffie was convicted of unlawful assembly after protesting the murder of George Floyd. In the summer of 2020, Griffie participated in marches in the City of Wichita with her community group, Project Justice ICT, during which she and others chanted "slogans such as 'No justice, No peace,' 'No Trump, No KKK, No Fascist USA,' [and] 'Black Lives Matter.'" *City of Wichita v. Griffie*, No. 124,412, 2022 WL 17072292, at *9 (Kan. Ct. App. Nov. 18, 2022) (unpublished opinion) (Lahey, J., dissenting). After participating in one such march, the City of Wichita charged Griffie with disorderly conduct under Wichita Municipal Ordinance § 5.73.030(1). That statute criminalizes "the meeting or coming together of not less than five persons for the purpose of engaging in conduct constituting [] disorderly conduct as defined by Section 5.24.010." *Id.* at *1 (majority opinion); W.M.O. § 5.73.030(1).

The particular form of disorderly conduct of which Griffie was convicted—"noisy conduct"—is defined as follows: "Disorderly conduct is, one or more of the following acts that the person knows or should know will alarm, anger or disturb others or provoke an assault or other breach of the peace: . . . engaging in noisy conduct tending to reasonably arouse alarm, anger or resentment in others." *Griffie*, 2022 WL 17072292, at *5 (quoting W.M.O. § 5.24.010(c)). This noisy conduct provision in W.M.O. § 5.24.010(c) is identical to K.S.A. § 21-6203(a)(3). Griffie appealed her conviction and brought this facial constitutional challenge to W.M.O. § 5.24.010(c).

The Wichita ordinance that Griffie supposedly violated is constitutionally overbroad. It criminalizes a massive amount of free expression, applies irrespective of time and location, and uses public anger as the metric for unlawful speech. The overbroad character of the Wichita ordinance is demonstrated by its application to Griffie. For these reasons, as explained fully below, we urge this Court to reverse the district court and Court of Appeals, strike down the Wichita ordinance and corresponding Kansas statute, and vacate Griffie's conviction.

A. Statutes that criminalize the exercise of core First Amendment rights must be strictly limited in time, place, and manner, and are subject to heightened scrutiny.

Free speech—particularly political protest—is a cornerstone of our democracy. "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002). The Supreme Court has recognized that the government "may impose reasonable restrictions on the time, place, or manner of protected speech," but such restrictions must

be "narrowly tailored to serve a significant government interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). For a restriction to be narrowly tailored, "it must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quoting *Ward*, 491 U.S. at 799); *see also City of Wichita v. Trotter*, 316 Kan. 310, 314 (2022) ("Where conduct and not merely speech is involved, the United States Supreme Court requires that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." (quotations omitted)). In other words, a narrowly tailored restriction must "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). "An ordinance or statute is overbroad when it regulates or prohibits constitutionally protected conduct which should be left to the private domain, that is, conduct which the national, state, or local government simply does not have the right to control." *Trotter*, 316 Kan. at 320 (quoting *Gordon v. Shiro*, 310 F. Supp. 884, 886 (E.D. La. 1970)). These doctrinal requirements ensure that the government cannot silence protected speech occurring in public fora, including by criminalizing that speech, except in exceptional circumstances. *See City of Houston, Tex. v. Hill*, 482 U.S. 451, 459 (1987) ("Criminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." (citations omitted)); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) ("The right to use a public place for expressive activity may be restricted only

for weighty reasons."); *Harman v. City of Santa Cruz, California*, 261 F. Supp. 3d 1031, 1042 (N.D. Cal. 2017) ("In such traditional public fora [as sidewalks], the government's authority to restrict speech is at its minimum."). Where, as here, the government possesses only a generalized interest in maintaining tranquility, blanket regulations on speech in public places cannot satisfy this standard.

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 291 (2008). On its face, the ordinance and corresponding statute are impermissibly overbroad.

Recall that the challenged ordinance and identical Kansas statute criminalize "engaging in noisy conduct tending to reasonably arouse alarm, anger or resentment in others." W.M.O § 5.24.010(c); K.S.A. § 21-6203(a)(3). Four components of this clause have enormous breadth. *First*, it contains no geographic limitations; it applies to all locations. *See State v. Beck*, 9 Kan. App. 2d 459, 461 (1984) (noting that the disorderly conduct statute applies in private and public settings). *Second*, the term "noisy conduct" is nearly unlimited. "Noisy" means "making noise." *Noisy*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/noisy (last accessed June 26, 2023). "Conduct" means "[p]ersonal behavior, whether by action or inaction, *verbal* or nonverbal; the manner in which a person behaves; collectively, a person's deeds." *Conduct*, Black's Law Dictionary (Westlaw 11th ed. 2019) (emphasis added). *Third*, as the dissent notes, the word "tending" is broad and means "to serve, contribute, or conduce in some way." *Griffie*, 2022 WL 17072292, at *10 (Lahey, J., dissenting)

(quoting Black's Law Dictionary 1770 (11th ed. 2019)). *Fourth*, the noisy conduct in question need only "arouse anger or resentment"—commonplace emotions that are ubiquitous to human experience. The Wichita ordinance thus criminalizes any speech or expression that makes noise that could in *any* way contribute to another's anger.

Collectively, these components create a nearly limitless ordinance that criminalizes a plethora of constitutionally protected speech. It entrusts police with the power to selectively enforce the ordinance against speech with which they disagree or prefer not to hear—far exceeding the bounds created by the First Amendment.

B. W.M.O. § 5.24.010(c) extensively criminalizes constitutionally protected speech.

It's not difficult to think of any number of constitutionally protected activities that are criminalized under the Wichita ordinance. Here is a short illustrative list:

- Any political protest with a megaphone (or other sound amplification) or yelling.
- Shouting at someone "get out of my way!"
- Booing or cheering at sporting events.
- Any political campaign rallies.
- Arguing with a spouse, child, or other family member.
- Playing any genre of music in public (because there are invariably people who will not enjoy that music). *See Ward*, 491 U.S. at 790 ("Music, as a form of expression and communication, is protected under the First Amendment.").
- Honking a car horn. *See State v. Immelt*, 173 Wash. 2d 1 (2011) (striking down as overbroad an ordinance which prohibited most horn-honking for purposes other than public safety because it "prohibit[ed] legitimate expressions of speech").
- Shouting expletives after being stung by a bee.

See generally Landry v. Daley, 280 F. Supp. 968, 970 (N.D. Ill. 1968) ("Political campaigns, athletic events, public meetings and a host of other activities produce loud, confused or senseless shouting not in accord with fact, truth or right procedure to say nothing of not in accord with propriety, modesty, good taste or good manners."). *See also City of Houston*, 482 U.S. at 472 ("[T]he First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.").

In its brief, the City argues that these sorts of applications are theoretical and therefore irrelevant because the overbreadth of a statute or ordinance must be "real." Suppl. Br. for Appellee, at 8, *City of Wichita v. Griffie*, Case No. 20-124412-S [hereinafter, City Br.]. But the Supreme Court has stated that *potential* applications of a law are relevant to the overbreadth analysis precisely because of the chilling effect that they may have on free speech. *See, e.g.*, *United States v. Hansen*, 599 U.S. ___, ___ (2023) (slip op., at 19 n.5) ("Overbreadth doctrine trafficks in hypotheticals . . . ."); *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1, 11 (1988) ("[F]ree expression may be inhibited almost as easily by the potential or threatened use of power as by the actual exercise of that power."); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) ("Our concern here is based upon the *potential* for arbitrarily suppressing First Amendment liberties . . . ." (emphasis added and quotations omitted)). The actual enforcement record of a statute or ordinance is not relevant to the overbreadth analysis. *See United States v. Stevens*, 559 U.S. 460, 470 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would

not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). Furthermore, in *Trotter*, this Court struck down a Wichita ordinance based on its potential applications. *See* 316 Kan. at 317. The Court can do so here as well.

Legitimate applications of the ordinance must be weighed against the above applications of the ordinance that encroach on constitutional rights. Tellingly, some of the examples the Court of Appeals majority cited of "plainly legitimate" applications of the law probably do not concern the "noisy conduct" prong of the Kansas statute at all. *E.g.*, *State v. Vehige*, No. 116,202, 2017 WL 3203381 (Kan. Ct. App. July 28, 2017) (unpublished opinion) (fighting words); *State v. Hughs*, No. 118,281, 2018 WL 2374766 (Kan. Ct. App. May 25, 2018) (unpublished opinion) (fighting words and brawling). That leaves the following examples from the majority:

- Man yelling, screaming, and approaching police. *State v. Mead*, No. 115,989, 2017 WL 4082240, at *4–5 (Kan. Ct. App. Sep. 15, 2017) (unpublished opinion).
- Man shouting vulgarities at the top of his lungs in the library. *City of Paola v. Ammel*, No. 96,301, 2007 WL 2767953 (Kan. Ct. App. Sep. 21, 2007) (unpublished opinion).
- Man shouting profanity at toll booth operator. *State v. Heyder*, No. 82,810, 2000 WL 36745844 (Kan. Ct. App. Feb. 11, 2000) (unpublished opinion).
- "[A]n inebriated person [] yelling and hurling insults at citizens trying to walk along a public sidewalk." *Griffie*, 2022 WL 17072292, at *8.
- "A person [] playing loud music outside at night in a residential area preventing neighbors from getting any sleep." *Id.*

This list reveals the narrow extent of legitimate applications of the law. These relatively niche applications of the Wichita ordinance show that its plainly legitimate applications are vastly outstripped by its encroachment on constitutionally protected expression.

C. W.M.O. § 5.24.010(c) is geographically overinclusive.

In addition to criminalizing various *types* of speech, the Wichita ordinance criminalizes speech occurring in virtually every setting. No doubt, Wichita has "a substantial interest in protecting its citizens from unwelcome noise." *Ward*, 491 U.S. at 796 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984)). But that interest is not unlimited; rather, the City's interest in preventing noise rises and falls depending on the location. The Supreme Court has recognized that "the standard by which limitations on speech must be evaluated differ depending on the character of the property at issue." *Frisby*, 487 U.S. 474 at 479 (quotations omitted); *Grayned*, 408 U.S. at 116. Thus, while restricting a speech in a library reading room may not encroach on constitutional liberties, the same restriction on a speech in a park likely would. *Grayned*, 408 U.S. at 116.

Based on these principles, the Supreme Court has upheld targeted speech restrictions when they are limited to appropriate times and places. For example, in *Grayned*, the Supreme Court upheld a noise ordinance that outlawed noise that disturbed school operations. *Id.* at 121. Similarly, in *Frisby*, the Supreme Court upheld an ordinance that banned picketing focused on a particular residence but suggested that it would not have upheld a similar ordinance banning all residential picketing. *See* 487 U.S. at 482–83. And in *Hill v. Colorado*, the Supreme Court upheld a Colorado statute that restricted speech within 100 feet of a health care facility. 530 U.S. 703 (2000). There, the court recognized that the state had a compelling interest in protecting health care facilities

and avoiding "potential trauma to patients associated with confrontational protests." *Id.* at 715.

Importantly, in each of these settings—schools, individual residences, and hospitals—unwilling listeners had little power to avoid unwanted communications. *See id.* at 716. But that same rationale holds no muster in public settings like parks, sidewalks, and markets. *See id.* That is because "[t]he recognizable privacy interest in avoiding unwanted communication . . . . is far less important when strolling through Central Park than when in the confines of one's home, or when persons are powerless to avoid it." *Id.*

The issue with the Wichita ordinance is that it restricts "noisy conduct" regardless of the location of the speech. The Ninth Circuit has coined such statutes that apply irrespective of location as "geographically overinclusive." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc); *Cuviello v. City of Vallejo*, 944 F.3d 816, 829 (9th Cir. 2019). In *Redondo Beach*, the Ninth Circuit struck down a solicitation ordinance that applied to all streets and highways as not narrowly tailored. 657 F.3d at 949. Although the city possessed a legitimate interest in preventing traffic problems on a few major streets and medians, the Ninth Circuit concluded that by applying the ordinance to "all streets, alleys, and sidewalks, the city [] burdened substantially more solicitation speech than [] reasonably necessary to achieve its purpose." *Id.*

Here, the only interest that the City of Wichita identifies is preventing "verbal and physical confrontation[s]." City Br., at 7. This interest, however, is already addressed by

another prong of W.M.O. § 5.24.010(c) criminalizing the use of "fighting words." Wichita has not advanced any justification for restricting "noisy conduct" in a huge variety of cases that may contribute to anger or resentment but that do not precipitate violence or confrontation. Even if Wichita has an interest in ensuring the tranquil and smooth functioning of schools, residences, hospitals, and churches (which the City did not invoke in its brief), it has no interest in restricting expressive conduct in public places or in restricting expressive conduct that does not meaningfully inhibit the function of those places. *See Reeves v. McConn*, 631 F.2d 377, 385 (5th Cir. 1980) ("There is no valid state interest in prohibiting amplified sound that does not actually cause, or imminently threaten to cause, material disruption at [residences, schools, courthouses, hospitals, or churches]."). Public parks, sidewalks, and markets "bustl[e] with the sounds of recreation, celebration, commerce, demonstration, rallies, music, poetry, speeches, and other expressive undertakings." *See Deegan v. City of Ithaca*, 444 F.3d 135, 144 (2d Cir. 2006). Wichita has no articulated interest in restricting these noises, particularly where onlookers can easily "avoid unwanted communication" by moving themselves to another location. *See Hill*, 530 U.S. at 716; *Frisby*, 487 U.S. at 484 ("[I]n many locations, we expect individuals simply to avoid speech they do not want to hear . . . .").

D. The inclusion of a "negligence" standard does not meaningfully narrow the applicability of the ordinance/statute to non-protected speech.

The lower court majority argues that the inclusion of a negligence standard in the Wichita ordinance safeguards against overbroad applications. *Griffie*, 2022 WL 17072292, at *6. But the ordinance's negligence standard does not help it overcome the

constitutional problems identified above. Addressing the argument in the context of "true threats," the Supreme Court squarely rejected the notion that a negligence standard adequately safeguards First Amendment protections in the recently decided *Counterman v. Colorado*. 600 U.S. ___, ___ (2023) (slip op., at 5–10). The Court reasoned that a subjective culpability requirement is necessary to reduce "the prospect of chilling fully protected expression." *Id.* at 7. So too here. Absence of a mens rea requirement deters "fully protected expression" because citizens can be charged even when they were not aware of the alarming or angering effect that their speech could have. *See id*; *see also State v. Hensel*, 901 N.W.2d 166, 174 (Minn. 2017) ("The statute's inclusion of a negligence standard makes it more likely that the statute will have a chilling effect on expression protected by the First Amendment, the key concern of the overbreadth doctrine.").

E. Anger and resentment cannot justify restrictions on free expression.

The majority cites two other limitations included in the ordinance in support of its conclusion that the ordinance is not overbroad. First, the majority notes that the statute contains "a focused actus reus component" because "[i]t only applies to noisy conduct 'tending to reasonably arouse alarm, anger, or resentment in others.'" *Griffie*, 2022 WL 17072292, at *6. Second, the majority argues that the inclusion of an objective standard with the use of the word "reasonably" effectively limits the ordinance. *Id.* Neither of these arguments is compelling.

The Supreme Court has repeatedly rejected the notion that offense to an onlooker may justify abridging free speech. *Cohen v. California*, 403 U.S. 15, 21 (1971) ("[T]he

mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) ("Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."). In fact, the Supreme Court has expressly noted that a "high purpose" of free speech is served when it "induces a condition of unrest, creates dissatisfaction with the conditions as they are, or even stirs people to *anger*." *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989) (emphasis added) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)); *see also Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971) ("[M]ere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms.").

Finally, the City argues that the inclusion of an objective component in the ordinance saves it, and the majority from the Court of Appeals agrees. City Br., at 9; *Griffie*, 2022 WL 17072282, at *8. But this conclusion cannot be correct. The Supreme Court has held that the general principle described above—that anger aroused in others does not justify restricting free expression—applies even to objectively offensive conduct. *See Virginia v. Black*, 538 U.S. 343, 366 (2003) ("It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings."). Accordingly, other courts have held that statutes are overbroad even when they contain an objective component. For example, in *Harman*

v. City of Santa Cruz, California, the Northern District of California struck down as overbroad an ordinance which criminalized "any noises or sounds which are . . . physically annoying to people of ordinary sensitiveness." 261 F. Supp. 3d 1031 (N.D. Cal. 2017). The court reasoned that "[t]he prevention of "annoyance" is not a proper basis on which to curtail protected speech." *Id.* at 1043. The court instructively noted that "it is a fundamental tenant of American democracy that the right to free speech outweighs the right to be free from annoyance." *Id.* Likewise, the right of free expression outweighs the right to be free from anger.

F. Griffie's conviction demonstrates the overbroad and arbitrary nature of the Wichita ordinance.

The City attempts to shift away from the constitutional infirmities in its ordinance by arguing that it prosecuted Griffie for blocking traffic, rather than noisy conduct, and thus any challenge based on overbreadth is misplaced. *Griffie*, 2022 WL 17072292, at *8. Yet the City's own actions during its prosecution of Griffie contradict its position here.

First, there is no evidence that the jury convicted Griffie for merely blocking traffic. Indeed, the jury instructions required the jury to find that Griffie had engaged in "noisy conduct" to return a guilty verdict. *Id.* at *3. And the alleged manner of blocking traffic in which Griffie purportedly engaged—physically obstructing a motorist, *see id.* at *2—does not involve noise. If this were the only conduct for which the City sought to convict Griffie, then the jury instructions need not have mentioned "noisy conduct" at all.

Furthermore, the only noise that Griffie engaged in during the conduct at issue in her criminal case was overt political protesting. *See id.* at *9 (Lahey, J., dissenting). Even

if blocking traffic could fairly be characterized as "noisy conduct," the evidence the City presented indicates that it wanted the jury to consider Griffie's protest and political speech itself in reaching a verdict against her. This objective explains why the City showed the jury a two-hour clip of the entire protest, rather than just the portion where Griffie allegedly blocked traffic. *See id.* at *2 (majority opinion). It is thus impossible to know what "noisy conduct" contained in the two-hour protest was the basis for the jury's conviction. Wichita's presentation of evidence outside the scope of Griffie blocking traffic undermines its contention that blocking traffic was the sole basis for charging her. That the jury could have found Griffie guilty for engaging in political protest confirms the clear overbreadth of the challenged ordinance.

Although not directly necessary for the Court's overbreadth analysis, it is worth noting that the charges levied against Griffie demonstrate the arbitrariness of both the Wichita ordinance and its enforcement. The Supreme Court has "repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them." *City of Houston*, 482 U.S. at 465. The Wichita ordinance does exactly that: it imbues the police with the power to arrest anyone who loudly proclaims a message that angers them. It's not surprising that the police wielded that power against Griffie, who was engaging in direct action addressing police brutality and misconduct, using messages that were critical of the police. In short, the Wichita police's choice to arrest and charge Griffie was very likely related to the content of her speech. Even that mere possibility is reason enough to strike down the Wichita ordinance.

CONCLUSION

The Wichita ordinance is plainly unconstitutional. Although there may be limited examples of its legitimate sweep, it also criminalizes a vast swath of constitutionally protected speech. It contains no geographic or temporal limitations, and no City interest justifies restricting noise in public settings like parks and sidewalks. As such, the Wichita ordinance "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *See McCullen*, 573 U.S. at 468 (quotations omitted).

Independently, the prohibition of conduct which may arouse anger or resentment is constitutionally intolerable. The Supreme Court has repeatedly held that public backlash cannot justify restrictions on expressive conduct. This is particularly true in public settings where people can easily avoid conduct they do not wish to observe. Given that the ordinance is criminal in nature, it demands particular scrutiny. Because free expression rights are foundational to our democracy, and because the ordinance and its corresponding state statute impermissibly criminalize core constitutionally protected activity, we urge the Court to reverse the lower court opinions and find W.M.O. § 5.24.010(c) unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed on July 3, 2023, via the court's electronic filing system, which will serve an electronic copy on all registered participants.

/s Sharon Brett
Sharon Brett