NO PLACE TO GO: HOW CHRONIC NUISANCE ORDINANCES VIOLATE THE FIRST AMENDMENT

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I. INTRODUCTION

Imagine being evicted from your home because you called 911 for help. This is the reality for many residents across the United States, and it is all due to a commonly adopted municipal law known as a chronic nuisance ordinance. In the Village of Groton, New York, a woman called the police scared for her life because her abuser, who was "intoxicated, volatile," and armed with a weapon, was at her home.[1] The police responded and removed her abuser.[2] As a result of this police response, nuisance "points" were assigned against the property.[3] The landlord evicted the woman despite her calling for emergency help.[4] This was due to the Village's now-repealed chronic nuisance ordinance, which declared a property as a "public nuisance" after a certain number of nuisance activities occurred on the premises.[5] What qualified as a nuisance activity ranged from disorderly conduct and noise violations to serious criminal offenses, even if the offenses did not result in a conviction.[6] Property owners in the Village were required to "abate" the nuisance or face possible daily penalties and property closures.[7] Abatements frequently took the form of evictions.

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[1] Brief for American Civil Liberties Union Foundation et al. as Amici Curiae Supporting Appellants at 15, Bd. of Trs. v. Pirro, 58 N.Y.S.3d 614 (N.Y. App. Div. 2017) (No. 523504).

[2] *Id.*

[3] Bd. of Trs. v. Pirro, 58 N.Y.S.3d 614, 622 (N.Y. App. Div. 2017).

[4] Brief for American Civil Liberties Union Foundation, *supra* note 1, at 15.

[5] *Bd. of Trs.*, 58 N.Y.S.3d at 616.

[6] *See id.* at 621, 623.

[7] *Id.* at 617.

The effect of the ordinance was simple: tenants had to choose between seeking police help or keeping a roof over their heads.

The situation reflected in the Village of Groton is *not* an anomaly—there are over 2,000 of these ordinances in the United States.[8] In fact, the Village's ordinance is more lenient compared to some other chronic nuisance ordinances, which explicitly provide that when 911 calls are made and the police respond to a property a certain number of times within a set number of months, the property is declared a chronic nuisance.[9] While ordinances vary by municipality, most chronic nuisance ordinances share three features: (1) a property is declared a nuisance after a certain number of 911 calls are made within a specified period of time; (2) the ordinance defines qualifying "nuisance" activities; and (3) there is a requirement that property owners "abate the nuisance" or "face fines, property forfeiture, or even incarceration."[10] Local municipalities justify these ordinances by maintaining that they reduce crime, prevent fraudulent 911 calls, save tax dollars being spent on emergency services, and promote the general welfare of the public.[11]

These ordinances have grave effects, specifically on crime and domestic violence victims and those genuinely in need of police or medical services. Not only are chronic nuisance ordinances enforced against Black and Latinx persons more frequently than those of other demographics, but they are also often enforced against victims of domestic violence and people experiencing medical emergencies.[12]

In addition to these ordinances being dangerous from a public policy standpoint, they also implicate the First Amendment. For

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[8] Kate Walz, *Let's Stop Criminalizing Victims of Domestic Violence*, SHRIVER CTR. ON POVERTY L. (Oct. 27, 2017), https://theshriverbrief.org/lets-stop-criminalizing-victims-of-domestic-violence-a72a06b50e42.

[9] *See, e.g.*, VILL. OF ELM GROVE, WIS., CODE § 208-13 (2008).

[10] Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOCIO. REV. 117, 120 (2013).

[11] *See id.* at 120 (discussing how "police came to view [the] ordinances as an effective way to allocate resources by offloading service calls to landlords."). *See also* Gretchen W. Arnold, *From Victim to Offender: How Nuisance Property Laws Affect Battered Women*, 34 J. INTERPERSONAL VIOLENCE 1, 2 (2016).

[12] Desmond & Valdez, *supra* note 10, at 125, 130 (finding that Milwaukee's ordinance was disproportionately enforced against Black neighborhoods and that acts of domestic violence were "[t]he third most common nuisance activity . . . ."); SCOUT KATOVICH, MORE THAN A NUISANCE: THE OUTSIZED CONSEQUENCES OF NEW YORK'S NUISANCE ORDINANCES 12 (2018) (describing how nuisance ordinances were disproportionately enforced against Black and Latinx neighborhoods in Rochester, New York).

example, in *Board of Trustees of Groton v. Pirro*, the New York Supreme Court, Appellate Division, held that the Village's chronic nuisance ordinance was unconstitutional because it prohibited protected First Amendment expression—the right to petition the government for a redress of grievances.[13] In response to this case, the New York State Legislature enacted a bill that prohibits any municipality from enacting an ordinance that penalizes a resident for calling 911.[14] Other cases brought on similar grounds have settled out of court, and some prompted municipalities to change their ordinances to exclude enforcement against individuals who call the police for help.[15]

This Comment will highlight the disparate effect that chronic nuisance ordinances have on Black and Latinx persons and argue that these ordinances, without exceptions for residents calling 911 for legitimate, non-fraudulent purposes, are unconstitutional under two First Amendment doctrines. Part II will provide a more in-depth analysis of why these ordinances are enacted, who they impact, and where they are being used. This Part will show the ramifications that these ordinances have on domestic violence victims; the ordinances' discriminatory effects; and the real-life implications of enforcing these ordinances. Part III will examine the applicable standards of scrutiny under the First Amendment and explore the modern trend of extending the right to petition the government to include calls to the police. Part IV will discuss the First Amendment *O'Brien* doctrine, which is applied when a government regulates conduct and, in doing so, incidentally burdens a First Amendment right. This Part will argue that chronic nuisance ordinances without exceptions for residents calling the police for legitimate reasons fail the fourth *O'Brien* prong—which requires a law to be no greater than necessary to further the government's interest. Part V will analyze a similar First Amendment doctrine, the "Time, Place, or Manner" (TPM) test, which the Supreme Court has applied alongside the *O'Brien* test. This Part will highlight the court's decision in *Board of Trustees of Groton v. Pirro*, which invalidated a chronic nuisance ordinance under the TPM

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[13] 58 N.Y.S.3d 614, 623 (N.Y. App. Div. 2017).

[14] Right to Call for Police and Emergency Assistance; Victim Protections, N.Y. CIV. RIGHTS LAW § 91 (2019).

[15] *See* Verified Second Amended Complaint at 1–4, Briggs v. Borough of Norristown, No. 2:13-cv-02191 (E.D. Pa. dismissed Oct. 30, 2014); Amended Complaint at 1–5, Markham v. City of Surprise, No. 2:15-cv-01696 (D. Ariz. dismissed July 8, 2018); First Amended Complaint at 1–4, Watson v. City of Maplewood, No. 4:17-CV-1268 (E.D. Mo. dismissed Sept. 26, 2018); First Amended Complaint at 1–4, Somai v. City of Bedford, No. 1:19-cv-373 (N.D. Ohio dismissed Nov. 17, 2020).

doctrine for failure to provide an adequate alternative channel for First Amendment expressions. Part VI will conclude that enforcing a chronic nuisance ordinance against a property where the tenant or property owner called 911 seeking help is not only egregious from a public policy standpoint, but it also unconstitutionally restricts residents from exercising their First Amendment rights. Given this, courts should invalidate chronic nuisance ordinances that do not have exceptions for residents calling 911 for legitimate assistance under both the *O'Brien* and the TPM test.

II. THE CHRONIC NUISANCE ORDINANCE

A. *What Is a Chronic Nuisance Ordinance?*

A chronic nuisance ordinance is a locally enacted law that gives the government the power to declare "a property a nuisance when it is the site of a certain number of police responses or alleged nuisance conduct."[16] This type of ordinance has many names, including crime-free ordinance, crime-activity ordinance, free housing ordinance, and nuisance property ordinance. No matter the name, they all share a common result: the number of times police respond to emergency calls to a certain property increases the risk of that resident's eviction.

A chronic nuisance ordinance typically sets forth several determinants: (1) what conduct qualifies as a nuisance; (2) the "threshold" number of permissible incidents; (3) which property type the ordinance can be enforced against; (4) the government entity responsible for enforcement; (5) actions property owners must take in order to comply with the nuisance law; and (6) the penalties for failing to abate the nuisance.[17] Most ordinances either provide a list of specific offenses or broadly include anything from poor lawn maintenance to criminal activity.[18] For example, in the Village of Groton's ordinance, qualifying nuisance conduct included: general noise; loitering; howling dogs; disorderly premises; alcohol and drug violations; welfare fraud; allowing too many persons on the premise; prostitution; firearms and dangerous weapons offenses; murder;

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[16] KATOVICH, *supra* note 12, at 6.

[17] KATHLEEN GALLAGHER, LISC, CHRONIC NUISANCE ORDINANCES 1, https://www.lisc.org/media/filer_public/16/04/16046c59-6f06-45f7-89f9-274da3430edf/chronic_nuisance_ordinances.pdf (last visited Nov. 6, 2021).

[18] Sejal Singh & Alisha Jarwala, *Nuisance Ordinances: The New Frontier in Social Control*, CURRENT AFFS. (Aug. 6, 2019), https://www.currentaffairs.org/2019/08/nuisance-ordinances-the-new-frontier-in-social-control.

assault; and sex offenses.[19] Most ordinances do not require a criminal conviction nor require that the tenant or property owner be the one actually engaging in the nuisance activity.[20]

The number of permissible nuisance incidents depends on the applicable ordinance. Some ordinances are more explicit in the number of phones calls allowed to report nuisance activities,[21] while others are implicit in the way the ordinance connects the number of police calls to nuisance activities.[22]

Chronic nuisance ordinances typically target the private housing market,[23] and they are enforced against both rental properties and single-family homes.[24] Despite these ordinances being more commonly enforced against rental properties, a recent example out of Ohio demonstrates how they are enforced against homeowners. An Ohio woman faced potential foreclosure because she failed to pay off $12,000 in nuisance penalties.[25] Ms. Parker was fined as a result of too many 911 calls made by her and her son, who suffers from schizophrenia.[26] The repeated phone calls were attempts to seek medical and police assistance when her son was suffering from mental health emergencies.[27] Pursuant to the ordinance, the penalties were then assessed as a lien on Ms. Parker's home, to be paid along with her property taxes.[28] Since she could not afford to pay the additional amount at that time, Ms. Parker was at risk of having her home

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[19] VILL. OF GROTON, N.Y., CODE § 152-3 (2014).

[20] *See, e.g.*, *id.*

[21] *See, e.g.*, First Amended Complaint at 2, Watson v. City of Maplewood, No. 4:17-CV-1268 (E.D. Mo. dismissed Sept. 26, 2018). Before it was appealed, Maplewood, Missouri's ordinance declared a property a nuisance after more than two phone calls to the police within 180 days. *Id.*

[22] *See, e.g.*, VILL. OF GROTON, N.Y., CODE § 152-3 (2014). The Village of Groton's ordinance stated that four or more *violations* in a year declares a property a nuisance, but evidence that a violation occurred came from police complaints, reports, and responses to that property. *See id.* §§ 152-3, 152-4.

[23] *See, e.g.*, Desmond & Valdez, *supra* note 10, at 123.

[24] *See, e.g.*, Bd. of Trs. v. Pirro, 58 N.Y.S.3d 614, 622–23 (N.Y. App. Div. 2017) (describing incidents in which the defendant attempted to comply with the ordinance for his rental properties).

[25] Emma Ockerman, *She Owes Over $12K for 911 Calls. Now She Could Lose Her Home.*, VICE:NEWS (Sept. 27, 2021, 10:35 AM), https://www.vice.com/en/article/4avzpn/anti-nuisance-laws-calling-911-home-foreclosure.

[26] *Id.*

[27] *See id.*

[28] *Id.*

foreclosed on, leaving her and her son homeless.[29] Ms. Parker's situation reflects how far-reaching these ordinances are.

Once a property reaches the number of permissible calls and becomes a nuisance, the property owner is required to "abate" the nuisance. Abatement procedures are typically set forth in the ordinance itself and may require a property owner to work with city officials to create an abatement plan.[30] A study out of Missouri collected previous city-approved abatement plans.[31] These plans included threatening tenants with fines or eviction and suggesting that their tenants should prevent the activities from occurring in their homes, despite them not being the ones to cause the nuisance activity.[32] In one case, a landlord told a tenant to "obtain a gun and kill [her abuser] in self-defense."[33] The most used methods for abating a nuisance, however, are formal and informal evictions.[34] Penalties can include monetary fines, revocation of rental licenses, closing the rental property down, placing a tax lien on the property, and even imprisonment for up to ninety days for each nuisance violation.[35]

Given that ordinance requirements vary based on municipality, it is important to provide examples of currently enacted nuisance ordinances to better identify the characteristics that are susceptible to First Amendment challenges. In Hobbs, New Mexico, a "[p]ublic nuisance . . . is further defined as any parcel of real property . . . that is the subject of or that has been involved with calls for service to any law enforcement agency(ies)."[36] Qualifying calls "include a repeated

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[29] *Id.* In response to the fines, Ms. Parker brought a lawsuit against the City of Euclid, challenging the constitutionality of the ordinance. The parties have since settled out of court. Pursuant to the settlement agreement, the City of Euclid paid Ms. Parker $65,000 in damages, discharged some of the lien on her home, and most importantly, repealed the nuisance ordinance. Adam Ferrise, *South Euclid Pays Woman $65,000, Changes Law to Settle Lawsuit over Charging Residents for Calling Police*, CLEVELAND.COM (July 11, 2022, 3:08 PM), https://www.cleveland.com/court-justice/2022/07/south-euclid-pays-woman-65000-changes-law-to-settle-lawsuit-over-charging-residents-for-calling-police.html.

[30] VILL. OF ELM GROVE, WIS., CODE § 208-15(D)(3) (2008) ("[T]he property owner shall, within 10 days, respond to the Chief of Police to propose a written course of action to abate the nuisance activities which is acceptable to the Chief.").

[31] Desmond & Valdez, *supra* note 10, at 132 fig.4.

[32] *Id.* 123, 131.

[33] *Id.* at 135.

[34] *Id.* at 131–32.

[35] *Id.* at 122; *see also* VILL. OF ELM GROVE, WIS., CODE § 208-16(B) (2008); HOBBS, N.M., CODE §§ 8.48.020(A)–090(A) (2008).

[36] HOBBS, N.M., CODE § 8.48.020(O)(2) (2008).

pattern of calls for service and complaints[,] . . . general calls for welfare checks, disorderly conduct, domestic violence, domestic altercations, [and] domestic disputes."[37] Penalties include fines for each violation.[38] Moreover, the city can request that the property owner "evict, remove, and permanently bar from entering the property any persons who committed the criminal activity forming the basis of the public nuisance, including, but not limited to, the defendant himself, his or her family members and relatives, and owners, tenants, occupants, guests, and other persons."[39]

In the Village of Elm Grove, Wisconsin, a chronic nuisance property is "[a]ny . . . residentially used parcel of land or structure which has generated three or more calls for police service for nuisance activities on separate days in one month, or six or more calls in a twelve-month period."[40] These activities range from "harassment," "[d]isorderly conduct," and "[t]respass," to the "creation of unnecessary noise," "[i]llegal sale . . . of fireworks," and "[a]ny other offense against peace and good order."[41] After being declared a chronic nuisance, the property owner has ten days to provide the Chief of Police with a "propose[d] . . . written course of action to abate the nuisance activities which is acceptable to the Chief."[42] Penalties include "the costs of the police service to the property associated with abatement," and any unpaid fines are assessed as a lien on the property, to be collected with the property's tax bill.[43] Each month it goes unpaid, 1 percent interest accrues.[44]

In Toms River, New Jersey, a nuisance property is one where "activities occur that result in qualifying calls for municipal services during any sixty-day period in excess of the number of calls listed on the schedule in § 368-12."[45] Section 368-12 provides that different property types have a different number of qualifying calls.[46] Residential properties with one to four units are only allowed to have five qualifying calls, while properties with up to forty units are allowed

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[37] *Id.*

[38] *Id.*

[39] *Id.* § 8.48.040.

[40] VILL. OF ELM GROVE, WIS., CODE § 208-13 (2008).

[41] *Id.* § 208-13(A).

[42] *Id.* § 208-15(D)(3).

[43] *Id.* § 208-16(B).

[44] *Id.*

[45] TOMS RIVER, N.J., CODE § 368-9 (2018).

[46] *See id.*

to have ten calls.[47] Qualifying calls include but are not limited to "disorderly conduct, disturbing the peace, littering, damage to property, injury to a person, criminal activity, improperly parking a vehicle, [and] possession."[48] Once "an individual dwelling unit within a multifamily dwelling has received five qualifying calls within a sixty-day period, the public officer shall notify the property owner and tenant/occupant . . . so that the property owner can take action to abate the nuisance."[49]

These three ordinances only provide a glimpse of how different these ordinances are written. While not always the case, this Comment focuses only on those nuisance ordinances that do not carve out exceptions for the tenants or homeowners who call 911 for help.

B. *Why Do Local Municipalities Enact These Ordinances?*

Cities began enacting chronic nuisance ordinances as an effort to combat drug dealing in private housing.[50] Given that these ordinances reduce calls to police, towns started to use them as a way to save resources by "offloading service calls to landlords."[51] When this happened, these ordinances turned into a form of "third-party policing," which law enforcement uses to help control crime by "convincing and coercing community actors . . . to assume some responsibility for correcting misconduct" in the local town or city.[52] Other reasons that have been cited for enacting a nuisance ordinance include: "[i]ncrease power to police department[s]";[53] "[s]erve as a formal response to resident complaints of unwelcome activities";[54] "[e]ncode into law the regulation of resident behavior/activity according to unwritten community norms, values, or 'character'";[55] "help recoup the costs of providing police services";[56] and promote the general welfare.[57] While a local government might view the enactment

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[47] *Id.* § 368-12(A)–(B)(1).

[48] *Id.* § 368-9(A)–(J).

[49] *Id.* § 368-13(E).

[50] *See* Desmond & Valdez, *supra* note 10, at 120.

[51] *See id.*

[52] *See id.* at 117.

[53] JOSEPH MEAD ET AL., WHO IS A NUISANCE? CRIMINAL ACTIVITY NUISANCE ORDINANCES IN OHIO 3 (2017).

[54] *Id.*

[55] *Id.*

[56] Arnold, *supra* note 11, at 1, 2 (citation omitted).

[57] *See* Bd. of Trs. v. Pirro, 58 N.Y.S.3d 614, 623 (N.Y. App. Div. 2017).

of a chronic nuisance ordinance as a good public policy choice, these ordinances harm vulnerable populations.

C. *The Real-Life Implications of These Ordinances*

Chronic nuisance ordinances are being enforced against individuals who need police or medical help. The practical effect is that these ordinances punish residents who cannot help themselves by discouraging the use of 911.[58] The impact that these ordinances have on domestic violence victims, residents in medical emergencies, and Black and Latinx persons is grave. Chronic nuisance ordinances exacerbate the risk of housing insecurities, which may be a risk that these individuals already face.[59]

1. Chronic Nuisance Ordinances and Domestic Violence Victims

Chronic nuisance ordinances without exceptions for domestic violence calls trap victims in unsafe environments.[60] In a study of Milwaukee's now-repealed chronic nuisance ordinance, nearly one third of the city's citations were in response to domestic violence

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[58] *See, e.g.*, Second Amended Complaint at 1, Somai v. City of Bedford, No. 1:19-cv-373 (N.D. Ohio 2020). The City of Bedford enacted an ordinance declaring a property a nuisance when two calls to the police, about *anything*, occur in one year. *Id.* Evidence showed that "the most common response for a property owner [wa]s to evict the tenant." *Id.* at 14. In this case, Ms. Somai called the police on numerous occasions seeking their help in mediating a noise dispute between her and her neighbor. *Id.* at 3. Ms. Somai lived with her adult son who has a developmental disability and stated her concerns about the impact of the noise on her son, given his sensitivity to loud noises. *Id.* This neighbor refused to heed police requests to lower his noise and began engaging in intimidating behavior towards Ms. Somai and her son, including lurking and following them to the grocery store. *Id.* at 31. Ms. Somai made further police complaints about this neighbor and was subsequently evicted. *Id.* at 31–33.

[59] Data reflects that COVID-19 has worsened the issues that the ordinances target. *See* Brad Boserup et al., *Alarming Trends in US Domestic Violence During the COVID-19 Pandemic*, 38 AM. J. EMERGENCY MED. 2753, 2753 (2020). *See generally* AM. MED. ASS'N, ISSUE BRIEF: NATION'S DRUG-RELATED OVERDOSE AND DEATH EPIDEMIC CONTINUES TO WORSEN (2022); Marcelino Benito, *'Demand Is Outpacing Capacity' / HFD Responds to Unprecedented Number of 911 Calls, Majority COVID-19 Symptom-Related*, KHOU (Aug. 27, 2021, 6:10 PM), https://www.khou.com/article/news/health/coronavirus/hfd-responds-unprecedented-number-911-calls-majority-covid-19-symptom-related/285-f9fbc31a-43de-4dc5-a3b7-7b410ab63903.

[60] *See* Desmond & Valdez, *supra* note 10, at 137. ("The nuisance property ordinance has the effect of forcing abused women to choose between calling the police on their abuser (only to risk eviction) or staying in their apartments (only to risk more abuse.").

incidents.[61] Milwaukee is representative of how other chronic nuisance ordinances are harming domestic violence victims across America. For example, in Norristown, Pennsylvania, a woman was evicted in response to being attacked by her abuser.[62] Ms. Briggs's abuser showed up to her apartment, "bit and tore her lip," smashed a glass ashtray against her head, and then "stabbed her in the neck with one of the large broken glass shards."[63] Ms. Briggs, who was aware of the nuisance rule and had called the police on her abuser several times before, tried to escape without calling 911.[64] Thankfully a neighbor called for help, and she was subsequently airlifted to the hospital.[65] Several days later, Ms. Briggs was given a ten-day notice to vacate her apartment because of the police and EMT response.[66] Similarly, in Lakewood, Ohio, a man attacked his girlfriend, broke her nose, and caused facial bruising.[67] This violent attack counted against her and qualified as a nuisance activity on the rental property.[68]

Just as concerning as the fact that citations are being generated against domestic violence victims are the landlords' responses to these citations. In one case, a landlord told his tenant, who previously called 911 to report abuse, that if she needs to call 911 again, she should do so down the street in order to prevent police from documenting the property.[69] In another case, a landlord submitted the following abatement plan to the city: "[w]e suggested she obtain a gun and kill him [referring to the tenant's abuser] in self-defense, but evidently she hasn't. Therefore, we are evicting her."[70] The Milwaukee study revealed that these attempts to prevent tenants from calling 911, did in fact decrease the number of emergency calls.[71] While gaining the landlords' perspective is useful to the understanding of chronic nuisance ordinances, the viewpoint from those who *actually* had to

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[61] *Id.*

[62] Brief for the Pennsylvania Coalition Against Domestic Violence et. al. as Amici Curiae Supporting Plaintiff at 4, Briggs v. Borough of Norristown, No. 2:13-cv-02191 (E.D. Pa. 2014).

[63] *Id.* at 4.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] MEAD ET AL., *supra* note 53, at 11.

[68] *Id.*

[69] Arnold, *supra* note 11, at 16–17.

[70] Desmond & Valdez, *supra* note 10, at 135.

[71] *Id.* at 137.

decide between safety or housing exposes just how disruptive these ordinances are.

Interviews with domestic violence victims who have encountered a chronic nuisance ordinance shed light on the realistic effects that these ordinances have on their personal lives. A research study on how nuisance property laws harm domestic violence survivors concluded that these laws undermine "their access to safe and secure housing, by discouraging them from calling 911, and by holding victims accountable for their batterers' abusive behavior."[72] The study interviewed twenty-six women and one man; all were negatively impacted by St. Louis's chronic nuisance ordinance.[73] The participants' responses show how heinous these ordinances are.

First, participants experienced severe abuse, ranging from "being beaten and choked, attacked with knives and pipes, sexually assaulted, threatened with guns, stalked, kidnapped, and held against their will."[74] Second, participants explained that they called 911 no less than four times prior to the nuisance law being triggered, and that after the first few calls, their landlord threatened them with fines or evictions.[75] In some cases, landlords did not give prior warnings and informally evicted the women without any court adjudication.[76]

Third, participants expressed their fears. They explained how they would try to hold off on calling 911 for as long as possible.[77] Most participants were only willing to call in "life-or-death situations."[78] Moreover, the women believed that the lack of police services increased their risk of being physically abused, and in some cases, abusers would take advantage of this.[79] Lastly, after eviction, most participants faced homelessness or extremely unstable living situations, resorting to staying with friends or family.[80] Several women

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[72] Arnold, *supra* note 11, at 4.

[73] *Id.* at 5. The ordinance provided for "two or more calls to 911" within twelve months, and the qualifying activity included "any 'activity that is considered a felony, misdemeanor, or ordinance violation under federal, state, or municipal law,'" and while domestic violence was not explicitly mentioned, domestic violence is a misdemeanor in Missouri. *Id.* at 2 (citation omitted).

[74] *Id.* at 5–7.

[75] *Id.* at 7–8.

[76] *Id.* at 9.

[77] *Id.* at 14.

[78] Arnold, *supra* note 11, at 14.

[79] *Id.* at 14–15.

[80] *Id.* at 9.

found it difficult to obtain subsequent housing because of a previous eviction on their record.[81]

Chronic nuisance ordinances exacerbate domestic violence victims' reluctance to seek law enforcement help,[82] despite emerging research showing that "reporting domestic violence can serve as an effective deterrent of future abuse."[83] Domestic violence victims already face housing insecurities and homelessness, and enforcing chronic nuisance ordinances against domestic violence victims increases these risks.[84] These ordinances end up "forcing abused women to choose between calling the police on their abuser (only to risk eviction) or staying in their apartments (only to risk more abuse)."[85]

2. Chronic Nuisance Ordinances and Medical Emergencies

Chronic nuisance ordinances discourage individuals from calling 911 in medical and mental health emergencies. There are several instances where a tenant was evicted or penalized for needing mental health services. In the Village of Groton, New York, police and EMTs were called to an apartment where the tenant threatened suicide after cutting his face with a knife.[86] This resulted in a nuisance citation.[87] In a small Ohio town, police notified a landlord that a nuisance activity occurred on his property when "[a] resident called a mobile crisis center and threatened to harm" himself.[88] Another Ohio town fined a property owner $250 when their "tenant called the police out of concern that her boyfriend was suicidal."[89]

Chronic nuisance ordinances penalize those in other kinds of medical emergencies as well. In one instance, a fine was assessed against a group home when a child with disabilities split his eye open

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[81] *Id.* at 10.

[82] Emily Moss, Why She Didn't Just Leave: The Effect of Nuisance Ordinances on Domestic Violence 9 (Apr. 2019) (B.A. thesis, Wellesley College) (on file with the Wellesley College Digital Repository).

[83] *Id.* at 7.

[84] Emily Holtzman, *Protecting Victims of Domestic Violence from Chronic Nuisance Ordinances*, 9 TENN. J. RACE, GENDER & SOC. JUST. 43, 45 (2019).

[85] Desmond & Valdez, *supra* note 10, at 137.

[86] Affidavit for Defendant at 9, Bd. of Trs. v. Pirro, 58 N.Y.S.3d 614 (N.Y. App. Div. 2017) (No. 2015-0719) (quoting Groton Village police report).

[87] *Id.* at 7–9.

[88] MEAD, *supra* note 53, at 14.

[89] *Id.*

after hitting his head.[90] In Neenah, Wisconsin, a landlord tried to evict a woman and her boyfriend after the woman called 911 because her boyfriend overdosed on heroin.[91] In Lake Worth Beach, Florida, the city amended its chronic nuisance ordinance in response to increased overdoses.[92] The statute now expressly asserts that "two or more overdose-related calls within 30 days" could result in an action against the property owner.[93] Fines and evictions in response to 911 calls for medical help do not prevent the medical emergencies or "nuisance activities" from occurring. Rather, these ordinances discourage individuals from seeking the help they need.

3. Chronic Nuisance Ordinances and Racial Minorities

Chronic nuisance ordinances are disproportionately enforced against Black and Latinx persons. These are two groups that already face an increased risk of being victims of domestic violence and crime.[94] This section explores how these ordinances unreasonably target Black and Latinx persons.

A study analyzing Milwaukee's now-repealed nuisance ordinance found that domestic violence property citations were issued in Black neighborhoods at a disproportionately high rate, and that in 83

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[90] *Id.* at 15.

[91] Alisha Jarwala & Sejal Singh, *When Disability Is a "Nuisance": How Chronic Nuisance Ordinances Push Residents with Disabilities Out of Their Homes*, 54 HARV. C.R.-C.L. L. REV. 875, 907–08 (2019).

[92] Jorge Millian, *After Bad Start to 2020 with Overdoses, Lake Worth Beach Beefs Up Chronic Nuisance Ordinance*, PALM BEACH POST (Feb. 14, 2020, 3:33 PM), https://www.palmbeachpost.com/story/news/2020/02/14/after-bad-start-to-2020-with-overdoses-lake-worth-beach-beefs-up-chronic-nuisance-ordinance/112233410.

[93] *Id.*

[94] N.Y.C. MAYOR'S OFF., 2020 REPORT ON THE INTERSECTION OF DOMESTIC VIOLENCE, RACE/ETHNICITY AND SEX 1, 3 (2021), https://www1.nyc.gov/assets/ocdv/downloads/pdf/endgbv-intersection-report.pdf. Data from the New York City Police Department regarding domestic violence and related offenses concluded that 45 percent of the city's domestic violence-related homicide victims are Black; 33.4 percent of the city's domestic violence-related rape victims are Black; 46.4 percent of the city's domestic violence-related felony assault victims are Black; and 44.1 percent of the city's domestic violence-related strangulation victims are Black. *See* N.Y.C. MAYOR'S OFF., THE INTERSECTION OF DOMESTIC VIOLENCE, RACE/ETHNICITY AND SEX 1 (2020), https://www1.nyc.gov/assets/ocdv/downloads/pdf/ENDGBV-Intersection-DV-Race-ethnicity-Sex.pdf (data brief from the New York City Mayor's Office, accompanying the 2020 Report). Only 21.9 percent of the city's population is Black. *Id.* Hispanics account for 29.2 percent of the city's population but made up 42.7 percent of the city's domestic violence-related rape victims and 42.6 percent of the city's domestic violence-related sex offense victims. *Id.*

percent of these citations, the landlords either evicted or threatened to evict the tenant (often at the request of police) if the tenant continued to call 911.[95]

Moreover, the study showed that properties with multiple 911 calls in predominately Black neighborhoods were the only ones that faced an increased risk of citations.[96] Nuisance citations in Milwaukee were "concentrated heavily in segregated black neighborhoods."[97] One in sixteen nuisance-eligible properties in Black neighborhoods received a citation, while only one out of forty-one nuisance-eligible properties received a citation in white neighborhoods.[98] A study on nuisance ordinances enacted in New York (before the State legislature preempted the enforcement of these ordinances) demonstrated similar trends. In the New York cities of Rochester and Troy, the ACLU concluded that nuisance points were assigned "more often in neighborhoods with higher percentages of people of color."[99] In Rochester, 35 percent of residents are white, yet white residents made up only 4 percent of the city's chronic nuisance citations.[100] Black residents make up 39 percent of the population but accounted for 49 percent of the ordinance's citations.[101] Hispanic residents make up 18 percent of the population but received 42 percent of the city's citations.[102] And in at least one Ohio town, legislatures did not even attempt to hide the discriminatory intent behind the enactment and enforcement of their chronic nuisance ordinance. During a town hall meeting, the Mayor of Bedford City, Ohio stated:

> One of the things that we take pride in is middle class values . . . . We believe in neighborhoods not hoods . . . . The people who do not and bring those values out here, the values of the gang or of drugs, that will not happen here. That is one of the reasons we passed that nuisance law tonight . . . . [I have] made mention of the students walking down the streets and those are predominantly African American kids who bring in that mentality from the inner

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95 Desmond & Valdez, *supra* note 10, at 133.

96 *Id.* at 137.

97 *Id.* at 136.

98 *Id.* at 125.

99 KATOVICH, *supra* note 12, at 10.

100 *Id.* at 12.

101 *Id.*

102 *Id.*

> city where that was a gang related thing by staking their turf. We are trying to stop that.[103]

Residents should not have to choose between calling 911 for help and keeping their homes. Chronic nuisance ordinances are against public policy and should not be enacted because of their effects on domestic violence victims, residents in medical emergencies, and Black and Latinx persons. The judiciary can be an avenue for relief to those victimized by chronic nuisance ordinances. As discussed below, chronic nuisance ordinances without exceptions for residents calling the police for help violate the First Amendment.

III. THE MODERN RIGHT TO FREE SPEECH AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES UNDER THE FIRST AMENDMENT

Chronic nuisance ordinances prevent residents from exercising their constitutional right to petition the government for a redress of grievances. Therefore, the First Amendment can be an important tool for residents seeking to challenge a chronic nuisance ordinance. The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[104]

In determining whether a government regulation violates the First Amendment, a court must first determine whether the regulation is content based or content neutral.[105] A content-based regulation strikes at "the very core of the First Amendment" by attempting to "restrict expression because of its message, its ideas, its subject matter, or its content."[106] These regulations are presumptively invalid and subject to strict scrutiny.[107] In contrast, intermediate scrutiny is applied

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[103] MEAD, *supra* note 53, at 4 (alteration in original) (quoting the minutes of a Bedford City townhall meeting).

[104] U.S. CONST. amend. I.

[105] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 1013 (6th ed. 2019).

[106] *Id.* at 1012–13.

[107] Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015). Strict scrutiny is a form of judicial review that requires the government to have a compelling interest in passing a certain law, and that the law is narrowly tailored to achieve the governmental interest. *Id.*

to regulations that are content neutral.[108] Content-neutral regulations are enacted for reasons unrelated to the content and meaning of the expression, but still interfere with protected First Amendment rights.[109]

Courts apply two different, but similar, tests to content-neutral regulations: the Time, Place, or Manner doctrine (TPM) and the *O'Brien* test.[110] The TPM doctrine is applied in cases where the government regulates the time, place, or manner in which an individual can exercise their First Amendment rights.[111] A regulation will be upheld if: (1) it is content-neutral; (2) there is a significant governmental interest; (3) the law is "narrowly tailored to serve [the] significant governmental interest[;]" and (4) the regulation preserves "ample alternative channels" of expression.[112] Conversely, the *O'Brien* standard is used to analyze government regulations on conduct, but where the regulation has an adverse and incidental impact on First Amendment rights.[113] Under the *O'Brien* standard, a governmental regulation will be upheld if: (1) the targeted conduct is within the government's power to regulate; (2) there is an important governmental interest; (3) the government's interest is unrelated to the suppression of expression; and (4) the incidental restrictions on First Amendment rights are not greater than essential to the furtherance of that interest.[114] On several occasions, the Supreme Court analyzed a law under both the TPM doctrine and the *O'Brien* standard.[115] The tests share the same prongs, but the TPM doctrine further requires that the government shows that its regulation leaves open alternative channels for individuals to exercise their First Amendment rights.[116]

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[108] *Id.* at 172 (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984)). Intermediate security is a form of judicial review that requires the government to show that the law furthers a substantial or important governmental interest, and that the law is "substantially related to [the] achievement of" the interest. Craig v. Boren, 429 U.S. 190, 197 (1976).

[109] David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491, 494–95 (1988).

[110] *Id.* at 493, 499 nn.50–51.

[111] *Id.* at 496.

[112] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[113] *Id.* at 298–99.

[114] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[115] *See Clark*, 468 U.S. at 298 (stating that the O'Brien test "is little, if any, different from the standard applied to time, place, or manner restrictions").

[116] *See id.* at 298–99.

The right to petition the government for a redress of grievances is one of the protected First Amendment rights.[117] The Supreme Court never specifically ruled on whether the right to petition includes the right to file a police complaint or call 911. The Court, however, held in *California Motor Transport Co. v. Trucking Unlimited* that the petition clause includes "all departments of the Government[,]"[118] and the lower courts extended this right to the filing of a criminal complaint.[119] In *Meyer v. Board of County Commissioners*, the Tenth Circuit held that filing a criminal complaint is an exercise of the First Amendment right to petition the government.[120] The court found that this right was violated when the plaintiff's efforts to report an assault was thwarted by the police's refusal to record her statement.[121] Additionally, the Eleventh Circuit held that a plaintiff's right to report a physical assault is protected speech under the First Amendment.[122] Finally, the Sixth Circuit held that "submission[s] of complaints and criticisms to nonlegislative and nonjudicial public agencies[,] like a police department[,] constitute[] petitioning activity protected by the petition clause."[123] As discussed in Part V *infra*, this modern extension of the petition clause to include the right to call the police was a critical determination in *Board of Trustees of Groton v. Pirro*.[124] A chronic nuisance ordinance without an exception for residents calling for emergency services violates this modern extension under both the *O'Brien* test and the TPM doctrine.

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[117] U.S. CONST. amend. I.

[118] In *Cal. Motor Transp. Co. v. Trucking Unlimited*, the Supreme Court stated that the "same philosophy governs the approach of citizens or groups of them to administrative agencies." 404 U.S. 508, 510 (1972).

[119] *See generally* Meyer v. Bd. of Cnty. Comm'rs, 482 F.3d 1232, 1243 (10th Cir. 2007); Gable v. Lewis, 201 F.3d 769, 772 (6th Cir. 2000); Seamons v. Snow, 84 F.3d 1226, 1237 (10th Cir. 1996); Jackson v. New York, 381 F. Supp. 2d 80, 89 (N.D.N.Y. 2005).

[120] *Meyer*, 482 F.3d at 1243.

[121] *Id.* at 1243–44.

[122] *Seamons*, 84 F.3d at 1237.

[123] *Gable*, 201 F.3d at 771; *see also Jackson*, 381 F. Supp. 2d at 89 (holding that a plaintiff has a First Amendment right to seek enforcement of a protection order).

[124] 58 N.Y.S.3d 614, 620 (N.Y. App. Div. 2017).

IV. HOW THE *O'BRIEN* TEST PROVIDES A BASIS FOR INVALIDATING A CHRONIC NUISANCE ORDINANCE

In *United States v. O'Brien*, the Supreme Court announced a doctrine that is not only important to First Amendment jurisprudence, but also one that can provide recourse for residents harmed by chronic nuisance ordinances. This doctrine is known as the *O'Brien* test.[125] The *O'Brien* test applies when the government seeks to regulate conduct, such as draft registration, but where the regulation has an incidental and "adverse impact on protected [First Amendment] expression."[126] In *United States v. O'Brien*, David O'Brien was convicted under the Universal Military Training and Service Act for burning his draft card as a means of protesting the Vietnam war.[127] The Act made it a criminal offense to alter, forge, knowingly destroy, or make any changes to a person's draft card.[128] O'Brien argued that the Act violated the First Amendment because the First Amendment protects all modes of "communication of ideas by conduct," and that his conduct was protected as a form of symbolic speech.[129] The Supreme Court rejected this argument and upheld the Act by concluding that Congress's intention was to prevent the destruction of draft cards, not regulate First Amendment expressions.[130] The Court went on and announced a new test: "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the *nonspeech* element can justify incidental limitations on First Amendment freedoms."[131]

In applying the *O'Brien* test, a court should invalidate a chronic nuisance ordinance that does not provide an exception for residents calling the police for assistance because this burdens substantially more speech than necessary. This Part will examine each *O'Brien* factor and illustrate why chronic nuisance ordinances are unconstitutional under the *O'Brien* test.

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125 United States v. O'Brien, 391 U.S. 367, 377 (1968).

126 Day, *supra* note 109, at 496.

127 *O'Brien*, 391 U.S. at 369–70.

128 *Id.* at 370.

129 *Id.* at 376.

130 *Id.*

131 *Id.* (emphasis added).

A. *Is There a First Amendment Right at Issue?*

In determining whether the *O'Brien* test applies, a court must first find that a plaintiff has engaged in conduct protected by the First Amendment. This is a pivotal first question because the *O'Brien* standard applies when an individual's conduct includes expressive and non-expressive elements.[132] In *United States v. O'Brien*, the Court rejected the idea that the First Amendment protects all conduct where the doer intends to communicate an idea—there is not "an apparently limitless variety of conduct" that can be labeled speech.[133] Chief Justice Warren assumed for the analysis that O'Brien's conduct in burning his draft card was symbolic, which was the alleged protected expression that brought "into play the First Amendment."[134] Therefore, O'Brien met this preliminary question: burning one's draft card might not itself be a constitutionally protected activity, but burning a draft card to symbolize a person's disapproval of the government is.[135]

While the *O'Brien* standard has been historically applied to cases involving "symbolic speech, 'such as walking, marching, sitting, sitting-in, and even sleeping,'"[136] the Supreme Court has applied *O'Brien* to cases implicating other First Amendment rights, such as the right to petition the government, the right to associate, and the right to post political signs.[137] Interestingly, the Supreme Court has had the most difficulty with determining this initial question in cases dealing with health and morality-based ordinances.[138]

This was the main issue in *Arcara v. Cloud Books*. There, a New York nuisance law declared places of prostitution and lewdness a

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[132] NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1172–73 (20th ed. 2019).

[133] *O'Brien*, 391 U.S. at 376.

[134] *Id.*; FELDMAN & SULLIVAN, *supra* note 132, at 1180; Day, *supra* note 109, at 500.

[135] *O'Brien*, 391 U.S. at 376.

[136] Day, *supra* note 109, at 500.

[137] *See* Wayte v. United States, 470 U.S. 598, 610 n.11 (1985) (applying the *O'Brien* test to alleged violations of both the right to petition and free speech but clarifying that "[petitioner] does not argue that [the law] burdened each right differently, [and] we view these claims as essentially the same. Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis."). NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (using the *O'Brien* test in a case about the right to associate); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (applying the *O'Brien* test to the right to post political signs).

[138] *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986).

public health nuisance, allowing for the closure of a place found to be a nuisance.[139] Cloud Books, an adult bookstore, was shut down after an investigation revealed that solicitation and other sexual activities were occurring at the store.[140] Cloud Books argued that closing the bookstore down prevented the sale of its books, which is protected by the First Amendment.[141] The Supreme Court declined to apply the *O'Brien* test, holding that the test "has no relevance to a statute directed at imposing sanctions on nonexpressive activity."[142] The Court stated that Cloud Books' conduct¾engaging in sexual activity¾did not have any elements protected by the First Amendment.[143] The Court went on to state that most criminal and civil laws have some "conceivable burden" on protected expression, but that the Court does not require these laws to be the least restrictive measure—"[r]ather, we have subjected such restrictions to scrutiny only where it was conduct[ed] with a significant expressive element that drew the legal remedy in the first place."[144]

Conversely, the Court found that two other public nudity bans implicated the First Amendment. In *Barnes v. Glen Theatre*[145] and *City of Erie v. Pap's A.M.*,[146] the majorities held that *O'Brien* was the correct test to apply because completely nude dancing, which was prohibited by the public nudity ordinances at issue, was protected expressive conduct "within the outer perimeters of the First Amendment."[147]

A plaintiff challenging a chronic nuisance ordinance under the First Amendment *O'Brien* standard must have engaged in some protected expression. In order to satisfy this prong, a plaintiff must either persuade a court that the right to petition the government extends to police calls or that 911 calls are themselves protected speech. As previously discussed, the Supreme Court recognized a right to petition non-legislative and non-judicial governmental agencies in

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[139] *Arcara*, 478 U.S. at 699–700.

[140] *Id.* at 698–99.

[141] *Id.* at 700.

[142] *Id.* at 707.

[143] *Id.* ("The legislation . . . was directed at unlawful conduct having nothing to do with books or other expressive activity . . . . Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises.").

[144] *Id.* at 706.

[145] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566–67 (1991).

[146] City of Erie v. Pap's A.M., 529 U.S. 277, 278 (2000).

[147] *Glen Theatre, Inc.*, 501 U.S. at 566–67; *City of Erie*, 529 U.S. at 278.

California Motor Transport Co. v. Trucking Unlimited.[148] Relying on this case, a plaintiff can satisfy this requirement because a local police force falls into the definition of a non-legislative and non-judicial government agency, and making a phone call to police can be expressive activity in itself.

B. O'Brien *Factor One: Does the Government Have the Power to Regulate this Conduct?*

The first official *O'Brien* factor requires that the government regulation "is within the constitutional power of the Government."[149] In *O'Brien*, the Court found that the Universal Military Training and Service Act was well within Congress's Article I powers to "raise and support armies and to make all laws necessary and proper to that end."[150]

Given the broad nature of state policing power,[151] the Supreme Court has yet to find that a state regulation fails this prong under the *O'Brien* standard.[152] Ordinances regulating citizens' conduct or First Amendment expressions typically are created in order to promote "public welfare."[153] Similar to the public welfare ordinances in *Glen Theatre*, chronic nuisance ordinances are typically enacted in order to promote the safety and welfare of a town.[154] Therefore, a local government enacting a chronic nuisance ordinance will likely satisfy this *O'Brien* factor because promoting the welfare of its town is within traditional policing powers.[155]

C. O'Brien *Factor Two: Does the Regulation Further a Substantial Government Interest?*

When applying the *O'Brien* standard, the Court looks to determine if the regulation furthers "an important or substantial

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[148] Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

[149] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[150] *Id.*

[151] *Glen Theatre, Inc.*, 501 U.S. at 569 ("[T]raditional police power of the States is defined as the authority to provide for the public health, safety, and morals.").

[152] Day, *supra* note 109, at 527.

[153] *See, e.g.*, VILL. OF GROTON, N.Y., CODE § 139-3 (2021); *Glen Theatre, Inc.*, 501 U.S. at 568 (finding that Indiana's public indecency statute was within the state's policing power because it was for the "purpose of protecting societal order and morality").

[154] *See, e.g.*, VILL. OF GROTON, N.Y., CODE § 152-1 (2014).

[155] *See Glen Theatre, Inc.*, 501 U.S. at 569.

government interest."[156] In *O'Brien*, the Court held that Congress had a substantial interest in ensuring that the registration system was functioning properly and that individuals had a "continuing availability" of their draft cards.[157]

This same substantial interest was found in *Wayte v. United States*. There, a federal statute made it a crime to "knowingly and willfully fail[] to register with the Selective Service."[158] The Court held that "[f]ew interests can be more compelling than a nation's need to ensure its own security."[159] Outside of the context of the draft, the Court has easily found this prong to be met in cases dealing with statutes enacted for the "purpose of protecting societal order and morality."[160]

As discussed above, municipalities typically enact chronic nuisance ordinances with the intent of promoting the town's general welfare. The Court has previously found this to be a substantial interest when applying the *O'Brien* standard. Therefore, unless the governmental interest is to harm or exclude racial minorities from a town, like the one seen in Bedford, Ohio,[161] a government defending its chronic nuisance ordinance will satisfy this prong.

D. O'Brien *Factor Three: Is the Governmental Interest Unrelated to the Suppression of Free Expression?*

The third factor performs a critical role in the *O'Brien* analysis. If the government's interest in creating the regulation is related to the suppression of First Amendment freedoms, then the *O'Brien* standard is not applicable.[162] Thus, the Court typically evaluates this issue as a first threshold question, and then later revisits the factor whilst applying all the *O'Brien* factors.[163] This factor is met "if the governmental interest is unrelated to the suppression of free

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[156] *O'Brien*, 391 U.S. at 377.

[157] *Id.* at 377–78.

[158] Wayte v. United States, 470 U.S. 598, 603 (1985).

[159] *Id.* at 611.

[160] *See, e.g.*, *Glen Theatre, Inc.*, 501 U.S. at 568.

[161] *See supra* Part II. The Mayor of Bedford, Ohio's statement would probably raise an equal protection claim under the 14th Amendment given its blatant discrimination. This, however, is outside the scope of this Comment.

[162] Day, *supra* note 109, at 528 ("Unless the government establishes that its regulation advances purposes unrelated to the suppression of expression, the Court's analysis will not reach the other prongs . . .").

[163] *Id.* at 527–28.

expression."[164] In *O'Brien*, the Court found that Congress's interest in regulating draft cards was unrelated to the suppression of First Amendment freedoms: Congress's interest was not to prevent individuals from protesting the war by burning their draft cards; rather Congress sought to ensure that individuals kept updated draft cards on their persons.[165]

Outside the context of the draft, the Court in *Glen Theatre* found that Indiana's interest in passing its public nudity ordinance was related to protecting public health and morality.[166] This was an interest "unrelated to the suppression of free expression."[167] The Court rejected the argument that restricting nudity in the interest of morality is related to expression, and compared the ordinance to *O'Brien*:

> It was assumed that O'Brien's act in burning the certificate had a communicative element in it sufficient to bring into play the First Amendment, but it was for the noncommunicative element that he was prosecuted. So here with the Indiana statute; while the dancing to which it was applied had a communicative element, it was not the dancing that was prohibited, but simply [the dancing] being done in the nude.[168]

In *Glen Theatre*, the Court determined that while nude dancing in this context had expressive elements, the state's interest dealt with the nudity, and not the dancing itself.[169] *O'Brien* rejected the "limitless" idea that conduct is expressive merely because the speaker intends it to be, and thus, the Court in *Glen Theatre* held that being nude is not expressive even if the dancer intends it to be.[170]

Likewise, in *City of Erie v. Pap's A.M.*, the city's general public nudity prohibition was a content-neutral regulation on conduct.[171] The Court found this statute identical to *Glen Theatre*: it only regulated the conduct of being nude in public, and it "d[id] not target nudity that contains an erotic message" such as nude dancing.[172] It was instead a blanket prohibition of "public nudity, regardless of whether

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164 United States v. O'Brien, 391 U.S. 367, 377 (1968).

165 *Id.*

166 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991).

167 *Id.* at 570.

168 *Id.* at 571 (citation omitted).

169 *Id.*

170 *Id.* at 570–71.

171 529 U.S. 277, 290 (2000).

172 *Id.*

that nudity [wa]s accompanied by expressive activity."[173] The City of Erie sought "to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood," which included "violence, public intoxication, prostitution[,] and other serious criminal activity."[174] Targeting these public harms are unrelated to the suppression of First Amendment rights.

A plaintiff challenging a chronic nuisance ordinance would want to argue that the ordinance regulates expression *directly*, by restricting the number of 911 phone calls. Making this *content-based* argument would subject the ordinance to strict scrutiny, requiring the government to prove that there is no other way to accomplish its goals without the ordinance.[175] Arguing that a chronic nuisance ordinance is content-based, however, is unlikely to prevail.[176] Similar to the regulations in *Cloud Books*, *Glen Theatre*, and *City of Erie*, chronic nuisance ordinances do not regulate protected expressions. Rather, they seek to regulate noncommunicative conduct that produces a nuisance to the community, like howling dogs, fighting, and disorderly premises. Therefore, the government would likely be successful in arguing that chronic nuisance ordinances are only subject to intermediate scrutiny because they are content-neutral.

E. O'Brien *Factor Four: Is the Regulation No Greater Than Essential to Further the Substantial Governmental Interest?*

The last factor is the "means" analysis, focusing on the connection between the government's interest and the regulation. A regulation that incidentally restricts First Amendment freedoms will be upheld if it is "no greater than is essential to the furtherance of that interest."[177] In *O'Brien*, the Supreme Court held that the scope of the Universal Training Military and Service Act was "limited to preventing harm to the smooth and efficient functioning" of the draft.[178] The Court found that there were no "alternative means" which would have been more effective in assuring "the continuing availability of issued Selective

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[173] *Id.*

[174] *Id.* at 293, 297.

[175] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).

[176] *See* Bd. of Trs. v. Pirro, 58 N.Y.S.3d 614, 620 (N.Y. App. Div. 2017) (applying the TPM doctrine, a content-neutral test, to the Village's ordinance).

[177] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[178] *Id.* at 382.

Service certificates than a law which prohibits their willful mutilation or destruction."[179]

This prong reflects the fact that *O'Brien* is a form of intermediate scrutiny. While the Court requires that the regulation be narrowly tailored in achieving the government's goal,[180] the Court will not invalidate a regulation just because there is a less restrictive alternative the government could use.[181] In *United States v. Albertini*, Albertini was convicted of re-entering a military base after being previously barred because he engaged in a peaceful protest on military grounds.[182] While there were other potential government regulations that would not have restricted Albertini's right to protest, the Court reiterated that the government does not need to implement the least restrictive alternative.[183]

A chronic nuisance ordinance without a resident exception fails the fourth *O'Brien* factor by imposing more than an incidental limitation on expressive activity. A government defending a chronic nuisance ordinance that does not exempt legitimate resident 911 calls will not be able to show that the ordinance is "not greater than essential." As seen in *Groton*, discussed below, an ordinance that strongly discourages a resident from exercising their right to petition by issuing fines and evictions goes beyond the governmental interest of promoting the general welfare. In fact, a chronic nuisance ordinance that penalizes residents for calling 911 is contrary to this interest. Police and EMTs aim to protect lives, property, and the environment. And while the *O'Brien* standard does not require the government to use the least restrictive means to achieve its interest, there are a multitude of other ways to prevent nuisance-producing activities that do not impede on constitutional rights. These include solutions that focus on the root of the alleged "nuisance-producing behaviors." For example, providing a better support system for victims of domestic violence and those in need of mental health services.

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[179] *Id.* at 381.

[180] While the *O'Brien* test is a form of intermediate scrutiny, the Court requires that this prong still be "narrowly tailored," which technically reflects strict scrutiny. CHEMERINSKY, *supra* note 105, at 1244 (quoting McCullen v. Coakley, 573 U.S. 464, 486 (2014)) ("The government still 'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'").

[181] 472 U.S. 675, 689 (1985).

[182] *Id.* at 677.

[183] *Id.* at 689.

Furthermore, when a government's interest in enacting a chronic nuisance ordinance relates to preventing 911 abuse,[184] an ordinance that penalizes *all* 911 calls is not narrowly tailored. From the government's perspective, exempting resident 911 calls from its ordinance will make it harder to crack down on 911 abuse. While preventing 911 abuse is a legitimate governmental interest, there are other ways to achieve this without violating First Amendment rights. First, the government may rely on other laws that penalize false 911 reports.[185] A municipality that has both a chronic nuisance ordinance and a criminal anti-911 abuse law will not be able to show that its nuisance ordinance is not greater than necessary. Tackling 911 abuse can be addressed by relying on the penal code only, and thus without needing to violate First Amendment rights. Second, instead of relying on an anti-911 abuse law, the government can explicitly provide an exception in its ordinance for residents making *legitimate* 911 calls. The proposed ordinance could set forth the standard that police would use for distinguishing legitimate calls from fraudulent calls. This can be achieved by either listing activities that count as legitimate, such as calls reporting harassment but not noise complaints, or by replicating a standard used in a criminal anti-abuse statute—a standard that police already utilize when making the determination between legitimate and fraudulent calls.[186] These two potential alternatives show that a chronic nuisance ordinance with a blanket prohibition for all 911 calls is far greater than essential in achieving the government's interest, and thus violates the First Amendment.

The *O'Brien* test, however, is not the only avenue for plaintiffs seeking to challenge a chronic nuisance ordinance: because a chronic nuisance ordinance may be viewed as regulating conduct or as placing restrictions on the Time, Place, or Manner a resident may exercise their First Amendment rights, a court should invalidate an ordinance under both the *O'Brien* test and the TPM test. The Supreme Court

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[184] *See supra* Part II.

[185] *See, e.g.*, N.Y. PENAL LAW § 240.55 (Consol. 2023) ("[F]alsely reporting an incident in the second degree."); ALA. CODE § 13A-11-11 (2006); CAL. GOV'T CODE § 53153.5 (2006); N.J. STAT. ANN. § 2C:28-4(b) (West 2016).

[186] *See, e.g.*, N.Y. PENAL LAW § 240.55 ("A person is guilty of falsely reporting an incident in the second degree when, knowing the information reported, conveyed or circulated to be false or baseless, he or she . . . [r]eports, by word or action, to any official or quasi-official agency or organization having the function of dealing with emergencies involving danger to life or property, an alleged occurrence or impending occurrence of a fire, explosion, or the release of a hazardous substance which did not in fact occur or does not in fact exist.").

views the *O'Brien* test as "little, if any, different from the [Time, Place, or Manner] standard[,]" and has frequently analyzed a law under both tests.[187] The two tests have the same prongs, but the TPM doctrine has a distinguishing factor—an additional requirement where the government must leave open ample alternative channels for First Amendment expressions.[188] Thus, a chronic nuisance ordinance without an exemption for residents calling 911 for help is not only unconstitutional under *O'Brien*, but also under the TPM doctrine because the lack of alternative channels for residents seeking to call 911. As discussed below, this is the precise holding in *Board of Trustees of Groton v. Pirro*.

V. A SUCCESSFUL FIRST AMENDMENT CHALLENGE TO A CHRONIC NUISANCE ORDINANCE UNDER THE TIME, PLACE, OR MANNER TEST: *BOARD OF TRUSTEES OF GROTON V. PIRRO*

In the *Board of Trustees of Groton v. Pirro*, the New York Supreme Court, Appellate Division, analyzed a chronic nuisance ordinance under the TPM doctrine and held that the ordinance was facially unconstitutional.[189] Residents challenging a chronic nuisance ordinance should rely on this case to support their First Amendment argument.

The TPM doctrine applies when the government regulates the time, place, or manner of First Amendment expressions in a way "that minimizes disruption of a public place while still protecting freedom of speech."[190] Similar to the *O'Brien* test, the government must show that its law (1) is justified without reference to the content of the regulated expressions, (2) serves a significant governmental interest, (3) does not burden substantially more speech than necessary in serving this interest, and (4) must leave open ample alternative channels for communicating First Amendment expressions.[191] This test, applied and discussed in *Groton*, reflects a form of intermediate

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[187] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1998) (upholding a law under both the *O'Brien* test and the TPM test).

[188] *Id.* at 293.

[189] 58 N.Y.S.3d 614, 623 (N.Y. App. Div. 2017).

[190] CHEMERINKSY, *supra* note 105, at 1238.

[191] *Clark*, 468 U.S. at 293 (applying the TPM doctrine to a regulation prohibiting camping in certain national parks); *see also* Madsen v. Women's Health Ctr., 512 U.S. 753, 764 (1994) (applying the TPM doctrine in the context of abortion protesters).

scrutiny because there is no least restrictive means requirement.[192] A chronic nuisance ordinance without a resident exemption not only violates the First Amendment under the *O'Brien* test, but also the TPM doctrine because of its failure to provide residents with an adequate alternative channel to call 911.

A. *Board of Trustees of Groton v. Pirro*

In response to public concerns regarding rental properties, the Village of Groton in New York passed a chronic nuisance ordinance in an attempt to promote the public health and welfare.[193] This ordinance assigned points to properties for various forms of proscribed conduct like "permitting the premises to become disorderly[,]" noise violations, and a multitude of criminal offenses.[194] Each specific nuisance activity had corresponding points (for example, minor offenses were two points and criminal offenses were twelve), and 911 calls "constitute[d] prima facie evidence of a public nuisance."[195] A property was declared a nuisance when twelve points accumulated in six months or eighteen points accumulated in one year.[196] Once a property became a public nuisance, the property owner had to "abate" the nuisance or else face penalties.[197] Penalties included a $1,000 fine per day, closing the property temporarily, and revoking or suspending an owner's property certificate.[198]

The Village brought an action against Norfe Pirro, a landlord of several rental properties in the Village because Pirro's properties collected enough points to become a public nuisance.[199] Pirro argued that this law violated his tenants' First Amendment rights to petition the government for a redress of "grievances from law enforcement."[200] The record reflected that points were assigned in multiple situations where the tenant called 911 for legitimate help: points were assigned

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[192] *See* Ward v. Rock Against Racism, 491 U.S. 781, 797–98 (1989). Even though the TPM doctrine is a form of intermediate scrutiny and does not require the least restrictive means, "it still must be 'narrowly tailored.'" CHEMERINKSY, *supra* note 105, at 1244.

[193] *Bd. of Trs.*, 58 N.Y.S.3d at 623.

[194] *Id.* at 621.

[195] *Id.*

[196] *Id.* at 616.

[197] *Id.* at 617.

[198] *Id.*

[199] *Bd. of Trs.*, 58 N.Y.S.3d at 617.

[200] *Id.*

when a woman called the police because her abuser was armed and intoxicated at her apartment; points were assigned when a tenant called 911 to report a burglary of his apartment; points were assigned when a tenant called 911 fearing for her life because people were threatening her and attempting to gain entry into her apartment; points were assigned when a tenant called 911 to enforce a protection order; and points were assigned when tenants asked the police to mediate a noncriminal verbal disagreement.[201] In order to comply with the ordinance, Pirro "abated" these nuisances by evicting several tenants.[202]

The New York Supreme Court, Appellate Division, applied the TPM doctrine and held that the Village's ordinance was unconstitutional under the First Amendment because it "facially 'prohibit[ed] a real and substantial amount of' expression guarded by the First Amendment."[203] This was enough to invalidate the entire ordinance.[204] The court took several steps to reach this conclusion. First, the court recognized that "the right to petition the government for a redress of grievances is 'one of the most precious of the liberties safeguarded by the Bill of Rights'"[205] and that it includes the right to "make criminal complaints to the police."[206]

Second, in analyzing the ordinance's text, the court found that its "plain language . . . discourage[d] tenants from seeking police help" because (1) the ordinance did not preclude assigning points against a tenant who called police, even those suffering from domestic violence; (2) one single non-convicted crime could result in enough points to be declared a nuisance; and (3) there was not a "distinction between crimes committed by tenants and those committed against tenants."[207] The court determined that the ordinance allowed the Village to require the temporary closure of the *entire* property, thus removing all

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[201] *Id.* at 622.

[202] *Id.*

[203] *Id.* at 623.

[204] When a court determines that a law is facially invalid, the court strikes down the entire law. In contrast, a court can strike down a law as-applied only to the litigant. This means that the law is only unconstitutional as applied to this particular litigants' actions. David Hudson, *Facial Challenges*, FIRST AMEND. ENCYC., https://www.mtsu.edu/first-amendment/article/954/facial-challenges (last visited Jan. 12, 2022).

[205] *Bd. of Trs.*, 58 N.Y.S.3d at 620.

[206] *Id.* at 620–21.

[207] *Id.* at 621.

tenants from the buildings¾even those who did not commit a nuisance violation or summon the police.[208]

Lastly, in determining whether the ordinance violated First Amendment rights, the court held that the ordinance was content neutral and applied the TPM doctrine.[209] In its application, the court found that the Village did have a significant governmental interest in promoting the general welfare and protecting residents from crime and noise.[210] The court, however, determined that the ordinance did not meet the other TPM requirements: the ordinance was not narrowly tailored because it penalized tenants for calling 911 in emergencies;[211] and the ordinance did not permit an alternative channel for residents wishing to exercise their right to call the police without risking being evicted for doing so.[212] Thus, the ordinance was facially overbroad because in most of its applications, it penalized First Amendment expressions.[213]

B. *Lack of Alternative Channels to Communicate with Police*

As *Groton* illustrates, a chronic nuisance ordinance that assigns points against a property for all police responses violates the First Amendment under the TPM doctrine. This is because it fails to provide *any* alternative channel for residents to call the police without risking fines or evictions. The requirement that a law leave open other ways for an individual to express their First Amendment rights is what distinguishes the TPM doctrine from the *O'Brien* test.[214] In explaining this additional requirement, the Supreme Court in *Heffron v. International Society for Krishna Consciousness* held that for the Minnesota law at issue to "be valid as a place and manner restriction, it must also be sufficiently clear that alternative forums for the expression of respondents' protected speech exist despite the effect of the [Minnesota] rule."[215] In the context of a chronic nuisance ordinance, once a resident reaches the number of permissible 911 calls under the ordinance, the resident will have no other way to communicate with police without serious repercussions. Not only does an ordinance

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[208] *Id.* at 622.

[209] *Id.* at 623.

[210] *Id.* at 622–23.

[211] *Bd. of Trs.*, 58 N.Y.S.3d at 623.

[212] *Id.*

[213] *Id.*

[214] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1998).

[215] 452 U.S. 640, 654 (1981).

without a resident exception fail to provide *any* alternative channels for residents, it will almost always be impossible to provide one that is *adequate*. There is not an alternative way to get help in an emergency that is equivalent to directly calling 911. Calling 911 right away is the only recourse for an individual who is suffering from a medical emergency or for a domestic violence victim who is being confronted by their abuser. A chronic nuisance ordinance without an exception for residents in these situations forces them to decide between safety or penalties. This is a violation of the First Amendment under the TPM doctrine.

VI. CONCLUSION

Chronic nuisance ordinances force people to decide between keeping their homes and keeping their safety. While legislators enact these nuisance-targeting ordinances with the intention of promoting the general welfare, these ordinances accomplish the opposite by discouraging domestic violence victims from seeking safety, preventing those experiencing medical emergencies from receiving care, and by penalizing people who call 911 with fines or evictions. Moreover, as this Comment has highlighted, local governments cite Black and Latinx persons for nuisance violations at disproportionate rates compared to their white counterparts.

While chronic nuisance ordinances are harmful from a public policy standpoint, they also violate residents' First Amendment rights. The Supreme Court has frequently applied two content-neutral tests to laws that regulate or impact First Amendment expressions. The *O'Brien* and TPM tests both require that a law be content-neutral, serve a substantial governmental interest, and be no greater than necessary in serving the interest. The TPM test further requires that the government leave open alternative adequate channels for individuals to exercise their First Amendment rights. A court evaluating a chronic nuisance ordinance that does not exempt residents from calling 911 should invalidate the ordinance under both tests. The government will be unsuccessful in showing that the ordinance is not greater than necessary to achieve either of its goals—evicting residents for requiring police or EMT services does not promote the general welfare, and cracking down on 911 abuse can be done by relying on other laws. Furthermore, as required by the TPM test, a chronic nuisance ordinance without a resident exception does not provide an alternative channel for residents to communicate their protected First Amendment expressions—911 calls. This Comment has provided a public policy reason and two First Amendment bases for invalidating

chronic nuisance ordinances. Not only should courts strike down such ordinances under both tests, but state legislatures should be proactive by exempting legitimate resident 911 calls from their chronic nuisance ordinances.