No. 23-423

In the Supreme Court of the United States

SUSAN PORTER,

Petitioner,

v.

KELLY MARTINEZ, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 27001 of the California Vehicle Code prohibits drivers from using their vehicles' horns except to "give audible warning" when "reasonably necessary to insure safe operation." Pet. App. 9a. Based on the testimony of an expert witness with "decades of experience working for the" California Highway Patrol, *id.* at 28a, as well as "a near-nationwide consensus on the need for such laws," *id.* at 33a, the court of appeals rejected petitioner's First Amendment challenge to Section 27001. The court reasoned that the statute is content-neutral, justified by an important interest in traffic safety, and adequately tailored to satisfy intermediate scrutiny. The question presented is:

Whether the court of appeals' application of intermediate scrutiny to California's vehicle horn regulation comports with the First Amendment.

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STATEMENT

1. Like many other States, California has adopted comprehensive laws governing traffic safety. *See, e.g.*, Cal. Veh. Code § 21000 *et seq.*; *id.* § 24250 *et seq.* The provision of the Vehicle Code at issue in this case restricts the circumstances when drivers may lawfully use the horns on their vehicles. Pet. App. 9a. California first adopted such a restriction in 1913, shortly after "the introduction of the Model T Ford," *id.* at 8a, and the current provision bars honking except as an "audible warning" when "reasonably necessary to insure safe operation" of a vehicle, Cal. Veh. Code § 27001. Forty other States have adopted similar restrictions. Pet. App. 9a.[1] So have the drafters of the Uniform Vehicle Code. *Id.*

A violation of Section 27001 is an infraction under California law. Cal. Veh. Code § 40000.1. Infractions are punishable by fines, not jail time. Cal. Penal Code §§ 19.6, 19.8; *Lange v. California*, 141 S. Ct. 2011, 2016 (2021) (contrasting a "lower-level[] noise infraction" with a misdemeanor authorizing jail time). The current fine for a violation of section 27001 is $238.[2]

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[1] *See, e.g.*, Ala. Code § 32-5-213(a) ("unlawful . . . for any person at any time to use a horn otherwise than as a reasonable warning"); Ind. Code § 9-19-5-2 ("driver . . . shall, when reasonably necessary to ensure safe operation, give audible warning with the horn on the motor vehicle but may not otherwise use the horn"); Md. Code Ann., Transp. § 22-401(b) ("driver . . . shall, when reasonably necessary to insure safe operation, give audible warning with his horn, but may not otherwise use the horn"); Tenn. Code Ann. § 55-9-201(a) ("unlawful . . . for any person at any time to use a horn otherwise than as a reasonable warning"); *see also* Pet. App. 62a-68a (collecting additional examples).

[2] *See* Judicial Council of Cal., *Uniform Bail and Penalty Schedules* (2021) 25, https://www.courts.ca.gov/documents/UBPS-2021-Final.pdf (last visited Jan. 17, 2024).

2. Beginning in 2017, petitioner Susan Porter "regularly participated in . . . weekly protests" held outside the district office of U.S. Representative Darrell Issa. *Id.* at 138a. On one occasion, petitioner "honked her horn 11-15 times in a row" in support of the other protesters. *Id.* at 139a. A sheriff's deputy stationed nearby "pulled her over and gave her a citation for misuse of a vehicle horn under Section 27001." *Id.* at 10a. The citation "was later dismissed when the sheriff's deputy failed to attend [petitioner's] traffic court hearing." *Id.*

3. Petitioner then filed this lawsuit in federal district court, seeking the invalidation of Section 27001 "both on its face and as applied" to what petitioner referred to as "expressive honking." Pet. App. 156a, 164a (emphasis omitted). The court granted summary judgment to the State. *Id.* at 155a-175a.[3] Because petitioner failed to "present[] arguments and case law to support" her facial challenge, *id.* at 156a, the court "limit[ed] its analysis to [her] as-applied challenge," *id.* at 157a. The court concluded that the State's longstanding restriction on honking is content-neutral and narrowly tailored to serve important interests in traffic safety and noise control. *Id.* at 159a-161a, 163a-174a. The court pointed to both expert testimony offered by the State, *see, e.g.*, *id.* at 169a, and "common sense," *id.* at 165a, which informed its determination that unnecessary honking "increases the likelihood of an accident" by distracting other drivers, *id.* at 166a.

The district court also expressed "concern[] as to how [petitioner's] requested remedy of 'not enforcing

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[3] Defendants are the Commissioner of the California Highway Patrol and the Sheriff of San Diego County. Pet. App. 135a. For simplicity, this brief refers to them collectively as the State.

Section 27001 against expressive honking' would work in practice." Pet. App. 167a. While acknowledging petitioner's desire to honk in certain circumstances prohibited by the statute—such as to "express a greeting" to friends or neighbors, *id.* at 198a—the court emphasized that any injunctive relief "must be 'reasonably understandable'" to officers in the field, *id.* at 167a. In the court's view, "it [would] be extremely difficult, if not impossible," for such officers to determine if a honk qualifies as "protected expression." *Id.* at 168a.

4. The court of appeals affirmed. Pet. App. 8a-37a. The court noted that petitioner "seemed to use" the terms facial challenge and as-applied challenge "interchangeably." *Id.* at 21a n.5. "Ultimately, however," the court saw no need to "decide whether [petitioner's] claim is best described as an as-applied or facial challenge." *Id.* In the court's view, petitioner's challenge fails either way because section 27001 is a content-neutral restriction that satisfies intermediate scrutiny both on its face and as applied to so-called "expressive honking." *Id.* at 20a; *see id.* at 27a-36a. Invoking the same expert testimony relied on by the district court, the court of appeals explained that "indiscriminate horn use can distract other drivers and pedestrians" and "dilute the potency of the horn as a warning device." *Id.* at 29a. The court also emphasized that the challenged law "has existed since the dawn of the automobile" and that "forty other states have similar laws." *Id.* at 33a

The court of appeals did not address the argument that Section 27001 "is unconstitutional as applied to *political* honking—specifically, 'honking in response to a political protest.'" Pet. App. 21a n.6 (emphasis in original). As the court explained, petitioner "[did] not advance[] that argument." *Id.* "Indeed, when pressed

at oral argument on whether she sought to enjoin the statute as applied only to political honking," petitioner's counsel "expressly disavowed any such . . . argument." *Id.*; *see id.* ("[W]e rely on the parties to frame the issues for decision.") (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)).

Judge Berzon dissented. Pet. App. 37a-60a. She did not contest the conclusion that Section 27001 is content-neutral and valid in most of its applications. *See id.* at 44a-47a, 49a. Nor did she conclude that petitioner is entitled to an order prohibiting "all 'expressive honking,'" which she agreed would be "too vague to be enforceable." *Id.* at 60a n.7. Instead, Judge Berzon would have held that petitioner is entitled to an injunction barring enforcement of Section 27001 against "political protest honking." *Id.* at 44a. While appearing to acknowledge that petitioner failed to seek such relief, *see id.* at 43a, Judge Berzon reasoned that "we are not bound by the scope of a party's requested remedy," *id.*

Petitioner filed a petition for rehearing en banc. Pet. App. 7a. No judge requested a vote, and the petition was denied. *Id.*

ARGUMENT

For more than a century, California has prohibited drivers from honking except when reasonably necessary to warn of danger. Pet. App. 8a-9a. The court of appeals properly rejected petitioner's First Amendment challenge to that longstanding restriction. As the court explained, there is a "near-nationwide consensus on the need for such laws," *id.* at 33a, and expert testimony introduced by the State showed that Section 27001 of the California Vehicle Code is narrowly tailored to serve an important interest in traffic

safety, *see id.* at 34a-37a. Petitioner provides no basis for this Court to disturb that judgment.

1. While petitioner's complaint "purported to challenge Section 27001 both (1) on its face and (2) as applied to expressive horn use," petitioner "seemed to use these phrases interchangeably" on appeal. Pet. App. 21a n.5. Petitioner takes a similar approach before this Court, failing to specify in her petition which type of challenge she seeks to advance. *Cf.* Pet. i-ii, 11-12. Either way, the petition should be denied: the court of appeals correctly held that Section 27001 is a "content-neutral law" that satisfies intermediate scrutiny both on its face and as-applied to what petitioner refers to as "expressive" honking. Pet. App. 27a.

As to facial validity, Section 27001 "is narrowly tailored to further California's interest in traffic safety." Pet. App. 34a.[4] Based on expert testimony introduced by the State, as well as "simple common sense" *id.* at 32a (internal quotation marks omitted), the court of appeals concluded that Section 27001 prevents "indiscriminate horn use," *id.* at 29a. As the State's expert explained, such horn use "can create a dangerous situation by startling or distracting drivers and others." *Id.* (internal quotation marks omitted). Indiscriminate horn use can also "dilute the potency of the horn as a warning device." *Id.*; *see id.* at 33a-34a (discussing "the entirely common-sense inference that, the more drivers honk for non-warning purposes, the less people can rely on the sound of a honk as an alert of imminent danger").

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[4] *See generally* Fallon, *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915, 952 (2011) (explaining that "constitutional tests such as strict and intermediate scrutiny" can sometimes involve "look[ing] beyond the specific facts of the challenger's case" to evaluate whether a statute is facially valid).

As the court of appeals recognized, California could not "achieve [its] interest in traffic safety" in a narrower or less restrictive way. Pet. App. 35a n.12. It would be quite difficult, for example, for officers in the field to enforce a law prohibiting honks only where there is proof that a honk has "distract[ed] other motorists . . . [or] disturb[ed] the peace." Pet. 26; *see* Pet. App. 34a-35a, 167a-169a, 178a-179a. "A law against distracting honking" would also be "counterproductive if it discouraged honking to warn others of danger." *Id.* at 35a n.12. In any event, intermediate scrutiny does not require the State to "adopt the least restrictive or least intrusive means available to achieve its legitimate interests." *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)).

For similar reasons, the court of appeals properly rejected petitioner's request to invalidate the statute as applied to all honking that petitioner deems "expressive." Pet. App. 21 n.6. In petitioner's view, "expressive horn use includes honks . . . to greet friends or neighbors, summon children or co-workers, or celebrate weddings or victories." *Id.* at 11a (quoting C.A. Opening Br. 1). Expressive or not, such honking can be highly distracting or dangerous and "undermine[] the effectiveness of the horn when used for its intended purpose of alerting others to danger." *Id.* at 35a-36a. By banning such horn use, the State did "no more than eliminate the exact source of the evil it sought to remedy." *Id.* at 36a (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984)).

Judge Berzon would have invalidated "application of Section 27001 to political protest honking." Pet. App. 44a; *see id.* at 56a. But the majority rightly re-

fused to address any such as-applied claim because petitioner "expressly disavowed" it. *Id.* at 21a n.6. This Court has repeatedly admonished lower courts to "decide only questions presented by the parties." *E.g.*, *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (internal quotation marks omitted). "In our adversarial system of adjudication," courts are to be "neutral arbiter[s] of matters the parties present." *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). Even if the court of appeals had addressed such an as-applied claim, however, it would have failed on the record here, which demonstrates that any "non-warning honks" can pose serious risks to traffic safety. Pet. App. 34a; *see also id.* at 29a, 34a-35a; *infra* p. 12 (explaining that this case would be a poor vehicle to address any such as-applied claim).

2. Petitioner's principal contention is that "[t]wo aspects of the Ninth Circuit's decision" conflict with the decisions of other federal appellate courts and the Washington Supreme Court. Pet. 11; *see id.* at 11-32. That is incorrect. Petitioner's first alleged conflict is premised on a distorted understanding of the opinion below. The second ignores critical differences between this case and the purportedly conflicting cases.

a. Petitioner first contends that the court of appeals below "split[] from the First, Sixth, and Tenth Circuits" in "holding that the government needed no evidence to show Section 27001 furthered its interest in 'traffic safety.'" Pet. 12. According to petitioner, the court below relied on mere "'common sense' and speculation." *Id.* at 16. As discussed above, however, *supra* p. 5, the court relied extensively on both common sense *and* testimony by the State's expert witness. Pet. App. 28a-34a. Drawing on "decades of experience working for the [California Highway Patrol]," *id.* at

28a-29a, Sergeant Beck testified that Section 27001 "guard[s] against distracting honking" and preserves the "horn's usefulness as a warning tool," *id.* at 33a.

Petitioner briefly asserts that Sergeant Beck was not qualified "to present expert testimony on the subject." Pet. 18. But the district court and the court of appeals rejected that argument. *See, e.g.*, Pet. App. 30a (citing *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 594 (1993)). Petitioner's dissatisfaction with that case-specific evidentiary ruling provides no basis for further review by this Court. None of the decisions invoked by petitioner in support of the alleged circuit conflict (Pet. 16-17) address any comparable questions about the admissibility of expert testimony. *See, e.g.*, *Cutting v. City of Portland*, 802 F.3d 79, 88-92 (1st Cir. 2015) (addressing restriction on certain activity within medians of city streets without considering any questions about admissibility of expert testimony).[5]

Nor do those decisions otherwise conflict with the decision below. None involves a restriction on the use of car horns—or an evidentiary record and justification comparable to those proffered by the State here. In *Cutting*, the First Circuit held that the City of Portland failed to justify an "indiscriminate[] ban[] [on] virtually all expressive activity in all of the City's median strips." *Id.* at 81. The evidence furnished by the city demonstrated a safety risk at only "a handful of intersections," not all medians across the city. *Id.* at

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[5] *See also Pagan v. Fruchey*, 492 F.3d 766, 772-778 (6th Cir. 2007) (en banc) (same, with respect to ordinance prohibiting the posting of "for sale" signs on parked vehicles); *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1245 (10th Cir. 2021) (similar, with respect to "prohibition on pedestrian presence near highway ramps"); *cf. id.* at 1228-1231 (referring to expert testimony without addressing whether it was properly admitted).

89 (internal quotation marks omitted). And the city merely demonstrated that pedestrians could endanger themselves or drivers when engaging in "disruptive or inattentive" behavior, not when protesting or otherwise expressing themselves in a responsible manner. *Id.* at 90. For those reasons, and because the court could not identify any "common sense"-based rationale for the measure like the one recognized in this case, *id.*, the court held that the city's ban was "too sweeping" to survive intermediate scrutiny, *id.* at 92.

In *Brewer v. City of Albuquerque*, 18 F.4th 1205 (10th Cir. 2021), the Tenth Circuit struck down an ordinance that "prohibit[ed] pedestrians from 'occupying roadways, certain medians, and roadside areas' and proscribe[d] 'certain pedestrian interactions with vehicles.'" *Id.* at 1210 (brackets omitted). As the court recognized, the government "is 'permitted to justify speech restrictions . . . based solely on history, consensus, and 'simple common sense.'" *Id.* at 1243-1244 (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001)).[6] The problem for the city was that the "evidence it . . . put forward" "*undercut[]*" any common sense-based rationale for the measure. *Id.* at 1244 (emphasis added). Absent any common sense or evidence-based justification, the court of appeals deemed the measure invalid. *See id.* at 1245 (describing the government's "largely evidence-free" attempt at "establishing [the measure's] constitutionality").

In *Pagan v. Fruchey*, the Sixth Circuit likewise acknowledged that the government can "justify speech

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[6] *See Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) ("even . . . in a case applying strict scrutiny," "we have permitted litigants . . . to justify restrictions based solely on history, consensus, and 'simple common sense'") (citing *Burson v. Freeman*, 504 U.S. 191, 211 (1992)); Pet. App. 32a (similar).

restrictions based on history, consensus, and simple common sense." 492 F.3d 766, 774, n.6 (2007) (en banc) (internal quotation marks and ellipses omitted). But as in *Cutting* and *Brewer*, the court concluded that there was no evidentiary or common sense-based rationale for the restriction at issue—a city ordinance that prohibited "the posting of 'For Sale' signs on cars parked [on city] streets." *Id.* at 772.[7] Far from disagreeing with *Cutting*, *Brewer*, or *Pagan*, the court of appeals here simply upheld a distinct type of traffic regulation on the basis of a different evidentiary record and common-sense justification.

b. The second aspect of the decision below challenged by petitioner is the court of appeals' approach to the "narrow-tailoring requirement." Pet. 22. Petitioner does not contest that Section 27001 is content-neutral and subject to intermediate scrutiny. *See, e.g.*, *id.* at i, 13. In petitioner's view, however, the court of appeals' application of intermediate scrutiny departs from the approach taken by the Washington Supreme Court and other federal appellate courts. Pet. 24-29. Petitioner is incorrect.

In *State v. Immelt*, 173 Wash. 2d 1, 10-13 (2011), the Washington Supreme Court did not even apply intermediate scrutiny. The court struck down a "content-based" local honking restriction on First Amendment overbreadth grounds. *Id.* at 10. Nothing in that decision suggests that the same result—or mode of analysis—would be appropriate where (as here) the challenged measure is content-neutral. *See*

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[7] *See, e.g.*, *Pagan*, 492 F.3d at 774 n.6 ("the alleged harms recited by the [government] cannot be characterized" as "derive[d] from common sense" or "as matters upon which there is longstanding consensus"); *id.* at 778 (emphasizing that the government furnished no evidence in support of the measure).

generally Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642, (1994) ("regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . . because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue").[8]

The other three decisions cited by petitioner (Pet. 27-29) merely recognize that laws sometimes fail intermediate scrutiny if the government has "too readily forgone options that could serve its interests *just as well*" as the challenged measure. *McCullen v. Coakley*, 573 U.S. 464, 490 (2014) (emphasis added). In *Cutting*, for example, the First Circuit faulted the government for failing to "try . . . or adequately explain why it did not try" less restrictive alternatives that would "achieve [its] interests" in protecting pedestrians and drivers from distracting activity on the medians of city streets. 802 F.3d at 91 (quoting *McCullen*, 573 U.S. at 495); *see Brewer*, 18 F.4th at 1246 (similar); *Reynolds v. Middleton*, 779 F.3d 222, 231-232 (4th Cir. 2015) (similar with respect to prohibition of solicitation on county roadways).

Here, by contrast, the alternatives identified by petitioner would *not* "achieve California's interest in traffic safety." Pet. App. 35a n.12; *supra* at p. 6. Petitioner's assertion that "[t]here were numerous regulatory alternatives that California could have tried" (Pet. 29) is belied by expert testimony, *see, e.g.*, Pet.

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[8] *Immelt*'s analysis is also incomplete. *Cf. Immelt*, 173 Wash.2d at 15, 28-29 (Madsen, C.J., dissenting). The court merely considered whether the law's scope was justified in light of the government's "interest in protecting residents from excessive and unwelcome noise." *Id.* at 11 (majority). The court nowhere considered the substantial interests in traffic safety addressed by the court of appeals here. *See, e.g.*, Pet. App. 27a-34a.

App. 167a-170a, and by the "near-nationwide consensus on the need" to prohibit horn use when unnecessary for alerting others to danger, *id.* at 33a; *see id.* at 34a-35a ("we discern no plausible means by which California could permit non-distracting honks while prohibiting distracting honks").

3. Petitioner also urges the Court to grant review on the ground that this case is "critically important." Pet. 37; *see id.* at 32-38. But petitioner overstates the legal and practical implications of the decision below.

For example, petitioner argues that "[i]f the decision below is allowed to stand, everyday Americans engaging in a core form of political expression . . . run the risk of criminal prosecution." Pet. 37. As discussed above, however, the court of appeals "declined to consider" whether Section 27001 can validly be applied to "*political* honking—'specifically, honking in response to a political protest.'" Pet. App. 21a-22a n.6; *see supra* at pp. 3-4, 6-7. Any concerns about applications of the statute to "political protest" honking, *cf. id.* at 47a-52a (Berzon, J., dissenting), should be addressed (if necessary) in a future case where those concerns are properly raised.

Petitioner is also wrong in asserting that the decision below "epitomizes . . . concerns" (Pet. 35) expressed by certain legal scholars that courts have "watered down" intermediate scrutiny (*id.* at 32). One of the referenced scholars wrote on this subject nearly four decades ago, asserting that this Court and other federal courts have applied intermediate scrutiny "in a toothless manner, producing a standard of review that in practice resembles mere rational basis scrutiny." Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 Wm. & Mary L. Rev. 779, 787 (1985); *see* Pet.

34-35. That claim is difficult to square with modern decisions striking down a range of laws on intermediate-scrutiny grounds—including the four federal appellate decisions on which the petition heavily relies.[9] In any event, in this case—the only case in which petitioner is presently seeking review—the court of appeals correctly applied the requirements of intermediate scrutiny. *See supra* at pp. 5-6, 7-8.

Finally, petitioner emphasizes that "[a]t least forty other states and the Uniform Vehicle Code provide similar prohibitions on non-warning honking." Pet. 37. But in the absence of any genuine disagreement in the lower courts on the validity of such laws, *see supra* at pp. 7-12, that consideration weighs against certiorari, not in favor of it. This Court is generally loathe to call into question the constitutionality of laws that "virtually every State has enacted." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125 (2011); *cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973) ("maintenance of the principles of federalism is a foremost consideration . . . [when] this Court examines state action").

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[9] *See, e.g.*, *McCullen*, 573 U.S. at 490-497; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011); *supra* at pp. 8-10, 7-12 (discussing *Cutting*, *Brewer*, *Pagan*, and *Reynolds*).

CONCLUSION

The petition for a writ of certiorari should be denied.

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