No. 23-423

IN THE

Supreme Court of the United States

SUSAN PORTER,
Petitioner,
v.
KELLY MARTINEZ, IN HER OFFICIAL CAPACITY AS SHERIFF OF SAN DIEGO COUNTY, AND SEAN DURYEE, AS SUCCESSOR TO AMANDA RAY, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF CALIFORNIA HIGHWAY PATROL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

THOMAS R. BURKE
Counsel of Record
THAILA K. SUNDARESAN
DAVIS WRIGHT TREMAINE LLP
50 California Street
23rd Floor
San Francisco, CA 94111
(415) 276-6500
thomasburke@dwt.com

JOHN DAVID LOY
FIRST AMENDMENT COALITION
534 4th Street, Suite B
San Rafael, CA
94901-3334

MICHAEL D. LEFFEL
FOLEY & LARDNER LLP
150 E. Gilman St.,
Suite 5000
Madison, WI 53703

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

MARIETTA CATSAMBAS
DAVIS WRIGHT TREMAINE LLP
1301 K St. NW,
Suite 500 East
Washington, D.C. 20005

BENJAMIN J. MORRIS
MIKLE S. JEW
FOLEY & LARDNER LLP
11988 El Camino Real
Suite 400
San Diego, CA 92130

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

CONCLUSION 6

SUPPLEMENTAL APPENDIX ..... isa

APPENDIX A 1sa

Excerpt of Complaint for Declaratory and Injunctive Relief, submitted to the U.S. District Court for Southern District of California in *Porter v. Gore*, No. 18CV1221 GPC JMA, ECF #1 (June 11, 2018) 1sa

APPENDIX B 3sa

Excerpt of Appellant's Reply Brief, submitted to the U.S. Court of Appeals for the Ninth Circuit in *Porter v. Gore*, No. 21-55149, ECF #54 (December 2, 2021) 3sa

APPENDIX C 5sa

Excerpt of Appellant's Supplemental Brief, submitted to the U.S. Court of Appeals for the Ninth Circuit in *Porter v. Martinez*, No. 21-55149, ECF #80 (March 28, 2022) 5sa

APPENDIX D 10sa

Excerpt of Petition for Rehearing En Banc, submitted to the U.S. Court of Appeals for the Ninth Circuit in *Porter v. Martinez*, No. 22-55149, ECF #112 (April 21, 2023) 10sa

TABLE OF AUTHORITIES

Page(s)

Cases

Brewer v. *City of Albuquerque*,
18 F.4th 1205 (10th Cir. 2021) 4

Citizens United v. *Fed. Election Comm'n*,
558 U.S. 310 (2010) 1-2

Cutting v. *City of Portland*,
802 F.3d 79 (1st Cir. 2015) 4

Holt Civic Club v. *City of Tuscaloosa*,
439 U.S. 60 (1978) 2

McCullen v. *Coakley*,
573 U.S. 464 (2014) 5

Pagan v. *Fruchey*,
492 F.3d 766 (6th Cir. 2007) 4

Randall v. *Sorrell*,
548 U.S. 230 (2006) 5

Washington v. *Immelt*,
173 Wash. 2d 1 (2011) 4

Constitutional Provisions

U.S. Const., amend. I 1-2, 5

Statutes

California Vehicle Code § 27001 1-6

ARGUMENT

1. The Government's attempts to narrow the scope of the issues should be rejected. The Petition, like Petitioner's complaint and her submissions to the Ninth Circuit, challenges Section 27001 both on its face and as applied to expressive honking. See, *e.g.*, Suppl. App. 1sa-2sa. "[T]he distinction between facial and as-applied challenges … goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). Both types of remedies remain available because the statute both is facially overbroad and was applied in a manner that unduly infringed on Petitioner's Frst Amendment rights.

The Government wrongly maintains that Petitioner "expressly disavowed" any argument that Section 27001 should be invalidated as to political protest honking specifically. Comm'r Opp. ("Opp.") 7 (quoting Pet. App. 21a n.6). To the contrary, Petitioner continually raised this issue before the Ninth Circuit—at oral argument, in her reply brief, and in her supplemental brief. See, *e.g.*, Suppl. App. 11sa n.5 ("At argument, counsel endorsed a remedy tailored to supporting protests."); *id.* at 3sa (contemplating possibility of "district court limit[ing] the injunction to support of protests"); *id.* at 8sa (noting that brief did not "waiv[e] any other argument for appropriate relief on remand"). Despite seeking broader relief, counsel clearly preserved the possibility of narrower relief at oral argument: "If the district court chose to limit it more narrowly, for concerns about workability or enforcement, we would address that in the briefs and the district court would

evidence. Our position is that yes, the First Amendment would prohibit enforcement of the statute against all expressive horn use, be it personal or political." Pet. App. 21a-22a n.6 (quoting Oral Arg. at 00:07:50-00:08:51). Despite proceeding as if Petitioner had "disavowed" the political protest honking argument, the majority opinion acknowledged that counsel "said that the district court would have discretion in crafting an injunction," while maintaining that Petitioner's "challenge was to Section 2700's prohibition on all expressive honking." *Id.* 22a n.6.

Thus, whether Section 27001 is constitutional as applied to political protest honking remains a live issue before this Court. Just as the Court may find it necessary to consider a statute's facial validity in a case making an as-applied challenge and order corresponding relief, see *Citizens United*, 558 U.S. at 333, the Court also has the power to craft a narrower remedy than what is being requested, and indeed, courts may not deny "a meritorious constitutional claim" even if a party "seeks one remedy rather than another." *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 65 (1978). While Petitioner's position continues to be that the statute is unconstitutional as applied to *all* expressive honking, Petitioner did not waive any argument for relief limited to political protest honking or other appropriate relief. Nothing Petitioner argued below or in her Petition impacts the Court's ability to consider the political protest honking issue or the appropriateness of granting certiorari here.

2. The Ninth Circuit incorrectly held that Section 27001 furthers the government's interest in traffic

safety and is narrowly tailored to do so. The Court should grant certiorari to correct these errors, both because the Ninth Circuit's decision conflicts with analogous decisions in other circuits and because the decision itself reflects a grievous misapplication of the intermediate scrutiny test.

a. First, there is zero evidence that Section 27001 furthers the government's interest in traffic safety. To uphold the law, the Ninth Circuit relied on Sergeant Beck's expert testimony, the Government's "common-sense" justification, and the fact that other jurisdictions have similar restrictions on honking. Pet. App. 32a-33a. It is of no consequence that the other circuits' decisions do not "address any comparable questions about the admissibility of expert testimony," Opp. 8, because *even if* Sergeant Beck's testimony is admissible, it is insufficient to meet the Government's burden because it was not based on any specific findings evidencing a purported safety risk. Pet. 18. Without any supporting facts regarding the safety risk the statute was meant to address, neither the statute's "common-sense" justification nor the existence of analogous (and potentially unconstitutional) laws in other states proves the constitutionality of Section 27001. *Id.* 19.

The First, Sixth, and Tenth Circuits' decisions underscore the Ninth Circuit's error in this regard. The Government tries to minimize the circuit split by stating that "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." Opp. 10. This statement obscures the reality that, in the other decisions, the courts correctly held that a "common-sense justification" was not enough to withstand intermediate scrutiny in the

absence of supporting evidence. See *Brewer* v. *City of Albuquerque*, 18 F.4th 1205, 1229 (10th Cir. 2021) (holding that "theoretical" opinions "unmoored from any on-the-ground data regarding [the city's] traffic safety problems" was not enough to support statute's constitutionality); *Cutting* v. *City of Portland*, 802 F.3d 79, 90-91 (1st Cir. 2015) (rejecting that public safety justified broad ban on expressive activity at medians "as a matter of common sense" where city's proffered evidence was "of limited value`"); *Pagan* v. *Fruchey*, 492 F.3d 766, 774 (6th Cir. 2007) (declining to "adopt a standard of 'obviousness' or 'common sense'" because Supreme Court precedent requires "*some* evidence to establish that a speech regulation addresses actual harms with some basis in fact").

b. Second, Section 27001's blanket ban on all non-warning honking is not narrowly tailored. The Government endorses the Ninth Circuit's incorrect conclusion that, "[b]y banning [non-warning] horn use, the State did 'no more than eliminate the exact source of the evil it sought to remedy.'" Opp. 6 (quoting Pet. App. 36a). To the contrary, if the government wanted to ban disruptive honking, it should have banned disruptive honking—and nothing more. See *Washington* v. *Immelt*, 173 Wash. 2d 1, 12 (2011) (en banc) (finding county ordinance unconstitutional where it "prohibit[ed] a wide swath of expressive conduct in order to protect against a narrow category of public disturbances").

As the Government acknowledges, the other circuits' decisions "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." Opp. 11

(quoting *McCullen* v. *Coakley*, 573 U.S. 464, 490 (2014)). By holding that Section 27001 was narrow enough to survive intermediate scrutiny, the Ninth Circuit failed to hold the Government to its burden, and ignored alternatives that would promote traffic safety just as well while safeguarding expressive honking, such as by "tailor[ing] the restriction to limit honking to circumstances where traffic safety concerns are actually present." Pet. 26. That other states have similar laws does not mean Section 27001 withstands intermediate scrutiny. Consensus does not equal constitutional legitimacy. See *Randall* v. *Sorrell*, 548 U.S. 230, 272 (2006) (Thomas, J., concurring) ("Tying individuals' First Amendment rights to the presence or absence of similar laws in other States is inconsistent with the First Amendment.").

3. Finally, the Court should grant review because the Ninth Circuit's approach poses a grave threat not only to expressive honking—a longstanding form of political expression—but also to all expressive conduct that governments seek to restrict through purported traffic-safety rationales. By misapplying intermediate scrutiny, the Ninth Circuit empowers lower courts to do the same and emboldens legislatures and law enforcement to execute similar measures. The Court should take this opportunity to clarify the intermediate scrutiny standard set forth in *O'Brien* and endorse the other Circuits' more demanding approaches.

Moreover, this case is the ideal vehicle to address the constitutional status of political protest honking if the Court so wishes. As explained above, the Government is wrong that Petitioner waived the

issue. See Opp. 12. Section 27001 should not be permitted to stand because it violates people's reasonable expectation that they can engage in constitutionally protected expressive activity without fear of criminal action.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition for certiorari.

Respectfully submitted,

THOMAS R. BURKE
Counsel of Record
THAILA K. SUNDARESAN
DAVIS WRIGHT TREMAINE LLP
50 California Street
23rd Floor
San Francisco, CA 94111
(415) 276-6500
thomasburke@dwt.com

MARIETTA CATSAMBAS
DAVIS WRIGHT TREMAINE LLP
1301 K St. NW,
Suite 500 East
Washington, D.C. 20005

JOHN DAVID LOY
FIRST AMENDMENT COALITION
534 4th Street, Suite B
San Rafael, CA
94901-3334

MICHAEL D. LEFFEL
FOLEY & LARDNER LLP
150 E. Gilman St.,
Suite 5000
Madison, WI 53703

BENJAMIN J. MORRIS
MIKLE S. JEW
FOLEY & LARDNER LLP
11988 El Camino Real
Suite 400
San Diego, CA 92130

Counsel for Petitioner