SUPPLEMENTAL APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SUSAN PORTER,

Plaintiff,

vs.

WILLIAM D. GORE, Sheriff of San Diego County, in his official capacity; WARREN STANLEY, Commissioner of California Highway Patrol, in his official) capacity,

Defendants.

Case No.
18CV1221GPG JMA

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

*** [6]

FIRST CLAIM

VIOLATION OF 42 U.S.C. § 1983 (First Amendment, Against All Defendants)

38. Ms. Porter hereby alleges and incorporates by reference each and every allegation contained in paragraphs 1 through 37 above, inclusive.

39. On its face or as applied, Vehicle Code § 27001 violates the First Amendment because it constitutes an overbroad restriction on the use of a vehicle horn for speech or expression.

40. On its face or as applied, Vehicle Code § 27001 violates the First Amendment because it constitutes

a content-based restriction on the use of a vehicle horn for speech or expression that is not narrowly tailored to a compelling governmental interest.

41. On its face or as applied, even if it is considered content-neutral, Vehicle Code § 27001 violates the First Amendment because it prohibits numerous uses of a vehicle horn for speech or expression and burdens substantially more speech or expression than necessary to protect legitimate governmental interests.

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APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUSAN PORTER, *Plaintiff-Appellant*, v. WILLIAM D. GORE, in his official capacity as Sheriff of San Diego County, and AMANDA RAY, as successor to Warren Stanley, in her official capacity as Commissioner of California Highway Patrol, *Defendants-Appellees*.	Case No. **21-55149** **APPELLANT'S REPLY BRIEF**

*** [11]
relief ultimately will be awarded." 10 Wright & Miller, Fed. Prac. & Proc. Civ. § 2664 (4th ed.). Defendants cannot defeat standing by quibbling with a hypothetical injunction not yet considered or entered, nor can they prevail by misleading this Court about premature issues to be decided on remand.

For example, if the district court limited the injunction to support of protests, that would not be a "restriction" on speech, "content-based" or otherwise. CHP Brief at 22 n.4. The First Amendment prohibits

"abridging the freedom of speech." U.S. Const, amend. I, cl. 3. An injunction upholding Ms. Porter's rights would not abridge speech. *See Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8,* 290 P.3d 1116, 1126 (Cal. 2012) (upholding statutes extending picketing rights to private property "because neither [statute] abridges speech"). When a restriction draws "lines on the basis of the message presented," that is "content discrimination prohibited by the First Amendment," because the government is selectively prohibiting speech. *Patriotic Veterans, Inc.* v. *Zoeller,* 845 F.3d 303, 305 (7th Cir. 2017). An injunction here would not prohibit anyone from speaking. The district court "is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public." *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 762 (1994). Because the injunction would protect rather than prohibit expression, it would present no

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APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUSAN PORTER,

Plaintiff-Appellant,

v.

KELLY MARTINEZ, in her official capacity as Sheriff of San Diego County, and AMANDA RAY, as successor to Warren Stanley, in her official capacity as Commissioner of California Highway Patrol,

Defendants-Appellees.

Case No. **21-55149**

APPELLANT'S PROPOSED SUPPLEMENTAL BRIEF

INTRODUCTION

This brief addresses two questions that arose at oral argument related to crafting a remedy on remand: (1) whether the district court would retain power to enjoin enforcement of the relevant statute on its face; and (2) how the district court could craft the precise terms of a workable content-neutral injunction.

The district court ruled against Ms. Porter on the merits and therefore did not decide on a precise remedy. If this Court reverses, an injunction would be

appropriate because First Amendment violations cause irreparable harm as a matter of law and the balance of equities and public interest favor protecting First Amendment rights. *Doe v. Harris,* 772 F.3d 563, 583 (9th Cir. 2014). Although this Court need not and should not prejudge the precise remedy, the district court would retain authority to enjoin enforcement of the relevant statutory provision on its face and could craft an appropriate and workable content-neutral injunction.

ARGUMENT

I. THE DISTRICT COURT COULD ENJOIN ENFORCEMENT OF THE STATUTE ON ITS FACE OR AS APPLIED.

The distinction between facial and as-applied relief goes to remedies to be decided on remand, not claims that can be pleaded, dismissed, or decided. Ms. Porter pleaded one claim that "[o]n its face or as applied, Vehicle Code § 27001 violates the First Amendment."[1] 6-ER-1412. As she has argued, the statute unconstitutionally prohibits expressive conduct by providing a "horn shall not otherwise be used" except as a theft alarm. Cal. Veh. Code § 27001(b). If this Court agrees and reverses, the district court may decide on remand whether to enjoin enforcement of the statute on its face or as applied to certain circumstances. Although the district court initially framed the case as an as-applied challenge and ruled against Ms. Porter on the merits on that

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[1] Different legal theories in support of that claim do not make it more than one claim. *ACF2006 Corp. v. Ladendorf,* 826 F.3d 976, 981 (7th Cir. 2016).

basis, l-ER-19; 6-ER-1395, nothing would prevent the court from considering a facial remedy on remand.[2]

As the Supreme Court has instructed, "the distinction between facial and as- applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. FEC,* 558 U.S. 310, 331 (2010). The distinction "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Id.* When a plaintiff claims the government "has violated its First Amendment right to free speech," a court cannot be prevented "from considering certain remedies if those remedies are necessary to resolve" that claim. *Id.* at 330-31.

Accordingly, the "precise characterization" of a claim as facial or as applied "has little bearing on the resolution of the legal question" at issue on the merits. *Isaacson v. Horne,* 716 F.3d 1213, 1230 (9th Cir. 2013). "Instead, the distinction matters primarily as to the remedy appropriate if a constitutional violation is found" or "the breadth of the relief' to which Ms. Porter would be entitled, given that the "substantive legal tests used in facial and as-applied challenges are invariant." *Id.* (citations omitted).

Therefore, if this Court reverses on the merits, the district court would retain power to decide whether to enjoin enforcement of the statute on its

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[2] Ms. Porter did not disavow any right to facial relief if she prevailed on the merits. 1-SER-103 (preserving "position that Section 27001 is unconstitutional on its face" and noting also that "Defendants have failed to justify enforcement of Section 27001 as applied to protected expression").

face or as applied, regardless of how the case has been framed to date. *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292, 2307 (2016) (holding court cannot be prevented "from awarding facial relief as the appropriate remedy for petitioners' as-applied claims"); *Citizens United,* 558 U.S. at 331 (holding "parties are not limited to the precise arguments" previously made and once "a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases"). This Court need not decide whether the remedy should be facial or as applied, but the district court cannot be limited from considering either option if its judgment is reversed.

II. THE DISTRICT COURT COULD CRAFT A CONTENT-NEUTRAL INJUNCTION THAT IS WORKABLE FOR OFFICERS TO APPLY IN THE REAL WORLD.

Without waiving any other argument for appropriate relief on remand, this brief provides examples of how the district court could enter a workable content-neutral injunction protecting expressive horn use.

One option is to enjoin Defendants from enforcing § 27001(b) on its face, if the district court determines that subsection is severable and "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Comite de Jornaleros de Redondo Beach* v. *City of Redondo Beach,* 657 F.3d 936, 944 (9th Cir. 2011) (en banc). If severance is not available, the district court could enjoin enforcement of § 27001 as a whole.

Another option is an as-applied injunction that contains the following provisions.

- Enjoining enforcement of § 27001(b) against expressive horn use regardless of the message conveyed.
- Defining expressive horn use under settled law as horn use intended to convey a particularized message with great likelihood that the message would be understood by those who observed it. *Edge v. City of Everett,* 929 F.3d 657, 668-69 (9th Cir. 2019).

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APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUSAN PORTER, *Plaintiff-Appellant*, v. KELLY MARTINEZ, in her official capacity as Sheriff of San Diego County, and AMANDA RAY, as successor to Warren Stanley, in her official capacity as Commissioner of California Highway Patrol, *Defendants-Appellees*.	Case No. **21-55149** **APPELLANT'S PROPOSED SUPPLEMENTAL BRIEF**

*** [15]

allow a ban on sidewalk protests merely because an "expert" says drivers would jump the curb or pedestrians would fall into the street.

By doing so, it makes First Amendment review an empty formality and threatens to reduce the public square to a "boutique of the banal," *Rodriguez v. Maricopa County Cmty. College Dist.,* 605 F.3d 703, 708 (9th Cir. 2010), not a robust forum to engage in "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Meyer* v. *Grant,* 486 U.S. 414, 421 (1988).

Threats to speech do not require "desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience." *McCullen,* 573 U.S. at 486. The majority decision licenses officials to curtail inconvenient protests.

Without en banc review, courts would be left rudderless in reviewing such restrictions. They would not know whether to apply the stringent standard of previous cases or the majority decision's deference to fact-free conjecture. Inconsistent decisions would result, confusing courts and officials.

The decision cannot be limited because Porter sought a potential remedy beyond political expression. First, she never "disavowed" a remedy tailored to protests, slip op. 18 n.6, and she argued it would be appropriate "if the district court limited the injunction to support of protests."[5] Appellant's Reply Brief at 11. Second, courts may not deny "a meritorious constitutional claim" because a party "seeks one remedy rather than another." *Holt Civic Club* v. *Tuscaloosa,* 439 U.S. 60, 65-66 (1978) (citing Fed. R. Civ. P. 54(c)).

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[5] At argument, counsel endorsed a remedy tailored to supporting protests. Oral Argument Video at 5:55-6:11, 7:05-7:30, 35:50-38:25, 1:13:25-1:14:00 (https://www.ca9.uscourts.gov/media/video/720220307/21-55149/). In also proposing a broader remedy, counsel was not "waiving any other argument for appropriate relief." Appellant's Supplemental Brief at 4. A remedy tailored to protests would not confuse officers. *Cf.* Cal. Penal Code § 409.7(a) (imposing certain obligations at "demonstration, march, protest, or rally").

Regardless of the precise remedy, which is for the district court to decide in the first instance, *Antoninetti v. Chipotle Mexican Grill, Inc.,* 643 F.3d 1165, 1175 (9th Cir. 2010), the record remains barren of facts sufficient to justify a restriction on expression, political or otherwise. The decision's stated rationale cannot be confined to this case and thus undermines First Amendment law.

II. THE MAJORITY DECISION CONFUSES THE LAW ON EXCLUDING UNRELIABLE OPINIONS.

Reliability is the touchstone of the court's "gatekeeping role" to exclude unfounded opinions, which can be "powerful and quite misleading." *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 595, 597 (1993). The majority decision conflicts with this Court's decisions holding mere "experience" cannot make opinions reliable. *Valencia-Lopez,* 971 F.3d at 898; *Hermanek,* 289 F.3d at 1093.