No. _____

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

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

ANDREW G. ROW
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street
Suite 2400
Los Angeles, CA 90017

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

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

MARYANN ALMEIDA
DAVIS WRIGHT TREMAINE LLP
920 5th Avenue, Suite 3300
Seattle, WA 98104

Counsel for Petitioner

QUESTIONS PRESENTED

Using a car's horn to express support for a protest is a widespread form of First Amendment protected activity that has a history virtually as long as that of the automobile. When a content-neutral law burdens expressive conduct, the government must prove that its law furthers an important governmental interest. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 664–65 (1994) (*Turner I*). Additionally, because this Court is "suspect" of "[b]road prophylactic rules" banning speech, *NAACP* v. *Button*, 371 U.S. 415, 438 (1963), the government must "show[] that it seriously undertook to address" its interests "with less intrusive tools readily available to it." *McCullen* v. *Coakley*, 573 U.S. 464, 494 (2014).

Applying these principles, several courts of appeals and one state court of last resort have struck down blanket bans on expressive conduct or speech on or near public roadways unsupported by any facts showing any hazard to traffic safety. Departing from that line of authority, the Ninth Circuit below held that California's categorical ban on all non-warning honking did not violate the First Amendment. This is despite the Government presenting zero evidence that expressive honking has ever presented a risk to traffic safety, and the Government not trying—or at least seriously considering—less intrusive measures to address its traffic safety concerns.

The questions presented are:

1. Whether the government may categorically ban expressive conduct, such as expressive honking of car

horns, in the name of traffic safety without presenting any evidence that its ban furthers that interest.

2. Whether the government may categorically ban expressive conduct, such as expressive honking of car horns, where the government had not tried—or at least seriously considered—using less restrictive measures to address its traffic safety concerns.

PARTIES TO THE PROCEEDING

The petitioner (plaintiff and appellant below) is Susan Porter.

The respondents (defendants and appellees below) who have been sued in their official capacities only are Kelly Martinez, Sheriff of San Diego County, and Sean Duryee, Commissioner of California Highway Patrol.*

* Pursuant to Supreme Court Rule 35.3, the two State of California officials have been substituted for their predecessors in office, who were named in the proceedings below. Kelly Martinez has succeeded William D. Gore as Sheriff of San Diego County. Sean Duryee has succeeded Warren Stanley as Commissioner of the California Highway Patrol.

RELATED PROCEEDINGS

Porter v. *Gore*, No. 18-cv-1221-GPC-LL (S.D. Cal. Feb 5, 2023)

Porter v. *Martinez*, No. 21-55149 (9th Cir. May 22, 2023)

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Susan Porter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

Since the dawn of the automobile at the turn of the twentieth century, Americans of all political persuasions have honked their cars' horns to express their support or displeasure and add their voice to the political and civic dialogue of this country. Every day across this country, motorists use their vehicles' horns to express themselves when passing roadside picket lines, demonstrations, and protests. Such "honks" not only operate as means for the motorist to communicate their support to their fellow citizens but also to amplify their fellow citizens' cause. The car horn is the sound of democracy in action.

Petitioner Susan Porter comes before this Court because the Ninth Circuit wrongly upheld California's categorical ban on expressive car horn honking, under which she was issued an infraction for honking her horn in support of a roadside political protest. California's Vehicle Code prohibits the use of a car horn for purposes other than ensuring the safe operation of a vehicle (herein referred to as "non-warning honking"). See CAL. VEH. CODE § 27001. The Government primarily justified its law by reference to its interest in traffic safety. However, the Government admitted that it knows of *not one accident* caused or threatened by non-warning honking.

Relieving the Government of its obligation to show that its law furthered a substantial government interest, the Ninth Circuit, over a dissent, held that it was "common sense" that the law furthered California's interest in traffic safety. The Ninth Circuit also held that the law was narrowly tailored, reasoning that there was no plausible means by which the Government could permit non-distracting honks while prohibiting distracting honks.

The Ninth Circuit's decision runs afoul of this Court's precedents and creates a split with at least three other courts of appeals and one state court of last resort.

First, the Government must show that any law that incidentally burdens expressive conduct, in fact, furthers the Government's interest—courts "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity." *City of Los Angeles* v. *Preferred Commc'ns, Inc.*, 476 U.S. 488, 496 (1986) (citation omitted). Despite the Government presenting no evidence that non-warning honking has ever created a traffic safety hazard, the Ninth Circuit held that it had met its burden based on "common sense" that Section 27001 furthered California's interest in traffic safety. At least the First, Sixth, and Tenth Circuits have struck down laws categorically banning expressive conduct or speech on or near public roadways where the government failed to demonstrate that its laws actually furthered its interest in traffic safety.

Second, the Ninth Circuit's holding that Section 27001 is narrowly tailored—despite it categorically banning expressive honking in all circumstances—runs afoul of this Court's precedent that the First Amendment abhors "[b]road prophylactic rules" and, instead, requires "[p]recision of regulation." *NAACP*, 371 U.S. at 438. The court's decision conflicts with a decision of the Washington Supreme Court striking down a similar anti-honking law as unconstitutionally overbroad. Moreover, it conflicts with cases from the First, Fourth, and Tenth Circuits striking down blanket bans on expressive conduct or speech on or near public roadways where the government had not tried—or at least seriously considered—using less restrictive measures to address its traffic safety concerns.

The Ninth Circuit's opinion reflects a continuing dilution of First Amendment protection for symbolic speech and cries out for this Court to reaffirm that the intermediate scrutiny established in *United States* v. *O'Brien*, 391 U.S. 367 (1968), remains the law today and embodies robust protection of expressive conduct, not a mere rubber stamp for any speculative justification that the government can concoct.

OPINIONS BELOW

The district court's opinion is published and available at 517 F. Supp. 3d 1109 and reproduced at Pet. App. 135a–175a. The U.S. Court of Appeals for the Ninth Circuit's original opinion is published at 64 F.4th 1112 and reproduced at Pet. App. 69a–134a. The Ninth Circuit's order denying Porter's petition for rehearing en banc and its amended opinion are

reported at 68 F.4th 429 and reproduced at Pet. App. 1a–68a.

JURISDICTION

The Ninth Circuit entered judgment on April 7, 2023. On April 21, 2023, Porter filed a petition for hearing en banc. On May 22, 2023, the Ninth Circuit denied the petition for rehearing en banc and issued an amended opinion. This Court has jurisdiction under 28 U.S.C. § 1254(1).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> 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.

Section 27001 of the California Vehicle Code provides:

> (a) The driver of a motor vehicle when reasonably necessary to insure safe

[1] On August 2, 2023, pursuant to Petitioner's timely filed application, Justice Kagan granted the application and extended the time for Petitioner to file her petition from August 20, 2023, to October 19, 2023.

> operation shall give audible warning with his horn.
>
> (b) The horn shall not otherwise be used, except as a theft alarm system * * * .

STATEMENT OF CASE

I. Americans Have Used Car Horns To Express Political Views Since The Advent Of The Automobile.

As William Faulkner remarked, "[t]he American really loves nothing but his automobile." William Faulkner, INTRUDER IN THE DUST 233 (Vintage International 1991). It is therefore unsurprising that, since the early twentieth century, Americans have used their cars—and their cars' horns—to protest injustices and show support for political causes. See, *e.g.*, Ernie Gates, *Antiwar Stories*, UNIVERSITY OF VIRGINIA MAGAZINE (Spring 2018), bit.ly/48PGE8B (detailing individuals' use of their car horns to protest the Vietnam War); Ian Urbina, *Silence Speaks Volumes at Intersection of Views on Iraq War*, NEW YORK TIMES (May 28, 2007), bit.ly/3M0i7nk (detailing use of car horns by both individuals who opposed and supported the Iraq War); BBC NEWS, *Coronavirus lockdown protest: What's behind the US demonstrations?* (Apr. 21, 2020), bit.ly/44rcRAg (detailing that individuals from over a "dozen states from coast to coast" honked their car horns to protest government stay-at-home orders).

Indeed, because of restrictions on gathering during the COVID-19 pandemic, the car horn became a staple—and, in some cases, the go-to—means by

which Americans of all political persuasions expressed their political views in public. See Nicole Gallucci, *The year of the beep: How car horns became the rallying cry of 2020*, MASHABLE (Dec. 28, 2020), bit.ly/3YjJXjh (recognizing that during the pandemic Americans became "creative [in] seeking out safer ways to host and attend large public gatherings" and protests). When people wanted to express their support for healthcare workers in the early days of the pandemic, they honked their horns. See, *e.g.*, Deborah Ferguson, *Community Honks in Support of Health Care Workers in Mansfield*, NBC DFW (Mar. 30, 2020), bit.ly/3OBC5X3. When people protested the murder of George Floyd, they honked their horns. See, *e.g.*, Camila Domonoske, *Caravan For Justice: Cars Offer Socially Distanced Protesting During Pandemic*, NATIONAL PUBLIC RADIO (June 5, 2020), bit.ly/3DcSBq4. When people protested government-imposed stay-at-home orders, mask mandates, and vaccine mandates, they honked their horns. See, *e.g.*, Omari Fleming, *'My Body, My Choice': Healthcare Workers Protest State Vaccine Mandate*, NBC SAN DIEGO (Aug. 9, 2021), bit.ly/43NqsAP; Delaney Smith, *'Honk to End the Shutdown' Protest Comes to Santa Barbara*, SANTA BARBARA INDEPENDENT (May 1, 2020), bit.ly/3DCSqEQ; Emily Hoeven, *School mask wars far from over*, CALMATTERS (Mar. 1, 2022), bit.ly/43V0onf.

Both President Joe Biden and former President Donald Trump have recognized honking as a form of political expression, illustrating the car horn's ubiquity in modern American politics. By way of example, during one of his drive-in rallies in 2020,

then-candidate Vice President Biden implored his supporters to "[h]onk if you want America to lead again. Honk if you want America to trust each other again. Honk if you want to be united again." See Bloomberg, *Biden at Iowa Drive-In Rally: 'Honk if You Want America to Be United Again'*, YOUTUBE (Oct. 30, 2020), bit.ly/3QgHrI7. Likewise, in May 2020, a convoy of truckers honked their horns to protest the government's trade policies, interrupting then-President Trump's speech in the White House Rose Garden. President Trump addressed the honking by stating that the "truckers * * * were with [him] all the way," and that the honks were a "sign of love." The Guardian, *'That's the sign of love:' Trump claims truckers' disruptive honking is 'in favor' of him*, YOUTUBE (May 15, 2020), bit.ly/3OhofYF.

Whether used as a "sign of love" or as a means of protest, Americans have used their car horns over the last century to express their political views and add their voice to debates on issues of public importance.

II. The Ninth Circuit Upholds California's Law Categorically Banning All Non-Warning Honking.

1. In 1913, California enacted its first iteration of its anti-honking law. See Act of May 31, 1913, ch. 326, § 12, 1913 Cal. Stat. 639, 645 ("No person shall sound such bell, gong, horn, whistle or other device for any purpose except as a warning of danger."). Today, California's anti-honking law, Section 27001, provides that vehicle horns shall not be used except "when reasonably necessary to insure [the] safe operation" of a motor vehicle. See CAL. VEH. CODE

§ 27001. Neither Section 27001 nor its statutory predecessors contain any relevant legislative findings explaining why California decided to ban all non-warning honking.

Section 27001 "applies to all vehicles whether publicly or privately owned when upon the highways." CAL. VEH. CODE § 24001. "Highway" is defined as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel"—in other words, "[h]ighway includes street." *Id.* § 360. The Vehicle Code is enforced by the California Highway Patrol and by local law enforcement agencies. A violation of Section 27001 constitutes a crime, and can be cited either as an infraction or a misdemeanor.[2]

2. In October 2017, Porter honked her car horn multiple times when passing a roadside protest occurring outside of a U.S. Congressman's office in Vista, California. Pet. App. 138a–140a. A San Diego County Sheriff's Deputy cited Porter for violating Section 27001. Pet. App. 139a–140a. When the Sheriff's Deputy failed to appear at Porter's hearing to contest the citation, the citation was dismissed. Pet. App. 140a.

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[2] See, *e.g.*, CAL. VEH. CODE §§ 40000.7, 40000.28. While infractions are less serious than misdemeanors, they are still considered criminal matters in California. See *California* v. *Simpson*, 223 Cal. App. 4th Supp. 6, 9 (Cal. App. Dep't Super. Ct. 2014) ("An infraction is a criminal matter subject generally to the provisions applicable to misdemeanors.").

Thereafter, Porter filed suit alleging that Section 27001 violates the First Amendment as applied to protected expression, namely expressive honking. The district court granted summary judgment for the Government. Pet. App. 174a–175a. A panel of the Ninth Circuit affirmed over a dissent by Judge Berzon. Pet. App. 37a.

The Ninth Circuit recognized that a car horn can constitute expressive conduct and that, as a result, Section 27001 could be understood to "prohibit[] some expressive conduct" protected by the First Amendment. Pet. App. 19a–21a ("The parties also do not dispute that at least some of the honking prohibited by Section 27001 is expressive for First Amendment purposes. We agree."). Nonetheless, the court held the law was constitutional.

In holding that Section 27001 passed intermediate scrutiny, the Ninth Circuit held that the law "further[ed] an important or substantial governmental interest," "unrelated to the suppression of free expression"—namely traffic safety.[3] Pet. App. 27a–34a (quoting *O'Brien*, 391 U.S. at 377). The court based this conclusion on the fact that other states have similar anti-honking laws and the "common-sense" dangers posed by non-warning honking. Pet. App. 33a–34a. Yet in the record there is neither any

[3] In the district court, in addition to traffic safety, the Government argued that Section 27001 furthered California's interest in noise control. The Ninth Circuit, however, did not consider that purported state interest in rendering its decision. See Pet. App. 35a n.12.

evidence that *a single accident* has ever been caused by non-warning honking, nor any fact-based or data-driven expert analysis of the potential traffic safety implications.

The Ninth Circuit further held that Section 27001 was narrowly tailored to advance California's interest in traffic safety because there was "no plausible means by which California could permit non-distracting honks while prohibiting distracting honks" and that by banning all non-warning honking, the State "did no more than eliminate the exact source of the evil it sought to remedy." Pet. App. 34a–37a (quoting *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 808 (1984)).

Finally, the Ninth Circuit held that Section 27001 left open "ample alternative channels" of speech, including attending "political demonstrations on foot" and allowing motorists to engage with "protestors from their cars by waiving, giving a thumbs up, or raising a fist as they drive by." Pet. App. 36a.

In a forceful dissent, Judge Berzon concluded that Section 27001 violates the First Amendment as applied to political protest honking. Judge Berzon concluded that the Government had failed to establish any facts showing expressive horn use "jeopardizes traffic safety." Pet. App. 38a, 53a. Moreover, Judge Berzon would have held a ban on political protest honking was not narrowly tailored because Section 27001 contains no "limitations [tailoring the statute] to situations involving the most serious risk to public peace or traffic safety." Pet. App. 54a–55a (citation omitted). Judge Berzon

concluded that the Government had failed to show it pursued "alternate measures" allowing it "to achieve the asserted governmental interests," such as enforcing laws directly addressing disturbance or distraction. Pet. App. 57a–58a.

REASONS FOR GRANTING THE WRIT

Two aspects of the Ninth Circuit's decision in this important First Amendment case warrant this Court's review.

First, the Ninth Circuit held that Section 27001 furthered California's interest in "traffic safety," despite there being zero evidence in the record that honking—let alone expressive honking in support of a political protest—has ever posed a traffic hazard or caused a traffic accident. By so ruling, the Ninth Circuit's approach incorrectly obviated the Government's burden to show that its speech restrictions furthered its asserted interest, effectively downgrading the applicable First Amendment scrutiny to rational basis review.

Second, the Ninth Circuit held that the Government's categorical ban on expressive honking was "narrowly tailored," despite the Government presenting no evidence that less restrictive alternatives—including enforcement of other laws, such as noise ordinances—could not further California's interest in traffic safety.

Not only does the Ninth Circuit's ruling run afoul of this Court's established First Amendment precedent, the decision also conflicts with: (i) decisions of other courts of appeals that have struck

down categorical prohibitions on street-adjacent expressive conduct or speech; and (ii) a decision of the Washington Supreme Court that struck down an almost-identical ordinance that categorically prohibited all non-warning honking. In light of the large number of similar bans on non-warning honking that are in force around the country, and the importance of the First Amendment rights at stake, the Court should grant certiorari to resolve these conflicts.

I. The Ninth Circuit's Holding That The Government Needed No Evidence To Show Section 27001 Furthered Its Interest In "Traffic Safety" Splits From The First, Sixth, And Tenth Circuits.

A. Restrictions on expressive conduct must advance an important government interest.

The free speech protections of the First Amendment are implicated when the government seeks to regulate conduct that is "sufficiently imbued with elements of communication," just as when the government regulates speech directly. *Texas* v. *Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence* v. *Washington*, 418 U.S. 405, 409 (1974)). Such protected conduct is often referred to as "expressive conduct" or "symbolic speech." Conduct is sufficiently expressive to garner First Amendment protection where the speaker intends for their conduct to convey a "particularized message" and the "likelihood [is] great" that a reasonable third-party observer would understand the message. *Spence*, 418 U.S. at 410–11.

As the Ninth Circuit recognized below, the parties "do not dispute that at least some of the honking prohibited by Section 27001 is expressive for First Amendment purposes." Pet. App. 19a. This is because in various circumstances "a honk can carry a message that 'is intended to be communicative and that, in context, would reasonably be understood by the [listener] to be communicative.'" Pet. App. 20a (quoting *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984)). Indeed, as the Ninth Circuit recognized, Porter intended her honks to show support for the protest, and the protestors "understood her intended message" as evidenced by their cheers in response. *Id.*

Under this Court's long-standing precedent, content-neutral laws that restrict expressive conduct must pass intermediate scrutiny. See *O'Brien*, 391 U.S. at 377; *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 189 (1997) (*Turner II*). The First Amendment permits such a law only if it: (1) is within the constitutional power of the government; (2) furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377; see also *Turner II*, 520 U.S. at 189 (law constitutional if it "advances important governmental interests unrelated to the suppression of free speech" and "does not burden substantially more speech than necessary to further those interests"). This standard is effectively identical to the analysis applied to time, place, and

manner restrictions on speech. See *Clark*, 468 U.S. at 298; *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991). It is also similar to the robust standard for reviewing governmental restrictions on commercial speech. See *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 430 (1993).

To show that a law advances an important governmental interest, the government must prove that the alleged harms it seeks to prevent (*i.e.*, the important governmental interest at stake) "are real, not merely conjectural." *Turner I*, 512 U.S. at 664–65; *FEC* v. *Ted Cruz for Senate*, 596 U.S. 289, 307–08 (2022) (government may not "merely hypothesize" that speech causes problems). In other words, the government "must do more than simply 'posit the existence of the disease sought to be cured.'" *Turner I*, 512 U.S. at 664 (citation omitted). Instead, the First Amendment requires that the government demonstrate that its speech restriction addresses "what is in fact a serious problem" and that it will alleviate the recited harms "in a direct and material way." *Edenfield* v. *Fane*, 507 U.S. 761, 776, (1993) (striking down commercial speech restriction unsupported by any "studies" or "anecdotal evidence" that the targeted speech "create[d] the dangers" alleged).

Consistent with this Court's precedent, decisions of the First, Sixth, and Tenth Circuits have struck down laws categorically banning expressive conduct or speech on or near public roadways where the government failed to demonstrate that its ban *actually furthered* its interest in traffic safety. In

contrast, in the decision below, the Ninth Circuit required no proof—just conjecture and "common sense"—that California's categorical ban of an entire form of expressive conduct furthered the State's interest in traffic safety.

B. The First, Sixth, and Tenth Circuits have held that the government must prove speech restrictions actually further traffic safety interests.

1. Ensuring the safety of motorists and pedestrians is, undoubtedly, an important and substantial government interest. See *McCullen* v. *Coakley*, 573 U.S. 464, 486 (2014); *Cox* v. *Louisiana*, 379 U.S. 536, 554–55 (1965). However, the government does not possess an unfettered ability to enact laws in the name of traffic safety; instead, the government must show that any law that incidentally burdens expressive conduct, in fact, "furthers" traffic safety in a "direct and material way." See *Turner I*, 512 U.S. at 664 ("[T]hat the [g]overnment's asserted interests are important in the abstract does not mean, however, that the [regulation] will in fact advance those interests."); see also *Satellite Broad. & Commc'ns Ass'n* v. *FCC*, 275 F.3d 337, 356 (4th Cir. 2001) ("If a regulation places even incidental burdens on speech without yielding some genuine benefit, it must be struck down.").

2. At least three courts of appeals have invalidated blanket bans on expressive conduct or speech on or near public roadways absent evidence that such restrictions further the government's asserted interest in traffic safety. Unlike the Ninth

Circuit below, those courts of appeals have not permitted the government to rely on mere "common sense" and speculation of the alleged harms sought to be redressed when justifying the sweeping restrictions.

a. In *Cutting* v. *City of Portland*, the First Circuit struck down a city ordinance aimed at stopping panhandling by prohibiting all standing, sitting, staying, driving, or parking in medians. 802 F.3d 79 (1st Cir. 2015). Despite the city's asserted interest in "public safety" and ensuring pedestrians were not struck by passing vehicles, the First Circuit held that the ban violated the First Amendment. *Id.* at 90 n.13. The court recognized that the city had failed to present any evidence that pedestrians engaging in conduct prohibited by the ordinance had been hit by vehicles. See *id.* at 91. In holding that the city had not met its burden under intermediate scrutiny, the First Circuit rejected the city's assertion that the dangers were "obvious" and that the broad-sweeping ordinance was a "common sense" response to the asserted traffic-safety issues justifying a categorical ban applying to all medians. *Id.* at 91, 93.

b. In *Pagan* v. *Fruchey*, the Sixth Circuit invalidated a municipal traffic ordinance prohibiting the placement of "for sale" signs on vehicles parked on public streets, finding it an unconstitutional speech restriction. 492 F.3d 766 (6th Cir. 2007) (en banc). The Sixth Circuit recognized that the city's sole support for its categorical ban hinged on a police chief's conjecture that something *might* occur if people stopped to look at the "for sale" signs on a

parked car. *Id.* at 772–73. Applying intermediate scrutiny, the Sixth Circuit held that such speculation was insufficient and that there was no evidence that any harm was actually being addressed by the ordinance. *Id.* at 734–74; *id.* at 778 ("A judicial pronouncement that an ordinance is consistent with common sense hardly establishes that it is so.").

c. In *Brewer* v. *City of Albuquerque*, the Tenth Circuit held that an ordinance aimed at stopping panhandling by prohibiting pedestrians from loitering "in and around roadways throughout Albuquerque" was an unconstitutional speech restriction. 18 F.4th 1205, 1209 (10th Cir. 2021). Applying intermediate scrutiny, the Tenth Circuit held that the city had failed to show it was addressing a significant governmental interest as it did not present any non-speculative evidence showing "significant safety problems arising from pedestrian presence near ramps or on medians, or from exchanges between pedestrians and vehicle occupants." *Id.* at 1227. The city's "theoretical" opinions "unmoored from any on-the-ground data" about "traffic safety problems" were not enough to show that the harms it sought to address were "real and non-speculative." *Id.* at 1227–28; *cf. Evans* v. *Sandy City*, 944 F.3d 847, 854–55 (10th Cir. 2019) (upholding Utah city's panhandling ordinance, finding that the city's fears of harm were supported by "several close calls where accidents involving pedestrians and vehicles could have been devastating" and city officials had surveyed the relative safety of medians) (internal quotation marks omitted).

C. Creating a split with the other circuits, the Ninth Circuit did not require the Government to prove Section 27001 furthered its interest in traffic safety.

1. Despite the Government's claim that Section 27001 furthers an important governmental interest (*i.e.*, traffic safety), the Government presented *zero* evidence suggesting that car honking has ever presented a traffic or safety hazard.

The only support the Government presented to show this point was the testimony of Sergeant William Beck, an officer and accident investigator employed by the California Highway Patrol. Pet. App. 12a–13a, 143a. Other than looking up "vehicle codes or laws and things like that"—hardly the process necessary to present expert testimony on the subject—Sergeant Beck conducted no research or testing with respect to the purported dangers associated with honking. Pet. App. 183a–184a, 187a, 194a, 198a–199a. Instead, Sergeant Beck opined on the dangers of honking based on "what [was] in [his] head from experience and from [his] own knowledge." Pet. App. 187a; see also Pet. App. 190a, 196a–198a. Sergeant Beck's opinions, however, were not supported by any data, research, studies, surveys, or any recorded facts demonstrating that car honking poses any danger to traffic safety. Pet. App. 187a–188a, 191a, 194a–197a, 199a. Indeed, when pressed, Sergeant Beck admitted that he knew of no "specific accident or collision that was caused by the use of a vehicle horn." Pet. App. 197a–198a; see also Pet. App. 12a. Nor does the legislative record for Section 27001

or its statutory predecessors contain any relevant legislative findings as to the purported dangers of car honking.

Despite the lack of evidence of a real harm that Section 27001 was addressing, the Ninth Circuit held that the fact numerous other states have similar anti-honking laws and the "common-sense" dangers posed by non-warning honking showed that Section 27001 furthered California's interest in traffic safety. Pet. App. 33a–34a. This justification, however, says nothing about whether Section 27001 actually furthers California's interest in traffic safety. See *Edenfield*, 507 U.S. at 771 (demanding evidence even when relying on similar legislation enacted in other locales). That other jurisdictions have similar, categorical restrictions on honking has no bearing on the constitutionality of such laws.[4] 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.").[5]

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[4] This Court has sometimes allowed jurisdictions to adopt restrictions on speech without making their own findings if they relied on sufficient studies or "detailed findings" made in other jurisdictions in support of similar restrictions. See *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 45, 51 (1986). But that line of cases has no bearing here, where the Government cited no findings made by any legislature in support of any law similar to Section 27001.

[5] In any event, a natural experiment conducted in another jurisdiction refutes the Government's speculative fears of harm.

2. The Ninth Circuit's decision below is a dangerous precedent that waters down the protection afforded to expressive conduct under the First Amendment. This is because concerns of "public safety" and "traffic safety" are amorphous state interests that can always be invoked to justify speech restrictions. See *Arizona* v. *Mayorkas*, 143 S. Ct. 1312, 1315 (2023) (Gorsuch, J., dissenting) (recognizing that "[f]ear and the desire for safety are powerful forces" that can "lead to a clamor for action —almost any action."). It is therefore imperative that, when faced with a First Amendment challenge, the government proffer evidence that the harms sought to be redressed are real—not speculative—and that its speech restrictions actually address those harms. This robust standard of review is essential to protecting the First Amendment, lest bogeyman concerns of "public safety" and "traffic safety" are elevated to the status of inviolable trump cards that the government can always wield to restrict expressive conduct. See *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) ("[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."); see also *Bl(a)ck Tea Soc'y* v. *City of Bos.*, 378 F.3d 8, 13 (1st Cir. 2004) ("Security is not a talisman that the government may invoke to

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See *Goedert* v. *City of Ferndale*, 596 F. Supp. 2d 1027, 1033 (E.D. Mich. 2008) ("The [demonstration] began nearly five years ago, and thousands of expressive honks have been made in support. Not a single accident has occurred as a result of the [demonstration].").

justify *any* burden on speech (no matter how oppressive).") By accepting fact-free conjecture as a justification for banning expressive conduct, the Ninth Circuit effectively downgraded its First Amendment scrutiny to rational basis review, which requires only "rational speculation unsupported by evidence or empirical data." *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).

This Court should not permit "common sense" to become a judicial panacea or magic wand justifying speech restrictions. See *Nixon* v. *Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden."); *Horina* v. *City of Granite City*, 538 F.3d 624, 633 (7th Cir. 2008) (recognizing that "common sense" can easily "mask unsupported conjecture, which is, of course, *verboten* in the First Amendment context"). Nor should this Court permit the intermediate scrutiny test for incidental restrictions on expressive conduct to become a "toothless" standard providing "a blank check to lawmakers to infringe" on the First Amendment in pursuit of the "state's asserted public-safety objective." See *Duncan* v. *Bonta*, 19 F.4th 1087, 1143–44 (9th Cir. 2021) (Bumatay, J., dissenting), *vacated*, 142 S. Ct. 2895 (2022) (appeal concerning Second Amendment challenge to California's ban on large-capacity magazines); *Minority Television Project, Inc.* v. *FCC*, 736 F.3d 1192, 1212 (9th Cir. 2013) (Kozinski, J., dissenting) ("[I]f intermediate scrutiny is to have any bite, we can't just trot out all of the reasons the government advances in support of the regulation and salute.").

The Ninth Circuit impermissibly relieved the Government of its fundamental burden to prove an important interest supported its speech restriction. Consistent with *O'Brien*, this Court should grant Porter's petition so that this Court, in line with the First, Sixth, and Tenth Circuits, can make clear that when imposing restrictions on expressive conduct in the name of public safety, the government must actually show with evidence or clear guidance in precedent that the restrictions truly further that interest.

II. Splitting With The Washington Supreme Court And The First, Fourth, And Tenth Circuits, The Ninth Circuit Held The Categorical Ban On All Non-Warning Honking Was Narrowly Tailored.

Even if the Government had proven that Section 27001 furthers California's interest in traffic safety, the law still fails to pass constitutional muster as it is not narrowly tailored.

The narrow-tailoring requirement is a bedrock principle that mandates "regulating speech must be a last—not first—resort." *Thompson* v. *W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). To ban expressive conduct in a traditional public forum, the government must prove that its law is narrowly tailored to serve an important and substantial governmental interest. See *O'Brien*, 391 U.S. at 377 (restriction on expressive conduct can be "no greater than is essential to the furtherance of that [important or substantial governmental] interest"); *McCullen*, 573 U.S. at 477

(government must prove law is "narrowly tailored to serve a significant governmental interest").

The narrow-tailoring requirement has two elements. *First*, the government bears the burden to show that the "remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Turner I*, 512 U.S. at 665 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989)). A speech restriction must "eliminate[] no more than the exact source of the 'evil' it seeks to remedy." *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988). *Second*, the government must also demonstrate that alternative measures that burden substantially less speech "would fail to achieve the government's interests." *McCullen*, 573 U.S. at 495. That is, the government must "show[] that it seriously undertook to address these * * * problems" with such alternative measures, including laws already on the books or "methods that other jurisdictions have found effective." *Id.* at 494. While a regulation "need not be the least restrictive or least intrusive means" of serving that interest, *Ward*, 491 U.S. at 798, a government may not rely on its "chosen route" because it is "easier" or more "efficient." *McCullen*, 573 U.S. at 495 ("[T]he prime objective of the First Amendment is not efficiency."); *Riley* v. *Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 795 (1988) ("[T]he First Amendment does not permit the State to sacrifice speech for efficiency.").

A. The Ninth Circuit held that Section 27001 did not substantially burden more speech than necessary.

Whereas the First Amendment requires a scalpel, Section 27001 impermissibly employs a sledgehammer by categorically banning an entire form of expressive conduct: non-warning honking.

The Ninth Circuit's decision holding that Section 27001 did not burden more speech than necessary directly conflicts with a decision of the Washington Supreme Court that held a similar honking ordinance was unconstitutionally overbroad. See *Washington* v. *Immelt*, 267 P.3d 305, 306 (Wash. 2011). The ordinance at issue in *Immelt* prohibited all car honking for "purposes other than public safety," with the exception for honks "originating from officially sanctioned parades and other public events." *Id.* at 306, 309 (quoting SNOHOMISH COUNTY CODE 10.01.040(1)(d), 10.01.050(1)(*l*)). The Washington Supreme Court recognized that honking "does constitute protected speech in many instances" because it "may rise to the level of speech when the actor intends to communicate a message and the message can be understood in context." *Id.* at 308–09; *id.* at 309 ("While it does not involve spoken words, horn honking may be clearly a form of expressive conduct."). The court held that the county ordinance was unconstitutionally overbroad as it "prohibit[ed] a wide swath of expressive conduct in order to protect against a narrow category of public disturbances." *Id.* at 310. The court recognized that an ordinance

"properly tailored" to prohibit only "disturbing horn honking that is intended to annoy or harass would likely" pass constitutional muster. *Ibid.*

In this case, in giving cursory consideration to this aspect of the narrow-tailoring inquiry, the Ninth Circuit recognized that while "most non-warning honks do not create distractions resulting in accidents," it could "discern no plausible means by which California could permit non-distracting honks while prohibiting distracting honks." Pet. App. 34a–35a. Moreover, the Ninth Circuit held that because any non-warning honking "undermines the effectiveness of the horn when used for its intended purpose of alerting others to danger," California's categorical prohibition "did no more than eliminate the exact source of the evil it sought to remedy." Pet. App. 35a–36a (quoting *Members of City Council of Los Angeles*, 466 U.S. at 808).

Not only does the Ninth Circuit's decision conflict with the Washington Supreme Court's decision in *Immelt*, it is manifestly wrong. Section 27001's ban on all non-warning honking burdens substantially more speech than necessary because it prohibits expressive honking in numerous instances that would not present a danger to traffic safety. *Frisby*, 487 U.S. at 485 ("A complete ban can be narrowly tailored, but *only if each activity within the proscription's scope is an appropriately targeted evil.*") (emphasis added). Even assuming some honking can pose a danger to traffic safety (which, again, the Government did not show in this case), not all instances of a motorist

engaging in expressive honking will pose such a danger.

Without any limitations that tailor the restriction to limit honking to circumstances where traffic safety concerns are actually present, Section 27001 prohibits substantially more speech than necessary to achieve its ends. *Cf. Martinez* v. *Rio Rancho*, 197 F. Supp. 3d 1294, 1300 (D.N.M. 2016) (city ordinance barring honking "in such manner as to distract other motorists on the public way or in such a manner as to disturb the peace" was constitutional). Given the absence of any evidence of any problems with expressive honking—let alone a problem in all areas and circumstances where expressive honking may take place—the categorical sweep of Section 27001 burdens more speech than necessary. See *McCullen*, 573 U.S. at 493 ("For a problem shown to arise only once a week in one city at one clinic, creating * * * buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution.").

Section 27001's broad sweep is apparent when considered in Porter's case. The protest where Porter used her horn occurred on a busy road in Vista, California. On the day she was cited, over 50 people had gathered for the protest. Pet. App. 214a–215a. Protesters were playing drums, holding picket signs, and using a megaphone to speak, sing hymns, and chant. Pet. App. 219a–221a. Indeed, adding to the cacophony of noises at the protest, a counter-protestor was present with "huge speakers" and a megaphone. Pet. App. 217–218a. When Porter was cited for honking her horn in support of the protest, the

citation contained no allegations about noise level, disturbing the peace, distracting any drivers, or endangering the safety of motorists or pedestrians. Amidst all the noise at the protest, Porter's car horn could not have caused any additional disturbance. Restricting Porter's use of her horn does not advance California's asserted interest in promoting traffic safety and demonstrates the over-inclusivity of Section 27001—the State's antidote is worse than the purported poison.

B. The Government failed to show less restrictive alternatives could not adequately further its asserted interest in traffic safety.

Several courts of appeals, including the First, Fourth, and Tenth Circuits, have struck down blanket bans on expressive conduct or speech on or near public roadways where the government failed to show that it first tried—or at least seriously considered— using less restrictive alternative measures.

a. In *Cutting*, as discussed *supra*, the First Circuit struck down an anti-panhandling ordinance. 802 F.3d 79. The court held that the ordinance was not narrowly tailored because "the [c]ity did not try—or adequately explain why it did not try—other, less speech restrictive means of addressing [its] safety concerns." *Id.* at 91. The city argued that "existing state and local laws [prohibiting] disruptive activity in roadways" were not adequate tools to address its safety concerns because such laws were "reactive, rather than proactive, and require[d] a police officer to directly observe the illegal behavior before taking

action." *Ibid.* (alterations omitted). The First Circuit, however, held those justifications were not enough "to show the need for the sweeping ban that the [c]ity chose" because, while an outright ban "is obviously more efficient, * * * efficiency is not always a sufficient justification for the most restrictive option." *Id.* at 92.

b. In *Reynolds* v. *Middleton*, the Fourth Circuit struck down a county ordinance that barred roadside solicitation. 779 F.3d 222, 225 (4th Cir. 2014). While the court recognized that a "significant" government interest was at stake, namely, "the [c]ounty's interests in safety and unobstructed use of its highways," *id.* at 229, it held that the ordinance failed to pass intermediate scrutiny because the government offered no evidence that it had tried—and failed—to address the problem with existing laws against individuals actually causing traffic safety issues (such as its laws governing jaywalking and obstructing traffic). See *id.* at 231–32. The Fourth Circuit explained that "without such evidence, the [c]ounty cannot carry its burden of demonstrating that the * * * [o]rdinance is narrowly tailored." *Id.* at 232.

c. In *Brewer*, as discussed *supra*, the Tenth Circuit struck down a city's anti-panhandling ordinance that regulated "pedestrian presence in and around roadways." *Brewer*, 18 F.4th at 1209. In addition to holding that the city had failed to show it was addressing a significant government interest, the Tenth Circuit held that the city's "bald assertion" that the ordinance was "not substantially broader than

necessary" was "[in]sufficient to satisfy the narrow-tailoring inquiry." *Id.* at 1255–56. The court explained that for a law to be narrowly tailored, the "government will ordinarily need to show that it seriously considered alternative regulatory options that burden less protected speech or expressive conduct, yet also have the potential of achieving its real and significant interests." *Id.* at 1246 (emphasis removed). Because the city had failed to provide any evidence that it "meaningfully engage[d] in a less-restrictive means analysis," the Tenth Circuit held that the ordinance was not narrowly tailored. *Id.* at 1256–57.

In ruling that Section 27001 is narrowly tailored, the Ninth Circuit's decision is contrary to the law of this Court and creates a split with other courts of appeals that have rejected broad-sweeping speech bans in the interest of traffic safety.

There were numerous regulatory alternatives that California could have tried before categorically banning all non-warning honking. For example, California could have stepped up enforcement of existing laws, including local noise ordinances, traffic laws prohibiting the obstruction of traffic, and the State's disturbing the peace law which makes it a crime to "maliciously and willfully disturb[] another person by loud and unreasonable noise." CAL. PENAL CODE § 415(2). At most, the Government relied on Sergeant Beck's testimony that increased enforcement of such laws was not "practical" and that Section 27001 was "better for efficiency" as it was "easier to prove" a violation of that statute. Pet. App.

201a–204a, 207–208a. But state efficiency is not the guiding light for constitutional tailoring. *McCullen*, 573 U.S. at 495.

In addition to enforcing laws on its books for instances of honking that jeopardizes traffic safety, California could have narrowly drafted Section 27001 to prohibit honking in a manner that distracts other motorists, disturbs the peace, or is intended to annoy or harass. See, *e.g.*, *Immelt*, 267 P.3d at 310 (recognizing a law tailored to prohibit "disturbing honking that is intended to annoy or harass" would likely be constitutional); *Martinez*, 197 F. Supp. 3d at 1313 (ruling city's anti-honking ordinance that prohibits honking in a "manner as to distract other motorists on the public way or * * * disturb the peace" was constitutional) (quoting RIO RANCHO MUN. CODE § 12-6-12.18(5)). As a result, California had "available to it a variety of approaches that appear capable of serving its interests" without categorically banning all non-warning honking. *McCullen*, 573 U.S. at 494.

The Ninth Circuit did not hold the Government to its burden to demonstrate that it had first tried or at least even considered alternative measures and that those measures were insufficient. Instead, the Ninth Circuit erroneously concluded there were no other, less restrictive alternatives available to achieve California's interest. Pet. App. 34a–35a ("[W]e discern no plausible means by which California could permit non-distracting honks while prohibiting distracting honks."). In addition to defying common sense, the Ninth Circuit's decision is impossible to

square with the decisions of the First, Fourth, and Tenth Circuits discussed *supra* that have held similar blanket bans on protected expressive conduct or speech unconstitutional.

Even assuming expressive horn use might present "opportunities for isolated abuses," that fact "does not justify a total ban on that mode of protected" expression because the government "can regulate such abuses * * * through far less restrictive and more precise means." *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988). As this Court has made clear, "[b]road prophylactic rules in the area of free expression are suspect" and "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP*, 371 U.S. at 438. Blanket bans of such expressive conduct warrant more than perfunctory constitutional scrutiny because "[a]nnoyance at ideas can be cloaked in annoyance at sound." *Saia* v. *New York*, 334 U.S. 558, 562 (1948). California could have achieved its interests "through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited." *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971).

A ruling that Section 27001 is unconstitutional would not unleash an unchecked cacophony of intolerable sounds into the public sphere from honking or otherwise. There is no constitutional right to make excessive noises for expressive purposes: if the noise generated by expression is significantly beyond ambient levels and genuinely disturbing, appropriate enforcement of noise controls or

disturbing the peace laws would not run afoul of the First Amendment. See, *e.g.*, *Harmon* v. *City of Norman*, 981 F.3d 1141, 1149 (10th Cir. 2020) (upholding enforcement of city's "prohibition against 'loud and unusual sounds' that 'disturb the peace of another'").

The Ninth Circuit's decision impermissibly "den[ies] a man the use of his [car horn] in order to protect a neighbor against sleepless nights" and speculative fears of traffic safety issues. See *Saia*, 334 U.S. at 562. If a law that prohibits all expressive honking, regardless of the circumstances, qualifies as narrowly tailored, then "narrow tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker." *Colorado* v. *Hill*, 530 U.S. 703, 749 (2000) (Scalia, J., dissenting).

III. The Ninth Circuit's Decision Reflects The Reality That Some Courts Have Watered Down The Standard Established In *O'Brien*.

The First Amendment protects expression manifested through conduct, as well as through speech. See *Texas* v. *Johnson*, 491 U.S. at 404 (recognizing that the First Amendment's "protection does not end at the spoken or written word").

As a result, this Court has recognized various forms of protected, expressive conduct used by individuals to protest or express their political views, including: burning a flag to express general displeasure with the policies of the Reagan administration, *Johnson*, 491 U.S. at 404, and *Schacht* v. *United States*, 398 U.S. 58, 62 (1970); wearing black armbands to protest America's

involvement in the Vietnam War, see *Tinker*, 393 U.S. at 505; sit-ins to protest segregation, see *Brown* v. *Louisiana*, 383 U.S. 131, 141–42 (1966); and picketing about a wide variety of causes, see, *e.g.*, *Amalgamated Food Emps. Union* v. *Logan Valley Plaza*, 391 U.S. 308, 313–14 (1968).

The protection of expressive conduct accords with the original meaning of the First Amendment. In the late 1700s and early 1800s, courts treated symbolic expression and verbal expression as "functionally equivalent" when it came to speech restrictions, and symbolic expression was "no less and no more protected than spoken and printed words." See Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEORGETOWN L.J. 1057, 1059–60 (2009). To this end, Madison's original draft of the First Amendment recognized the "right to speak, to write, or to publish," and the term "to publish" was recognized as including "publicly communicating symbolic expression, such as * * * effigies[] and processions." *Id.* at 1060. Constitutional scholars do not view the change in the wording of the First Amendment as originally drafted from "to publish" to "freedom of the press" as a "deliberate decision[] to narrow the scope of Madison's language." *Id.* at 1080–82 (citing the commentary of St. George Tucker, Chancellor James Kent, and Justice Joseph Story).

The Founders' reverence for symbolic expression is understandable because symbolic expression was central to American life and identity at the time of this Nation's founding. During these times,

Americans: wore colored cockades in their hats to represent their political allegiances; raised liberty poles (tall poles crowned with flags or "liberty caps" used as a symbol of hostility to perceived oppression by the federal government); burned flags; conducted funeral processions for the perceived death of liberty after the passing of the Stamp Act; orchestrated parades denouncing adultery accompanied by "rough music" produced from banging frying pans and the blowing of bulls' horns; and burned copies of the Sedition Act and other federal laws in protest. *Id.* at 1061–62, 1072. Thus, "early courts' and commentators' treatment of symbolic expression as equivalent to verbal expression" provides a clear insight that such forms of expression were intended to be protected by the First Amendment. *Id.* at 1083.

Recognizing that such expressive conduct falls within the purview of the First Amendment, in *O'Brien*, this Court established that, if a content-neutral law incidentally burdens expressive conduct, for it to pass constitutional scrutiny it must, *inter alia*, further an important or substantial governmental interest and its restriction on "First Amendment freedoms" must be "no greater than is essential." *O'Brien*, 391 U.S. at 377. While such an intermediate level of scrutiny is meant to have some bite, many commentators have noted that the test has been, in many cases, transformed by lower courts into "a highly deferential form of review which virtually all laws pass." Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 237 (2012); see also Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental*

Restrictions on Communications, 26 WM. & MARY L. REV. 779, 788 (1985) ("In practice, the application of the lower track of this analysis, although open linguistically to the possibility of some bite, has resembled rational basis review."). The Ninth Circuit's decision below epitomizes such concerns.

Commentators have critiqued the intermediate standard of scrutiny applied to restrictions on expressive conduct as lacking safeguards, leading courts to engage in an "undifferentiated balancing" whereby the government often enjoys a "substantial advantage." Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 821 (2007) (finding that courts rejected First Amendment claims in almost three-quarters of cases where the court applied the intermediate scrutiny standard).

This undifferentiated balancing arises, in part, from the fact this Court has provided "little guidance" for how to weigh the "value of speech in the course of [such] balancing." *Id.* at 823. Differentiation is important because, as this Court has recognized, not all speech is equal. The kind of speech covered by the test in *O'Brien* encompasses a broad spectrum of expressive conduct, from conduct at the heart of political expression all the way to "nude dancing," the latter of which is in the "outer ambit" of the First Amendment's protection. *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion) (upholding city's ordinance proscribing nudity in public places under the *O'Brien* standard).

The kind of political expression in which Porter engaged goes to the core of the interests that the First Amendment seeks to protect. *Roth* v. *United States*, 354 U.S. 476, 484 (1957) (the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"). Expression that pertains to public and political affairs "is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74–75 (1964). Such expression "has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey* v. *Brown*, 447 U.S. 455, 467 (1980)). For that reason, the Ninth Circuit's imprimatur of California's categorical ban of a form of expression which is central to how Americans show support for political and civic causes is all the more troubling. This Court should grant Porter's petition to reaffirm that the intermediate level of scrutiny established in *O'Brien* requires more than the perfunctory level of constitutional scrutiny the Ninth Circuit applied to Section 27001.

IV. The Questions Presented Are Important, And This Case Is An Ideal Vehicle To Resolve Them.

Both of the questions presented are important. The first question addresses a circuit split over the government's burden to prove its speech restrictions further its purported interest in public safety. And the second question addresses a conflict over the government's ability to categorically ban a form of

expressive conduct or speech without demonstrating it has first tried—or at least seriously considered—using less restrictive alternatives. The Ninth Circuit has created a split of authority with several other courts of appeals on both of these questions and at least one state supreme court on the second question. Both splits warrant resolution by this Court.

These questions are critically important because the Ninth Circuit's approach condones criminalizing a long-standing form of political expression. Seemingly emboldened by the Ninth Circuit's decision, there have already been instances of law enforcement publicly broadcasting to citizens at demonstrations—and passing motorists—that honking can lead to criminal prosecution. See Lynette Rice, *Law Enforcement Warns Strike Supporters Outside Warner Bros About Excessive Horn Use*, DEADLINE (May 11, 2023), bit.ly/44JM4yn.

At least forty other states and the Uniform Vehicle Code provide similar prohibitions on non-warning honking. See Pet. App. 61a–68a. As a result, the Ninth Circuit's decision and its holding that expressive honking can be subject to criminal prosecution in all circumstances risks chilling speech across the country. If the decision below is allowed to stand, everyday Americans engaging in a core form of political expression—and one that has become only more common in recent years—run the risk of criminal prosecution under such laws. It is difficult to imagine a more direct and pervasive chilling effect on protected speech. Such a chilling effect is anathema to this Court's First Amendment

jurisprudence, and this Court's review is therefore warranted.

This case is an ideal vehicle to resolve both questions presented. The Ninth Circuit's analysis of these issues was essential to its decision: the court's determination turned on its holdings that California was neither required to provide any actual evidence its law furthered its purported interest in traffic safety, nor demonstrate that it had first tried—or at least seriously considered—using less restrictive alternatives. If the Ninth Circuit had adopted the position taken by the other courts of appeals and the Washington Supreme Court—which was reflected in the dissent below—then the outcome of the case necessarily would have been different.

CONCLUSION

Allowing the Ninth Circuit's decision to stand would cast a pall over ordinary citizens who will be deterred from honking their horns in support of political causes close to their heart—a long-standing practice—for fear of criminal prosecution. The Court should, therefore, grant certiorari and address the fundamental constitutional issues at stake.

Respectfully submitted,

THOMAS R. BURKE
Counsel of Record
THAILA K. SUNDARESAN
DAVIS WRIGHT TREMAINE LLP
50 California Street
23rd Floor
San Francisco, CA 94111

ANDREW G. ROW
DAVIS WRIGHT TREMAINE LLP
865 S. Figueroa Street
Suite 2400
Los Angeles, CA 90017

MARYANN ALMEIDA
DAVIS WRIGHT TREMAINE LLP
920 5th Avenue
Suite 3300
Seattle, WA 98104

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

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