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APPENDIX A

FOR PUBLICATION

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; AMANDA RAY, as successor to Warren Stanley, in her official capacity as Commissioner of California Highway Patrol, *Defendants-Appellees*, and WARREN STANLEY, *Defendant.*	No. 21-55149 D.C. No. 3:18-cv-01221-GPC-LL ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Southern District of California
Gonzalo P. Curiel, District Judge, Presiding

Argued and Submitted March 7, 2022
Submission Vacated March 17, 2022
Resubmitted March 31, 2023
Pasadena, California

Filed April 7, 2023
Amended May 22, 2023

Before: Marsha S. Berzon and Michelle T. Friedland, Circuit Judges, and Edward R. Korman,* District Judge.

Order;
Opinion by Judge Friedland;
Dissent by Judge Berzon

SUMMARY**

Civil Rights

The panel affirmed the district court's summary judgment in favor of the State of California in an action challenging a California law that prohibits honking a vehicle's horn except when reasonably

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* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

necessary to warn of a safety hazard. Cal. Veh. Code § 27001.

Plaintiff was cited for misuse of a vehicle horn under Section 27001 after she honked in support of protestors gathered outside a government official's office. Although the citation was dismissed, Porter filed suit to block future enforcement of 27001 against any expressive horn use—including honks not only to "support candidates or causes" but also to "greet friends or neighbors, summon children or co-workers, or celebrate weddings or victories." She asserted that Section 27001 violates the First and Fourteenth Amendments as a content-based regulation that is not narrowly tailored to further a compelling government interest. Alternatively, she argued that even if the law is not content based, it burdens substantially more speech than necessary to protect legitimate government interests.

The panel first held that plaintiff had standing to challenge the law because, ever since she received a citation for impermissible horn use, she has refrained from honking in support of political protests to avoid being cited again.

Addressing the merits, the panel determined that at least in some 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. The panel next held that because section 27001 applies evenhandedly to all who wish to use a horn when a safety hazard is not present, it draws a line based on the surrounding factual situation, not based on the content of

expression. The panel therefore evaluated Section 27001 as a content-neutral law and applied intermediate scrutiny. The panel concluded that Section 27001 was narrowly tailored to further California's substantial interest in traffic safety, and therefore that it passed intermediate scrutiny. The panel noted that plaintiff had not alleged that the State has a policy or practice of improper selective enforcement of Section 27001, so the panel had no occasion to address that possibility here.

Dissenting, Judge Berzon would hold that Section 27001 does not withstand intermediate scrutiny insofar as it prohibits core expressive conduct, and is therefore unconstitutional in that respect. The majority's fundamental error was that it failed to sufficiently focus on the specific type of enforcement at the core of this case—enforcement against honking in response to a political protest. Honking at a political protest is a core form of expressive conduct that merits the most stringent constitutional protection, and is, in that respect, qualitatively different from warning honks and other forms of vehicle horn use. Section 27001 violates the First Amendment because defendants have not shown that the statute furthers a significant government interest as applied to political protest honking, and because the statute is not narrowly tailored to exclude such honking. Judge Berzon would grant an injunction prohibiting the enforcement of Section 27001 against political protest honking.

COUNSEL

John David Loy (argued), First Amendment Coalition, San Rafael, California; J. Mark Waxman, Mikle S. Jew, Lindsey L. Pierce, and Benjamin J. Morris, Foley & Lardner LLP, San Diego, California; for Plaintiff-Appellant.

Jeffrey P. Michalowski (argued), Quarles & Brady LLP, San Diego, California; Timothy M. White, Senior Deputy, Office of County Counsel, County of San Diego, San Diego, California; for Defendant-Appellee Kelly Martinez, Sheriff of San Diego County.

Sharon L. O'Grady (argued), Deputy Attorney General; Paul E. Stein, Supervising Deputy Attorney General; Thomas S. Patterson, Senior Assistant Attorney General; Rob Bonta, Attorney General of California; Office of the California Attorney General; San Francisco, California; for Defendant-Appellee Amanda Ray, commissioner of California Highway Patrol.

David Snyder, First Amendment Coalition, San Rafael, California; G.S. Hans, Cornell Law School, Ithaca, New York; for Amicus Curiae First Amendment Coalition.

ORDER

The opinion filed on April 7, 2023, from which Judge Berzon dissented, is amended as follows, with Judge Berzon dissenting from the amendment as well:

Page 18, Footnote 6: Change <Indeed, when pressed at oral argument on whether she sought to enjoin the statute as applied only to political honking, she expressly disavowed any such limitation of her argument, firmly replying that she sought to enjoin enforcement against "all expressive conduct through use of a vehicle horn."> to <Indeed, when pressed at oral argument on whether she sought to enjoin the statute as applied only to political honking or as applied to all expressive conduct, Porter's counsel expressly disavowed any such limitation of Porter's argument: "We would ask ultimately for an injunction that prohibited enforcement against all expressive conduct through use of a vehicle horn. 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 decide that in its discretion based on the record and evidence. Our position as plaintiff is that yes, the First Amendment would prohibit enforcement of the statute against all expressive horn use, be it personal or political." Oral Arg. at 00:07:50-00:08:51. At other times in the oral argument, Porter's counsel again said that the district court would have discretion in crafting an injunction, but never backed away from the notion that Porter's challenge was to Section 27001's prohibition on all expressive honking.>

With that amendment, Judge Friedland has voted to deny the petition for rehearing en banc, and Judge Korman so recommends. Judge Berzon recommends granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED.** No future petitions for rehearing or rehearing en banc will be entertained.

OPINION

FRIEDLAND, Circuit Judge:

Appellant Susan Porter brings a First Amendment challenge to a California law that prohibits honking a vehicle's horn except when reasonably necessary to warn of a safety hazard. We hold that Porter has standing to challenge that law because, ever since she received a citation for impermissible horn use, she has refrained from honking in support of political protests to avoid being cited again. Applying intermediate scrutiny, we affirm the district court's rejection of Porter's constitutional challenge.

I.

A.

California has regulated the use of automobile warning devices such as horns since the dawn of the automobile. In 1913, five years after the introduction of the Model T Ford, California adopted the first version of the law challenged here:

> Every motor vehicle shall be equipped with a bell, gong, horn, whistle or other device in good working order, capable of emitting an abrupt sound adequate in quality and volume to give warning of the approach of such vehicle to pedestrians and to the riders or drivers of animals or of other vehicles and to persons entering or leaving street, interurban and railroad cars. No person shall sound such bell, gong, horn,

> whistle or other device for any purpose except as a warning of danger.

Act of May 31, 1913, ch. 326, § 12, 1913 Cal. Stat. 639, 645; *see* Robert Casey, *The Model T: A Centennial History* 1 (2008). Today, the relevant provision of the California Vehicle Code provides:

> (a) The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn.
>
> (b) The horn shall not otherwise be used, except as a theft alarm system.

Cal. Veh. Code § 27001 ("Section 27001"). Section 27001 "applies to all vehicles whether publicly or privately owned when upon the highways." *Id. §* 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. Forty other states and the Uniform Vehicle Code provide similar limitations on the use of vehicle horns. *See* Appendix.

Section 27001 is in a division of the California Vehicle Code regulating the required equipment for vehicles in California. *See id.* div. 12 ("Equipment of Vehicles"). That division of the Code contains various other limitations on the use of equipment for safety purposes. *See, e.g., id. §* 25268 ("No person shall display a flashing amber warning light on a vehicle as permitted by this code except when an unusual traffic

hazard exists."); *id.* § 25269 ("No person shall display a flashing or steady burning red warning light on a vehicle except as permitted by Section 21055 or when an extreme hazard exists."). The Vehicle Code is enforced by the California Highway Patrol and by local law enforcement agencies.

B.

In 2017, Susan Porter drove her car past a group of protesters gathered outside a government official's office—a protest that, minutes earlier, she herself had been attending. As she drove down the street, which was located between a residential area and a six-lane freeway, Porter honked in support of the protesters. A sheriff's deputy pulled her over and gave her a citation for misuse of a vehicle horn under Section 27001. Porter's citation was later dismissed when the sheriff's deputy failed to attend Porter's traffic court hearing. Porter subsequently brought this action challenging the constitutionality of Section 27001.

Porter's Complaint seeks declaratory and injunctive relief against the Sheriff of San Diego County ("the Sheriff") and the Commissioner of the California Highway Patrol ("CHP") in their official capacities (collectively, "the State"[1]). She contends that Section 27001 violates the First and Fourteenth

[1] The Sheriff joins all of CHP's arguments about the constitutionality of Section 27001. Those arguments address all the issues we need to reach to affirm, so we do not consider any arguments that are specific to the Sheriff, including her argument that she is not liable under *Monell v. Department of Social Services,* 436 U.S. 658 (1978).

Amendments as a content-based regulation that is not narrowly tailored to a compelling government interest. Alternatively, she argues that even if the law is not content based, it is a content-neutral regulation that burdens substantially more speech than necessary to protect legitimate government interests. Porter alleges that she drives by rallies, protests, and demonstrations in San Diego County and elsewhere in California and would like to express her support for these events by honking. She alleges that she now refrains from using her horn for such purposes because she fears enforcement of Section 27001. Porter seeks to block enforcement of Section 27001 against what she calls "expressive" honking. In Porter's view, expressive horn use includes honks not only to "support candidates or causes" but also to "greet friends or neighbors, summon children or co-workers, or celebrate weddings or victories."

The State moved to dismiss Porter's First Amendment claim. The State argued that even if Section 27001 governs expressive activity, the law is content neutral and reasonably furthers California's interests in promoting traffic safety and reducing noise pollution. Applying intermediate scrutiny, the district court concluded that, on the pleadings at least, the State had "defaulted on [its] burden of showing that honks such as Plaintiff's undermine the government's interest in traffic safety and noise control." Accordingly, the district court refused to dismiss the First Amendment claim.

The parties proceeded to discovery and eventually filed cross-motions for summary judgment. In support of the noise-control rationale for Section 27001, the

State submitted numerous government reports and scientific articles discussing the contributions honking and other traffic sounds can make to noise pollution, and the dangers noise pollution poses to human health.

In support of the traffic-safety rationale, the State relied heavily on the expert testimony of Sergeant William Beck, a twenty-four-year veteran of CHP. Sergeant Beck opined that "when a vehicle horn is used improperly, it can create a dangerous situation by startling or distracting drivers and others," and that "the vehicle horn's usefulness as a warning device would be diminished if law enforcement officers were unable to enforce Vehicle Code section 27001." He explained:

> Absent Vehicle Code section 27001, people would be free to, and could be expected to, use the horn for purposes unrelated to traffic safety. That would, in turn, diminish the usefulness of the vehicle horn for its intended purpose, which is to be used as a warning or for other purposes related to the safe operation of a vehicle.

When asked in a deposition, Sergeant Beck admitted that he was unaware of any "specific accident or collision that was caused by the use of a vehicle horn." Porter's rebuttal expert, Dr. Peter Hancock, criticized Sergeant Beck's opinions about the link between Section 27001 and traffic safety as unsupported by scientific studies; relying in part on these criticisms, Porter moved unsuccessfully to exclude Sergeant

Beck's expert testimony under Federal Rule of Evidence 702.

The district court entered summary judgment in favor of the State. After holding that Porter had standing to bring a pre-enforcement challenge based on self-censorship, the district court repeated its earlier conclusion that Section 27001 is content neutral and subject to intermediate scrutiny. The court excluded the State's government and scientific reports as hearsay but held that, although the State "ha[d] offered little in the way of scientific studies that [wa]s not hearsay, ... history, consensus, common sense, and the declaration of Sergeant Beck support[] the [State's] proffered justification[s]." The court concluded that California's interests in maintaining traffic safety and reducing noise pollution are significant, and that Section 27001 is narrowly tailored to serve those interests.

Porter timely appealed.

II.

We evaluate standing de novo. *California v. Azar,* 911 F.3d 558, 568 (9th Cir. 2018). We also review de novo an order granting summary judgment. *Italian Colors Rest. v. Becerra,* 878 F.3d 1165, 1171 (9th Cir. 2018).

III.

To establish Article III standing, a plaintiff must show that she suffered an injury in fact, the injury is fairly traceable to the challenged conduct of the defendant, and it is likely that her injury will be

redressed by a favorable judicial decision. *Italian Colors Rest. v. Becerra,* 878 F.3d 1165, 1171 (9th Cir. 2018). "First Amendment challenges 'present unique standing considerations' because of the 'chilling effect of sweeping restrictions' on speech." *Id.* at 1171 (quoting *Ariz. Right to Life Pol. Action Comm. v. Bayless,* 320 F.3d 1002, 1006 (9th Cir. 2003)). "[W]here a plaintiff has refrained from engaging in expressive activity for fear of prosecution under the challenged statute, such self-censorship is a constitutionally sufficient injury as long as it is based on an actual and well-founded fear that the challenged statute will be enforced." *Libertarian Party of L.A. v. Bowen,* 709 F.3d 867, 870 (9th Cir. 2013) (alteration in original) (quoting *Human Life of Wash. Inc. v. Brumsickle,* 624 F.3d 990, 1001 (9th Cir. 2010)). To assess the credibility of a claimed threat of enforcement, we have looked to factors such as "(1) whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate [enforcement] proceedings, and (3) the history of past prosecution or enforcement under the challenged statute."[2] *Id.* (quoting *McCormack v. Hiedeman,* 694 F.3d 1004, 1021 (9th Cir. 2012)).

The State argues that Porter has not established a well-founded fear because she has not shown a concrete plan for expressive honking and she previously "honked only at the single protest at which she was cited." The State's argument is unpersuasive.

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[2] As discussed below, we conclude that honking can constitute expressive activity.

Porter testified: "[I]f I was driving down the freeway and there was a banner that said 'Support Our Veterans,' I now would not honk my horn because the CHP could pull me over." She also described driving by specific political protests where she had wished to honk to show her support but refrained from doing so to avoid receiving another citation. Porter's testimony is specific enough to show that her expressive activity is being chilled.

The State next argues that the odds of anyone being cited for honking are "vanishingly small." For example, CHP points out that it issues an average of eighty citations per year for Section 27001 violations. Similarly, evidence in the record shows that in recent years the Sheriff's Department has issued approximately eight citations per year under Section 27001. But both CHP and the Sheriff nevertheless do enforce Section 27001, and they do not disclaim their ability to do so in cases of expressive honking. That Porter was cited the one time she honked in support of a protest is "good evidence that the threat of enforcement is not 'chimerical.'" *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 164 (2014) (quoting *Steffel v. Thompson,* 415 U.S. 452, 459 (1974)). Whatever the statistical likelihood of any driver's receiving a Section 27001 citation, Porter's own experience supports "an actual and well-founded fear that the challenged statute will be enforced" against her. *Bowen,* 709 F.3d at 870 (quoting *Human Life,* 624 F.3d at 1001). Porter has thus shown a concrete injury in the form of self-censorship caused by Section 27001.

The State further argues that Porter's alleged injury is not redressable, contending that a statewide injunction to protect expressive honking would be unconstitutionally vague and would raise concerns about federalism. But those concerns go to the proper scope of any remedy, not the "constitutional minimum" of redressability, which "depend[s] on the relief that federal courts are *capable* of granting." *Kirola v. City & County of San Francisco,* 860 F.3d 1164, 1176 (9th Cir. 2017). Because the district court *could* declare Section 27001 unconstitutional and unenforceable in its entirety, thereby redressing Porter's alleged injury, we conclude that the redressability requirement is satisfied. We therefore proceed to the merits of Porter's First Amendment challenge.

IV.

The First Amendment "literally forbids the abridgment only of 'speech,'" but its protections "do[] not end at the spoken or written word." *Texas v. Johnson,* 491 U.S. 397, 404 (1989). Conduct—such as burning a flag, wearing a black armband, or staging a sit-in—"may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Id.* (quoting *Spence v. Washington,* 418 U.S. 405, 409 (1974) (per curiam)); *see also id.* at 406 (holding that burning an American flag at a political protest was protected expression); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 505-06 (1969) (holding that wearing black armbands to protest the war in Vietnam was protected expression); *Brown v. Louisiana,* 383 U.S. 131, 141-42 (1966) (holding that a silent sit-in to

protest racial segregation in a public library was protected expression). "Non-verbal conduct implicates the First Amendment when it is intended to convey a 'particularized message' and the likelihood is great that the message would be so understood." *Nunez v. Davis,* 169 F.3d 1222, 1226 (9th Cir. 1999) (quoting *Johnson,* 491 U.S. at 404)). That said, "a narrow, succinctly articulable message is not a condition of constitutional protection" for expressive conduct. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515* U.S. 557, 569 (1995).

In "quintessential public forums" such as streets, parks, and other "places which by long tradition ... have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed." *Perry Educ. Ass 'n v. Perry Loc. Educators ' Ass 'n,* 460 U.S. 37, 45 (1983). "The government bears the burden of justifying the regulation of expressive activity in a public forum." *Berger v. City of Seattle,* 569 F.3d 1029, 1035 (9th Cir. 2009) (en banc).

When considering a First Amendment challenge to a law regulating expression in a public forum, we ask first whether the law is content based or content neutral. *United States v. Swisher,* 811 F.3d 299, 311 (9th Cir. 2016) (en banc). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The "crucial first step in the content-neutrality analysis," the Supreme Court has instructed, is "determining whether the law is content neutral on its face"—that is, whether it "draws

distinctions based on the message a speaker conveys." *Id.* at 163, 165. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 165 (quoting *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429 (1993)). The second step in the content-neutrality analysis is to ask whether the law is content based in its justification. Even "facially content neutral" regulations will be considered content based if they "cannot be 'justified without reference to the content of the regulated speech'" or "were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* at 164 (alteration in original) (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989)).

The threshold content-neutrality question is often critical. "It is rare that a regulation restricting speech because of its content will ever be permissible," *United States v. Playboy Ent. Grp., Inc.,* 529 U.S. 803, 818 (2000), because such a regulation must satisfy strict scrutiny—that is, "the regulation is valid only if it is the least restrictive means available to further a compelling government interest," *Berger,* 569 F.3d at 1050. By contrast, a content-neutral regulation of expression must meet the less exacting standard of intermediate scrutiny. *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 642 (1994). For content-neutral rules governing expressive conduct, then, a regulation is constitutional "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression

of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien,* 391 U.S. 367, 377 (1968); *see Swisher,* 811 F.3d at 312.[3]

A.

The parties do not dispute that Section 27001 effectively forbids drivers from honking in public forums unless there is a traffic-safety reason to do so. That makes sense, because Section 27001 applies on public streets, which are "the archetype of a traditional public forum." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* 657 F.3d 936, 945 (9th Cir. 2011) (en banc) (quoting *Snyder v. Phelps,* 562 U.S. 443, 456 (2011)).[4]

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.

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[3] The *O'Brien* test is substantively equivalent to the requirement that a content-neutral time, place, or manner restriction on speech be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 293, 298 & n.8 (1984); *see Swisher,* 811 F.3d at 312 & n.7 (explaining that the two tests are equivalent). In the analysis that follows, we therefore rely on cases applying either test.

[4] Presumably because Section 27001 applies in some public forums, the State concedes that intermediate scrutiny applies to our evaluation of the statute's constitutionality. Given that concession, and because we conclude that the law survives intermediate scrutiny, we need not decide whether all the places in which Section 27001 applies are public forums.

Whether conduct such as honking is "sufficiently imbued with elements of communication" to be protected expression depends on "the nature of [the] activity, combined with the factual context and environment in which it was undertaken." *Spence,* 418 U.S. at 409-10. The protest at which Porter received a Section 27001 citation provides an example. Porter attended the protest and, while departing in her car, honked her horn in three clusters of short beeps, for a total of fourteen beeps. She later testified that her intent was to show support for the protest. The crowd cheered, suggesting that the group with which she had just been protesting understood her intended message. Porter's experience shows that, at least in some 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." *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 294 (1984). Of course, a honk is just a noise, so it may not always be understood—indeed, it may be particularly susceptible to being misunderstood given the inflexibility of the medium. A driver honking while passing by a protest might be expressing support, expressing disagreement, or signaling to another driver that continuing to change lanes could cause an accident. But the nature and circumstances of the honk will sometimes provide the necessary context for the message intended by the honk to be understood. Although we do not define today the full scope of expressive honking, we hold that enough honks will be understood in context to

treat Section 27001 as prohibiting some expressive conduct.[5]

B.

We next consider whether Section 27001 is a content-based regulation of expressive honking.[6]

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[5] Porter's Complaint purported to challenge Section 27001 both (1) on its face and (2) as applied to expressive horn use, though at times in the litigation she has seemed to use these phrases interchangeably. Those challenges are probably not entirely equivalent, because some horn use seems neither safety-related nor expressive. For example, a driver might honk along to the beat of music, or a child might reach over the driver to honk the horn for fun. Ultimately, however, we need not decide whether Porter's claim is best described as an as-applied or facial challenge (or both). Our constitutional analysis will be the same either way because "the substantive legal tests used in [facial and as-applied] challenges are 'invariant.'" *Hoye v. City of Oakland,* 653 F.3d 835, 857 (9th Cir. 2011) (quoting *Legal Aid Servs. of Or. v. Legal Servs. Corp.,* 608 F.3d 1084, 1096 (9th Cir. 2010)).

[6] The dissent argues that Section 27001 is unconstitutional as applied to *political* honking—specifically, "honking in response to a political protest." But Porter herself has not advanced that argument, contending instead that the statute is unconstitutional as applied to *all* expressive honking, which under her definition includes honking to communicate greetings and celebratory sentiments, among other things. Indeed, when pressed at oral argument on whether she sought to enjoin the statute as applied only to political honking or as applied to all expressive conduct, Porter's counsel expressly disavowed any such limitation of Porter's argument:

> "We would ask ultimately for an injunction that prohibited enforcement against all expressive conduct through use of a vehicle horn. 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

Again, Section 27001 provides that "[t]he driver of a motor vehicle when reasonably necessary to [e]nsure safe operation shall give audible warning with his horn," but that "[t]he horn shall not otherwise be used, except as a theft alarm system."[7] Cal. Veh. Code § 27001. Porter argues that Section 27001 is content based "on its face" because it "draws distinctions based on the message a speaker conveys." *Reed,* 576 U.S. at 163.

> court would decide that in its discretion based on the record and evidence. Our position as plaintiff is that yes, the First Amendment would prohibit enforcement of the statute against all expressive horn use, be it personal or political."

Oral Arg. at 00:07:50-00:08:51. At other times in the oral argument, Porter's counsel again said that the district court would have discretion in crafting an injunction, but never backed away from the notion that Porter's challenge was to Section 27001's prohibition on all expressive honking. Taking Porter at her word, we decide only whether the statute is unconstitutional on its face or as applied to all expressive honking. *See Bell v. Wilmott Storage Servs., LLC,* 12 F.4th 1065, 1071 n.8 (9th Cir. 2021) (declining to consider certain arguments where the defendant failed to make the relevant arguments in its briefing and disclaimed such arguments at oral argument); *cf. Greenlaw v. United States,* 554 U.S. 237, 243 (2008) ("[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."). We emphasize that although Porter's Article III standing stems from the citation she received after honking at a protest, that citation was dismissed, and no aspect of her current arguments or our analysis of them turns on the particular facts of that incident.

[7] Use of a horn as a theft alarm is part of an automatic system, not a honk initiated by the driver. *See* Cal. Veh. Code. § 28085. Porter does not argue that the exception for theft alarms is a content-based distinction.

We disagree. Even if we were to accept Porter's questionable assertion that honking to give a warning is a form of expression, the relevant distinction Section 27001 makes is not, as Porter suggests, between honks intended to convey warnings and honks intended to convey other messages. Rather, the law prohibits *all* driver-initiated horn use except when such use is "reasonably necessary to [e]nsure safe operation" of the vehicle. Thus, while it may be that Section 27001 prohibits some expressive conduct, the primary distinction the statute makes does not depend on the message that might be conveyed. Section 27001 does not single out for differential treatment, for example, political honking, ideological honking, celebratory honking, or honking to summon a carpool rider. Instead, the law "applies evenhandedly to all who wish to" use the horn when a safety hazard is not present. *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 649 (1981). Section 27001 draws a line based on the surrounding factual situation, not based on the content of expression.[8]

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[8] It is true that, in those safety-related situations where honking is permitted, Section 27001 permits the driver to honk only to "give audible warning." But Porter has not argued that it violates the First Amendment to allow only warning, but not other, honks when a warning honk is "reasonably necessary to [e]nsure safe operation" of the vehicle. Moreover, Porter likely would not have standing to challenge an alleged content-based distinction in the context of a scenario where honking is "reasonably necessary to [e]nsure safe operation" of the vehicle. After all, the honk she was cited for did not occur in such a situation, and she never has claimed to want to give non-warning honks when a safety concern is present.

Porter contends that Section 27001 is content based on its face because an officer must "'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley,* 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 383 (1984)). But to conclude that a honk complies with the statute, an officer need not examine the "content" of the honk the way one might read a sign or evaluate a spoken statement—he need only observe the traffic circumstances and determine if a safety risk is present. For instance, the sheriff's deputy who cited Porter explained that he "was watching the traffic" and "didn't see an emergency" when Porter honked, so he decided to pull her over.

In any event, even if evaluating the traffic-related *context* of a honk involves listening to the sound of the horn—and thus could be seen as analogous to reading a sign to evaluate its content—the Supreme Court recently rejected as "too extreme an interpretation of [its] precedent" a rule "that a [sign] regulation cannot be content neutral if it requires reading the sign at issue." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC,* 142 S. Ct. 1464, 1471 (2022). In *City of Austin,* the Court considered a challenge to a city ordinance that distinguished between "off-premises" and "on-premises" signs—that is, "between signs (such as billboards) that promote ideas, products, or services located elsewhere and those that promote or identify things located onsite." *Id.* at 1469. The Court explained that the most recent case in which it had held a sign ordinance to be content based, *Reed v. Town of Gilbert,* had involved "a comprehensive sign code that 'single[d] out specific subject matter for

differential treatment.'" *Id.* at 1471 (alteration in original) (quoting *Reed,* 576 U.S. at 169); *see also Reed,* 576 U.S. at 160-61 (discussing an ordinance with different rules for "ideological" signs, "political" signs, and "temporary directional" signs relating to events "sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization"). In *City of Austin,* by contrast, the Court held that the sign ordinance was content neutral because "the City's off-premises distinction require[d] an examination of speech only in service of drawing neutral, location-based lines. It [was] agnostic as to content." 142 S. Ct. at 1471.

Indeed, the Supreme Court has "consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." *Id.* at 1473. As the Court emphasized in *City of Austin,* it has treated as content neutral regulations of solicitation—"that is, speech 'requesting or seeking to obtain something' or '[a]n attempt or effort to gain business,'" *Id.* (alteration in original) (quoting *Solicitation,* Black's Law Dictionary (11th ed. 2019))—even though enforcement requires an examination of the speaker's message. The Court explained:

> To identify whether speech entails solicitation, one must read or hear it first. Even so, the Court has reasoned that restrictions on solicitation are not content based and do not inherently present "the potential for becoming a means of suppressing a particular point

> of view," so long as they do not discriminate based on topic, subject matter, or viewpoint.

Id. (quoting *Heffron,* 452 U.S. at 649).

Under these cases, the fact that an officer, after hearing the sound of a honk, would need to look at the surroundings for a traffic hazard before deciding if the honk was "reasonably necessary to [e]nsure safe operation" of the vehicle, does not render the limitation on honking a content-based regulation of expression. Such an examination—like evaluating a message to determine if it is solicitation, or reading a sign to see if it is on-premises or off-premises advertising—"do[es] not inherently present 'the potential for becoming a means of suppressing a particular point of view.'" *Id.* (quoting *Heffron,* 452 U.S. at 649).

Turning to the final step of the content-neutrality inquiry, we have no concern that Section 27001 "cannot be 'justified without reference to the content of the regulated speech'" or was "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed,* 576 U.S. at 164 (alteration in original) (quoting *Ward,* 491 U.S. at 791). Porter does not argue that Section 27001 is justified by anything other than the safe operation of motor vehicles and noise reduction, nor does she argue that the California legislature was motivated by disagreement with any particular expressive use of the vehicle horn. Aware of no evidence that would have supported such arguments, we proceed to

evaluate Section 27001 as a content-neutral law, applying intermediate scrutiny.

C.

To survive intermediate scrutiny, a content-neutral regulation of expressive conduct must "further[] an important or substantial governmental interest," that interest must be "unrelated to the suppression of free expression," and the "incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *O'Brien,* 391 U.S. at 377. To be no more burdensome "than is essential to the furtherance of" the government's interest, *id.,* a regulation "need not be the least restrictive or least intrusive means" of serving that interest. *Ward,* 491 U.S. at 798. But the "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 799. The regulation must also "leave open ample alternative channels for communication of the information." *Clark,* 468 U.S. at 293.

1.

We first consider whether Section 27001 furthers a substantial government interest that is unrelated to the suppression of free expression. The State asserts that Section 27001 furthers its interest in traffic safety. There can be no doubt that this interest is substantial. *See Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 507-08 (1981) (holding that traffic safety is a "substantial governmental goal[]"). And California's interest in traffic safety is unrelated to

the suppression of free expression; Porter does not contend otherwise. But our inquiry does not end there, because when the government seeks to regulate expression, even incidentally, to address anticipated harms, it must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner,* 512 U.S. at 664. That is, we must be persuaded that the law actually furthers the State's asserted interests.

The asserted interest in traffic safety appears on the face of the statute itself. Section 27001's first subsection provides that the driver of a motor vehicle shall, "when reasonably necessary *to &insure safe operation,"* "give audible warning with his horn." Cal. Veh. Code § 27001(a) (emphasis added). The second subsection then dictates that "[t]he horn shall not otherwise be used, except as a theft alarm system." *Id. §* 27001(b). These twin commands make logical sense: For the horn to serve its intended purpose as a warning device, it must not be used indiscriminately.[9]

The State's expert testimony supports that logic. Drawing on his decades of experience working for the

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[9] The dissent contends that this justification for Section 27001 is undercut by the statute's lack of enforcement. There is no evidence in the record, however, indicating that the statute is indeed rampantly underenforced. The State acknowledges that citations for violations of the statute are rare, but this says nothing about how frequently the statute is *violated—citations* could be rare for the simple reason that violations are rare. To the extent that the dissent relies on Lieutenant Munsey's comment to Deputy Klein as evidence of underenforcement, that comment's meaning is too hard to decipher to support the dissent's claim that "Section 27001 is pretty much a dead letter."

CHP, Sergeant Beck explained that "the horn itself is a great warning device for traffic safety" because it allows drivers to "communicate if there's a hazardous situation." He went on to opine that indiscriminate horn use could dilute the potency of the horn as a warning device, testifying that if law enforcement officers were unable to enforce Section 27001, "the public in general would . . . [think it was] okay to use your horn whenever you want for whatever purpose." He said that, as a result, "people would not recognize the horn as something that's used for safety or to warn them of a hazard" and "the effectiveness of the horn would be diminished." In other words, the more drivers honk in protest, or in greeting, or for no reason at all, the less likely people are to be alerted to danger by the sound of a horn.

Sergeant Beck also explained that indiscriminate horn use can distract other drivers and pedestrians. He opined that, "when a vehicle horn is used improperly, it can create a dangerous situation by startling or distracting drivers and others." Sergeant Beck explained that, in his own experience, the sound of a horn "makes me look up, take my eyes off what I'm doing, which could affect my safety." He also explained that honking can startle pedestrians in high-traffic areas, potentially putting them in harm's way.

Porter argues that the State has not met its burden to show that Section 27001 furthers traffic safety because it relied primarily on Sergeant Beck's testimony, which Porter contends was pure speculation and should not have been admitted. We disagree.

As an initial matter, the district court did not abuse its discretion in admitting Sergeant Beck's testimony under Federal Rule of Evidence 702. "The inquiry envisioned by Rule 702 is ... a flexible one." *Daubert v. Merrell Dow Pharms.,* 509 U.S. 579, 594 (1993). In evaluating expert testimony, the district court need not follow a "definitive checklist or test." *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 150 (1999) (quoting *Daubert,* 509 U.S. at 593). Where an expert offers non-scientific testimony, "reliability depends heavily on the *knowledge and experience* of the expert, rather than the methodology or theory behind" the testimony. *Hangarter v. Provident Life & Acc. Ins. Co.,* 373 F.3d 998, 1017 (9th Cir. 2004) (quoting *United States v. Hankey,* 203 F.3d 1160, 1169 (9th Cir. 2000)); *see also Kumho Tire,* 526 U.S. at 150 (explaining that the reliability inquiry "may focus upon personal knowledge or experience" of the witness).

The district court carefully considered Sergeant Beck's knowledge and experience before concluding that his opinions were relevant, reliable, and helpful to the court. The court pointed, for example, to Beck's "extensive experience working for the CHP, responding to car accidents, and training CHP cadets." To be sure, "reliability becomes more, not less, important when the 'experience-based' expert opinion is perhaps not subject to routine testing, error rate, or peer review type analysis, like science-based expert testimony." *United States v. Valencia-Lopez,* 971 F.3d 891, 898 (9th Cir. 2020). But "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire,*

526 U.S. at 152. The district court appropriately exercised that discretion here in concluding that Sergeant Beck's opinions were relevant, reliably grounded in his training and experience, and helpful to the court.

Sergeant Beck's decades of experience in highway patrol allowed him to elucidate "the practical realities" of Section 27001's relationship to traffic safety. Given that Sergeant Beck's experience comes from a world in which Section 27001 does exist, he could not reasonably be expected to opine authoritatively—contrary to what the dissent seems to suggest—on what traffic safety would be like in the absence of that statute.[10] He could, however, help the court assess the *current* relationship between Section 27001 and traffic safety.

Although Porter's expert criticized Sergeant Beck's opinions about the impact of enjoining Section 27001 enforcement against expressive activity, averring that they were "founded upon insufficiently representative observations" to be "scientifically reliable," he did not contend that

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[10] The dissent seems to assume that Section 27001 is effectively nonexistent. But Section 27001 does exist, and we take judicial notice of the fact that California's driver education materials, provided for anyone taking the test for a state driver's license, instruct that the horn should be used only "to let other drivers know you are there," "warn others of a hazard," "avoid collisions," or "alert oncoming traffic on narrow mountain roads where you cannot see at least 200 feet ahead"—all safety-related functions. *See* State of Cal. Dep't of Motor Vehicles, *California Driver's Handbook* 13 (2023), https://www.dmv.ca.gov/portal/file/california-driver-handbook-pdf.

Sergeant Beck's explanations were wrong—rather, he merely opined that "we don't have the science to support or deny" those explanations. In other words, studies on the issue simply do not exist. And Porter's own expert acknowledged that conducting a study to obtain such evidence would be both "very expensive" and "exceptionally difficult." Given the infeasibility of scientific studies on the topic, it was not inappropriate to treat Sergeant Beck as having gained expertise from his decades of experience enforcing traffic safety.

Once properly admitted, Sergeant Beck's testimony assisted the State in meeting its burden under intermediate scrutiny. The Supreme Court has instructed that courts must "never accept[] mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 392 (2000). But "the quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the [law's] justification." *Id.* at 391. In a case applying strict scrutiny to content-based restrictions around polling places, for instance, the Supreme Court has considered "[a] long history, a substantial consensus, and simple common sense" to be sufficient evidence to support the justification of protecting the fundamental right to vote. *Burson v. Freeman,* 504 U.S. 191, 211 (1992).

There is nothing novel about Section 27001's traffic-safety justification—in fact, it seems the California legislature had traffic safety in mind when it first enacted a version of Section 27001 in 1913. That early version of the law prohibited honking "for

any purpose except as a warning of danger." Act of May 31, 1913, ch. 326, § 12, 1913 Cal. Stat. 639, 645. The traffic-safety justification for restricting the use of the horn can also be seen in the vehicle codes of at least forty other states, indicating a near-nationwide consensus on the need for such laws. *See* Appendix; *see also, e.g.,* Del. Code Ann. tit. 21, § 4306(b) ("The driver of a vehicle shall, when reasonably necessary to insure safe operation, give audible warning with the horn but shall not otherwise use the horn for any other purpose."). This long history and consensus, coupled with the common-sense inference that the horn's usefulness as a warning tool will decrease the more drivers use it for any other function, support the State's asserted interest in traffic safety.

"Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner,* 512 U.S. at 665. Here—where the law has existed since the dawn of the automobile, forty other states have similar laws, the law's justification is so logical, and conducting the relevant studies would be prohibitively difficult and expensive—California does not need to produce new empirical evidence to justify Section 27001. "There might, of course, be [a] need for a more extensive evidentiary documentation" if Porter "had made any showing of [her] own to cast doubt" on the State's justifications. *Nixon,* 528 U.S. at 394. But Porter has done nothing to cast doubt on Sergeant Beck's testimony that Section 27001 helps guard against distracting honking, or 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. *See* Aesop, *The Shepherd Boy and the Wolf, in* Aesop's Fables 74, 74 (Boris Artzybasheff ed., Viking Press 1947) (1933) (telling the tale of a boy who cried "Wolf!" to trick local villagers so many times that later, when a wolf actually arrived and the boy "cried out in earnest," the "neighbors, supposing him to be at his old sport, paid no heed to his cries").[11]

Accordingly, we conclude that Section 27001 "furthers an important or substantial governmental interest" that is "unrelated to the suppression of free expression." *O'Brien,* 391 U.S. at 377.

2.

We are also persuaded that Section 27001 is narrowly tailored to further California's interest in traffic safety. The statute encourages the use of a vehicle's horn "when reasonably necessary to [e]nsure safe operation" and prohibits honking in all other circumstances—because, as explained above, honking when there is no hazard both dilutes the horn's usefulness as a safety device and creates dangers of its own. To be sure, most non-warning honks do not create distractions resulting in accidents, but we discern no plausible means by which California could permit non-distracting honks while prohibiting

[11] Contrary to Porter's suggestion, the exception for theft alarms does not undermine California's anti-dilution justification for Section 27001. Theft alarms sound very different from honking initiated by the driver, so they are unlikely to be mistaken for warning honks.

distracting honks.[12] And, regardless, *any* honking other than "when reasonably necessary to [e]nsure safe operation" of the vehicle undermines the

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[12] Porter points to a local ordinance in Rio Rancho, New Mexico, which provides: "No person shall ... operate a motor vehicle's equipment, including but not limited to the vehicle horn or lights, in such manner as to distract other motorists on the public way or in such a manner as to disturb the peace." Rio Rancho Mun. Code § 12-6-12.18(5). She argues that such a law would be more narrowly tailored to promoting traffic safety. Although "the existence of obvious, less burdensome alternatives is 'a relevant consideration in determining whether the fit between ends and means is reasonable,'" the State need not adopt "'the least restrictive or least intrusive means' available to achieve [its] legitimate interests." *Berger,* 569 F.3d at 1041 (first quoting *Cincinnati,* 507 U.S. at 417 n.13, then quoting *Ward,* 491 U.S. at 798). In any event, we are not persuaded that this sort of alternative law would achieve California's interest in traffic safety. A law against distracting honking might be counterproductive if it discouraged honking to warn others of danger. And, as the State notes, New Mexico has a statewide law similar to California's that instructs drivers to honk only when reasonably necessary to ensure traffic safety, but not otherwise—suggesting that the local ordinance does not need to achieve the same traffic safety goals as Section 27001, because a statewide law already has those goals covered. N.M. Stat. Ann. § 66-3-843(A).

The dissent also contends that local noise ordinances or California Penal Code § 415(2), which prohibits "maliciously and willfully disturb[ing] another person by loud and unreasonable noise," could allow the State more narrowly to achieve its interests in traffic safety and noise control. But Porter has offered no argument that such noise control provisions would achieve the State's goal of ensuring traffic safety. In any event, our holding rests on the state's interest in traffic safety alone. Because we conclude that Section 27001 is narrowly tailored to advancing California's substantial interest in traffic safety, we do not address the parties' arguments about the State's separate interest in noise control.

effectiveness of the horn when used for its intended purpose of alerting others to danger. Thus, by banning horn use in all other circumstances, the State "did no more than eliminate the exact source of the evil it sought to remedy." *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 808 (1984).

Finally, Section 27001 plainly leaves open ample alternative channels for people to communicate their ideas and messages, including from their cars. Porter argues that Section 27001 prevents spontaneous communication by drivers about protests or other events, but common sense and Porter's own testimony indicate otherwise. As Porter herself has done on numerous occasions, drivers can park their cars and attend political demonstrations on foot. They can also express agreement with protestors from their cars by waving, giving a thumbs up, or raising a fist as they drive by.[13] They can put bumper stickers on their cars. Although some people may find it more satisfying to honk in certain circumstances, "[w]e will not invalidate a regulation merely because it restricts the speaker's preferred method of communication." *United Bhd. of Carpenters & Joiners v. NLRB,* 540 F.3d 957, 969 (9th Cir. 2008); *see also Taxpayers for Vincent,* 466 U.S. at 812 ("[T]he First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places.").

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[13] The dissent theorizes that these options "would surely pose a greater threat to traffic safety than a honk." But there is no basis for the conclusion that briefly taking a hand off the wheel is more dangerous than startling others by honking.

We hold that Section 27001 is narrowly tailored to advancing California's substantial interest in traffic safety, and therefore that it passes intermediate scrutiny.

* * *

We make one final observation: It appears that Section 27001 citations are not common, and officers are taught to use "sound professional judgment" in deciding whether to give a warning or a citation for a violation of Section 27001. As the dissent aptly observes in footnote 6, such broad discretion *could* open the door to selective enforcement. Porter does not allege, however, that the State has a policy or practice of improper selective enforcement of Section 27001, so we have no occasion to address that possibility here.

V.

For the foregoing reasons, we affirm the district court's summary judgment in favor of the State.

BERZON, Circuit Judge, dissenting:

The majority today upholds a ban on a popular form of political expressive conduct—honking horns to support protests or rallies. Political protest "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown,* 447 U.S. 455, 467 (1980). Defendants' enforcement of California Vehicle Code Section 27001 prohibited Susan Porter from exercising her right to participate in political protest by honking in support of a

demonstration against an elected official.[1] Yet, there is no evidence in the record (or elsewhere, as far as I can determine) that such political expressive horn use jeopardizes traffic safety or frustrates noise control.

I therefore respectfully dissent. I would hold that Section 27001 does not withstand intermediate scrutiny insofar as it prohibits core expressive conduct, and is therefore unconstitutional in that respect.

I.

As a preliminary matter, but one critical to my larger concerns, I would hold—contrary to the majority's conclusion—that the district court's admission of the expert testimony of California Highway Patrol (CHP) officer Sergeant William Beck in support of Defendants' motion for summary judgment was an abuse of discretion.

"Before admitting expert testimony into evidence, the district court must perform a 'gatekeeping role' of ensuring that the testimony is both 'relevant' and 'reliable'" under Federal Rule of Evidence 702. *United States v. Ruvalcaba-Garcia,* 923 F.3d 1183, 1188 (9th Cir. 2019) (quoting *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 597 (1993)). The majority assumes that Beck's experience working for the CHP provided a reliable basis for his opinions as to Section 27001's impact on road safety. *See* Majority Op. 26-28. But

[1] The majority refers to the defendants, the Sheriff of San Diego County and the Commissioner of the California Highway Patrol, collectively as "the State." *See* Majority Op. 9. I use the term "Defendants" instead.

"reliability becomes more, not less, important when the 'experience-based' expert opinion is . . . not subject to routine testing, error rate, or peer review type analysis, like science-based expert testimony." *United States v. Valencia-Lopez,* 971 F.3d 891, 898 (9th Cir. 2020). An examination of the record reveals that Beck utterly failed to explain how his general law enforcement experience supported the specific opinions he enunciated regarding the impact of Section 27001-especially with regard to political protest honking—on traffic safety.

Beck declared that his opinions were based on his "24 years of experience working for the California Highway Patrol." Based on that experience alone, he opined that the improper use of a vehicle horn can create danger by startling or distracting others. But when asked during his deposition for the basis of this opinion, Beck couldn't articulate a reasoned explanation for the connection between his experience and that opinion. He did not provide a single example of an accident caused by *any* type of horn honking, let alone honking in support of a political protest.

Of the three examples he was able to give in which he was personally distracted by horn honking, two of the examples were safety-related honks, permissible under Section 27001, used to notify drivers "backing out" who "don't see other people that are behind them." In reciting the third example, Beck explained that he has been briefly startled "when I'm writing a citation" or "working a traffic collision" and "somebody blasts their horn for a reason." In none of these examples did Beck report any actual danger created by the honk. And, in any case, those examples

were based on Beck's personal experience, no different from anyone else's experience with horn honking and so unrelated to any "scientific, technical, or other specialized knowledge" or experience. *Compare* Fed. R. Evid. 701(c), *with* 702(a). The examples are therefore not admissible as a basis for expert opinion.

Beck also conjectured that a horn's usefulness as a warning device would be diminished if law enforcement officers were unable to enforce Section 27001. People, he supposed, would think it "okay to use your horn whenever you want for whatever purpose and I feel that people would not recognize the horn as something that's used for safety." He analogized the enforcement of Section 27001 to speeding laws and bicycle helmet laws, opining that "more people break [the] law if we're not out enforcing it."

One problem with this speculative testimony is that nothing in Beck's specific experiences as a CHP officer provides a basis for determining the effect of non-enforcement of traffic laws. He did not suggest that he has done, or read, any studies demonstrating a correlation between the degree of enforcement of speeding or bike helmet laws and the prevalence of violations of those laws. Nor did he aver, even anecdotally, that he had observed in his experience that fewer people speed or more people wear bike helmets in areas where the relevant statutes are enforced.

Moreover, and more importantly, Beck reported that, in his twenty-four-year career, he had stopped

people for a Section 27001 violation only "four or five times" and the last time he wrote a citation was "several years ago . . . probably around 2013, 2014." Thus, his opinion as to the salutary effect of actually enforcing Section 27001's ban on non-safety-related horn honking has no grounding in his own experience, as he has exceedingly rarely enforced the statute.

Finally, Beck opined that other laws, including local noise ordinances and California Penal Code Section 415(2), are inadequate alternatives to Section 27001.[2] But he stated that "I have not generally enforced local ordinances," that he was not aware of any local noise ordinances, and that he was not aware of any specific situation where enforcement of a local noise ordinance was an inadequate substitute for the absolute prohibition contained in Section 27001. He also stated that he had never personally enforced, nor seen an officer enforce, Section 415(2) against horn honking, nor was he aware of any specific problems that would arise were an officer to attempt to do so.

When an expert witness "is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Fed. R. Evid. 702 advisory committee's note to 2000 amendment. Although Beck's "qualifications and experience are relevant ...

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[2] Penal Code Section 415(2) provides that "[a]ny person who maliciously and willfully disturbs another person by loud and unreasonable noise .. . shall be punished" by imprisonment or fine.

the record contains no evidence as to why that experience, by itself, equals reliability for his testimony." *Valencia-Lopez,* 971 F.3d at 898, 900. An expert "must establish that reliable principles and methods underlie the particular conclusions offered." *United States v. Hermanek,* 289 F.3d 1076, 1094 (9th Cir. 2002). Beck could point to nothing specific in his experience as a CHP officer to substantiate his general speculations about the effect of horn honking on traffic safety, or any basis for supposing that the inclusion of political protest honking in Section 27001 enhances traffic safety. As a result, that testimony does not satisfy the reliability requirement of Rule 702.

The district court thus abused its discretion when it admitted Beck's expert testimony. That error was far from harmless. As discussed later, Beck's testimony was the *only* evidence upon which the district court relied, and which the majority opinion emphasizes, to conclude that Section 27001 passes intermediate scrutiny as applied to horn honking as a medium for political protest.

II.

Turning now to the merits of Porter's First Amendment challenge, I would hold that Section 27001 is unconstitutional as applied to political expressive conduct such as Porter's. The majority's fundamental error, in my view, in concluding otherwise is that it does not sufficiently focus on the specific type of enforcement at the core of this case—enforcement against honking in response to a political protest.

Generally, when a statute has both constitutional and unconstitutional applications, we "enjoin only the unconstitutional applications ... while leaving other applications in force." *Ayotte v. Planned Parenthood of N. New England,* 546 U.S. 320, 329 (2006). Porter was cited for honking in support of a political protest, and she asserted in her deposition that the threat of enforcement has chilled her future plans only for such political honking; she did not aver an intent to engage in any other honking she characterizes as "expressive." So the particular "subset of the statute's applications" cognizably challenged here is the enforcement of Section 27001 against political protest honking. *Hoye v. City of Oakland,* 653 F.3d 835, 857 (9th Cir. 2011).

The requested relief in Porter's complaint does include enjoining Defendants from enforcing Section 27001 against "protected speech or expression." The complaint and her briefs on appeal assert that "expressive" honking can include using a vehicle horn to "express support or approval of parades, protests, rallies, demonstrations, or fundraising or for other expressive purposes such as greeting a relative, friend, or acquaintance." Relying on this expansion of the requested relief beyond Porter's own past experience and desired future actions, the majority states that, because Porter seeks to enjoin enforcement against all expressive honking, "we decide only whether the statute is unconstitutional on its face or as applied to all expressive honking." Majority Op. 20 n.6.

But we are not bound by the scope of a party's requested remedy. *See, e.g., Hoye,* 653 F.3d at 856-57

(crafting narrow declaratory relief despite plaintiff's broad facial challenge to ordinance); *N. Cheyenne Tribe v. Norton,* 503 F.3d 836, 842-44 (9th Cir. 2007) (affirming partial rather than blanket injunction requested by parties). Porter's actual injury, past and future, which provides her Article III standing, is narrower than the scope of the injunctive relief she requested. *See* Majority Op. 12-14. Moreover, as will appear, I would conclude that "expressive horn use" is a fairly narrow subset of horn beeping, of which political protest honking is the most obvious example.

For these reasons, I concentrate this dissent on the application of Section 27001 to political protest honking.

A.

I agree with the majority that "at least some of the honking prohibited by Section 27001 is expressive for First Amendment purposes," Majority Op. 17, and that Section 27001 is content neutral, *id.* at 19-24. It is important to clarify, however, that honking at a political protest is a *core* form of expressive conduct that merits the most stringent constitutional protection, and is, in that respect, qualitatively different from warning honks and other forms of vehicle horn use.

Expressive conduct that merits protection under the First Amendment is "characterized by two requirements: (1) an intent to convey a particularized message and (2) a great likelihood that the message would be understood by those who viewed it." *Edge v. City of Everett,* 929 F.3d 657,668 (9th Cir. 2019)

(cleaned up). Porter's political protest honking meets both criteria.

The incident that gave rise to this lawsuit is illustrative. Porter honked "in three clusters of short beeps" while driving by a political protest, and "her intent was to show support for the protest." Majority Op. 18. The crowd cheered, suggesting that her intended message was understood. *Id.* The officers' body-worn camera footage shows that many other drivers honked as they drove by the protest that day, with protesters cheering in response. More generally, honking is a widespread, long-established form of political protest.[3]

Political honking is thus "imbued with elements of communication." *Spence v. State of Wash.,* 418 U.S. 405, 409 (1974). As the majority explains, such honking "carr[ies] a message that 'is intended to be communicative and that, in context would reasonably be understood by the [listener] to be communicative.'" Majority Op. 18 (quoting *Clark v. Cmty. For Creative Non-Violence,* 468 U.S. 288, 294 (1984)). "The expressive, overtly political nature of [Porter's] conduct was both intentional and overwhelmingly apparent." *Texas v. Johnson,* 491 U.S. 397,406 (1989).

But most other honking is not equally expressive. As the majority notes, ordinarily, "a honk is just a

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[3] *See, e.g.,* Kirk Johnson, *Honk if You Agree There Is a Difference Between Free Speech and Noise,* N.Y. Times, Nov. 18, 2011, https://www.nytimes.com/2011/11/19/us/is-honking-free-speech-or-just-noise-pollution.html; *Honk for Peace Cases,* ACLU of Minnesota, https://www.aclu-mn.org/en/cases/honk-peace-cases; Honk for Justice Chicago, https://honkforjusticechicago.com/.

noise." Majority Op. 18. Thus, whether any given honk is "sufficiently imbued with elements of communication" to constitute protected expression depends on "the nature of [the] activity, combined with the factual context and environment in which it was undertaken." *Id.* at 17-18 (quoting *Spence,* 418 U.S. at 409-10). "It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 570, (1991) (quoting *Dallas v. Stanglin,* 490 U.S. 19, 25 (1989)).

Warning honks, for example, are, in my view, not expressive conduct.[4] A person's reaction to hearing a warning honk is to look up or toward the source of the noise. But "given the inflexibility of the medium," Majority Op. 18, the hearer cannot tell if the honk conveys some specific traffic direction—for example, whether it means "slow down" or "speed up." Instead, a warning honk is just a loud noise that grabs the attention of the hearer. Once engaged, the hearer can notice the traffic situation and determine an appropriate course of action. This attention-grabbing function is why the Vehicle Code requires vehicle horns to be loud, "capable of emitting sound audible under normal conditions from a distance of not less than 200 feet." Cal. Veh. Code § 27000(a). And it is also why a warning honk does not carry a "great"

[4] The majority leaves this issue (slightly) open, simply noting that Porter's "assertion that honking to give a warning is a form of expression" is "questionable." Majority Op. 20.

likelihood of conveying a "particularized message," *Johnson,* 491 U.S. at 404-it is just a noise.

Because of the attention-alerting nature of a warning honk, determining whether a honk qualifies as a warning honk does not require evaluating and differentiating honks based on their content. A law enforcement officer seeking to determine whether a beep on the horn was a warning honk, as the majority explains, "need only observe the traffic circumstances and determine if a safety risk is present."

Majority Op. 21. I therefore agree that "Section 27001 draws a line based on the surrounding factual situation, not based on the content of expression." *Id.* at 21.

I would go further: In *many* contexts, a honk conveys no comprehensible expressive message. Porter asserts that honks to "greet friends or neighbors" or "summon children or co-workers" are expressive honks. But even in those instances, honks are used to grab the hearer's attention, not to convey any articulable message. A greeting honk, for example, emits a loud noise that causes the listener to look up; the honk itself is not a greeting message, but it causes the listener to look up, notice, and identify the honker as a friend. Similarly, a honk to summon a child does not itself convey a message; it grabs the child's attention, so she notices that her parent is waiting for her.

Honking at a political protest, on the other hand, is a use of a vehicle horn that definitely *does* constitute message-conveying expressive conduct and so merits First Amendment protection. When Susan

Porter honked while passing a protest against U.S. Representative Darrell Issa, she was not just making noise to attract attention. She was conveying a distinct message—agreement with the protesters' objections to Darrell Issa's stance on gun control. And that message was understood, as the protesters cheered when she beeped. The protesters did not have to be startled into looking up to understand what Porter was honking about; in the context, they understood the message immediately.

Because political protest honking conveys a distinct message, one that implicates core First Amendment values, it is the banning of this message that should be—but in the majority opinion is not—the focus of the First Amendment analysis. The constitutionality of Section 27001 must be weighed specifically in light of the restrictions it places on political expression. *See, e.g., Johnson,* 491 U.S. at 402-20 (analyzing constitutionality of a statute prohibiting flag burning based on its restriction of an individual's political protest regarding the renomination of Ronald Reagan for president).

B.

Beginning from that premise, I cannot agree with the majority's conclusion that Defendants have sufficiently demonstrated that Section 27001's restriction on political protest honking furthers a significant government interest.[5]

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[5] I assume for purposes of this dissent that intermediate scrutiny applies. But I am not certain that categorization is correct. As Section 27001, in my view, mostly applies to non-expressive

The asserted government interests in traffic safety and noise control are substantial. However, the fact "[t]hat the Government's asserted interests are important in the abstract does not mean . . . that [a challenged statute] will in fact advance those interests." *Turner Broad. Sys., Inc. v. F.C.C.,* 512 U.S. 622, 664 (1994). "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms," the government has the burden to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* "[M]erely invoking interests in regulating traffic" or noise control "is insufficient." *Kuba v. 1-A Agric. Ass'*n, 387 F.3d 850, 859 (9th Cir. 2004).

I would hold that Defendants have not met their burden to show that the asserted harms caused by political honking are real. Sergeant Beck's testimony is the *only* evidence upon which the district court relied. As I have explained, I would hold that evidence inadmissible as not meeting the standards for competent expert testimony. With that evidence out of the case, there is no basis whatever in the record for concluding that the asserted governmental interests supporting a ban on political horn honking are substantial.

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conduct, the content neutrality rubric adopted by the majority, *see* Majority Op. 14-17, seems inapplicable. Rather, once again, the focus should be on the ban of political protest honking—a ban that viewed discretely would surely trigger strict scrutiny. *See, e.g., Meyer v. Grant,* 486 U.S. 414, 420 (1988).

Even if Beck's testimony were admissible, my conclusion would be the same. Beck hypothesized that without Section 27001, "the public in general would ... [think it was] okay to use your horn whenever you want" and "the effectiveness of the horn would be diminished." Yet, as discussed above, in his twenty-four-year career with the CHP, Beck did not know of a single accident caused by any type of horn honking, let alone the political honking at issue here. And he did not purport to offer any opinions as to the impact of horn honking on noise control concerns.

Defendants offered no other evidence deemed admissible by the district court to demonstrate that political horn honking endangers its asserted interests. For example, no evidence was introduced about the frequency of political honking, the relationship between political honking and increased traffic danger, or its geographic scope. Where "[t]here is no record of harm or safety concerns caused by such activity," this "void in the record belies" the significance of the state interest. *Kuba,* 387 F.3d at 860.

Despite this lack of evidence, the majority asserts that the relationship between Section 27001 and a governmental interest in traffic safety makes "logical sense: For the horn to serve its intended purpose as a warning device, it must not be used indiscriminately." Majority Op. 25. This conclusion is too glib. Common sense also indicates that people *do* honk their horns for non-safety reasons all the time, and that they are not cited for it.

This lack of enforcement is borne out by the record and undermines the purported importance of Section 27001 in furthering the asserted governmental interests. Any enforcement of Section 27001 is left to the broad discretion of peace officers. The result of that discretion? Section 27001 is almost never enforced, even though violations are legion. Defendants assert, for example, that of the nearly 4.3 million citations issued by CHP between 2016 and 2018, only 180 were for a Section 27001 violation, and that "the odds of anyone being cited by CHP for violating Section 27001 under any circumstances—much less at a protest—are *de minimis.*"

The facts of this case bear out what everyone who drives in California knows: Section 27001 is pretty much a dead letter. The honking of horns for non-safety reasons is rampant and hardly ever sanctioned. As Deputy Klein was issuing the citation to Porter, his supervisor, Lieutenant Munsey, told him, "Oh illegally honking the horn? If you want to urn, because everybody does it, if you feel like it and don't have any cites, warn them, if you don't, well, it's up to you." Klein only wrote one citation for a Section 27001 violation that day, even though he heard many people honking their horns.[6] Were there really a substantial

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[6] Jaywalking is a salient illustration that, where a generic traffic law is on the books but not enforced, it may well be because there's no real government interest underlying it. Jaywalking was, until recently, illegal in California, but also "endemic" and "rarely result[ed] in arrest." *Nieves v. Bartlett,* 139 S. Ct. 1715, 1727 (2019); *see* Cal. Stats. 2022, ch. 957 (A.B. 2147). Based in part on evidence that people of color and low-income individuals are disproportionately cited for jaywalking violations, a selective enforcement danger that arises where officers have probable

state interest in curbing non-safety-related beeping of car horns—let alone the protest or political honking protected by the First Amendment—surely there would be some serious attempt to sanction noncompliance.

C.

Even if we assume Defendants did provide sufficient support for their asserted interests in traffic safety and noise control, Section 27001's near-complete ban on honking is unconstitutional because it is not narrowly tailored to serve those interests. *Clark,* 468 U.S. at 293.

1.

To satisfy the narrow tailoring requirement, Defendants must show that the statute "does not 'burden substantially more speech than is necessary'" to further the asserted governmental interests. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* 657 F.3d 936, 948 (9th Cir. 2011) (quoting *Turner,* 512 U.S. at 665). "In particular, [a statute's] expansive language can signal that the [government] has burdened substantially more

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cause to make arrests but typically exercise their discretion not to do so, the California legislature recently amended its jaywalking laws to permit a peace officer to stop a jaywalker only if "a reasonably careful person would realize there is an immediate danger of a collision with a moving vehicle." *See, e.g.,* Cal. Stats. 2022, ch. 957 (A.B. 2147), § 11(b)(1); Cal. Veh. Code § 21955 (2023); *see* Colleen Shalby, *Jaywalking Is Decriminalized in California Under New Law,* L.A. Times, Oct. 1, 2022, https://www.latimes.comicalifornia/story/2022-10-01/jaywalking-decriminalized-in-california-under-new-law.

speech than effectively advances its goals." *Cuviello v. City of Vallejo,* 944 F.3d 816, 829 (9th Cir. 2019).

Downplaying the broad sweep of the statute, the majority asserts that Defendants "did no more than eliminate the exact source of the evil it sought to remedy." Majority Op. 32 (quoting *Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 808 (1984)). I would hold that Section 27001's ban on almost all honking burdens substantially more speech than necessary, because it prohibits political honking that does not implicate traffic safety or noise control concerns.

At a basic level, Section 27001-if enforced—could contribute to noise control and driver distraction; prohibiting drivers from honking in nearly all circumstances does reduces noise levels, and noise may be distracting. But a sweeping ban on nearly all honking prohibits political expression—"the core of speech protected by the First Amendment"—without regard to whether such expression actually jeopardizes the asserted governmental interests. *Sanders Cnty. Republican Cent. Comm. v. Bullock,* 698 F.3d 741, 745 (9th Cir. 2012).

The facts of this case show why this is so. Porter was cited for honking at a political protest on the sidewalk in front of a politician's office. The protest was a weekly, organized event; on this particular day, it had a sign-in table, and volunteers in vests helped pedestrians cross the street. Deputy Klein perceived that a "couple hundred" protesters were present. The protesters had a megaphone and a drum, and they held picket signs, chanted, and sang. A counter-

protester stood across the street and played amplified music through big speakers to drown out the protesters. Porter honked her horn in support of the protest as she drove by—as many others did—and Deputy Klein heard "people cheering . . . someone on a loud speaker, a microphone."

Whatever the governmental interests may be in noise control or curbing driver distraction, there's just no record evidence that Porter's political honking at an already noisy event endangered those interests. A political protest is *designed* to be noticed. As Deputy Klein testified, "it was loud." Political honking was hardly a significant source of noise or distraction in that environment. There is no basis for supposing that anyone was confused or distracted by the honking. Instead, Porter's honking was understood as political expression by the protesters, who cheered in response.

A statute is overinclusive when it prohibits expression, especially core political expression, "without any specifications or limitations that may tailor [the statute] to situations involving the most serious risk to public peace or traffic safety." *Cuviello,* 944 F.3d at 830. *Cuviello* held, for example, that a permitting requirement for using sound-amplifying devices was likely not narrowly tailored, noting that it applied to a public sidewalk next to a Six Flags theme park, an "already [] noisy area, where patrons flock in droves." *Id.* "Amidst all the noise, the sound of one bullhorn likely would not cause an additional disturbance to traffic safety or public peace." *Id.*

So here. Porter's honking was in response to an already noisy—and undoubtedly distracting to passersby and drivers—political protest. The point of such protests is to draw attention to the cause supported. As in *Cuviello,* Section 27001's broad ban on noisy, distracting political expression serves no governmental purpose where there is already cacophony and flurry. The statute therefore is not narrowly tailored to the circumstances in which such purposes could be served.

The minimal enforcement of Section 27001 is further evidence that the statute sweeps too broadly. When police officers exercise their discretion not to enforce a statute, the fair inference is that they have concluded that no governmental interest would be served by doing so. And where, as here, the statute is almost never enforced, one can only conclude that it is vastly overbroad, and that a narrower, targeted ban would suffice.

2.

The majority recognizes that "most non-warning honks do not create distractions resulting in accidents," but holds that Section 27001 is narrowly tailored because "we discern no plausible means by which California could permit non-distracting honks while prohibiting distracting honks." Majority Op. 31. I disagree with the take-off point of this analysis, as well as with its conclusion.

As I've explained, much honking is just noise, *not* First Amendment-protected communication. *See supra* Part II.A. The obvious way to eliminate the statutory overbreadth as applied to First

Amendment-protected honking is to except such beeping from the statute's reach. As Section 27001 has no such exception, an injunction against enforcement of the statute against political protest honking is an appropriate remedy for Porter's injury here. *See Ayotte,* 546 U.S. at 32829.

Contrary to Defendants' submission, law enforcement officers should have no difficulty differentiating between non-expressive honks and political protest honks. Again, conduct is expressive only if an "intent to convey a particularized message [is] present, and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who view[] it." *Spence,* 418 U.S. at 410-11. Many honks do not communicate a particularized message and so, as I have explained, do not meet this standard. Honking in response to a political protest, in contrast, is generally understood by listeners—including law enforcement officers-as communicating a message.

i.

To the extent Defendants maintain that political protest honking itself must be regulated because such honking can be disruptive, there are alternate methods for doing so. To satisfy the narrow tailoring requirement, a statute "need not be the least restrictive or least intrusive means" of furthering legitimate governmental interests, *Ward v. Rock Against Racism,* 491 U.S. 781, 798 (1989), but "an assessment of alternatives can still bear on the reasonableness of the tailoring," *Long Beach Area Peace Network v. City of Long Beach,* 574 F.3d 1011,

1025 (9th Cir. 2009) (quoting *Menotti v. City of Seattle,* 409 F.3d 1113, 1131 n.31 (9th Cir. 2005)). "Even under the intermediate scrutiny 'time, place, and manner' analysis, we cannot ignore the existence of . . . readily available alternatives." *Comite de Jornaleros,* 657 F.3d at 950.

Porter has identified various other laws that would allow Defendants to achieve the asserted governmental interests in traffic safety and noise control. Local noise ordinances are designed to regulate "[d]isturbing, excessive or offensive noise." San Diego, Cal., Code of Regulatory Ordinances ch. 4, § 36.401; *see, e.g., id. §* 36.410 (sound level limitations on impulsive noise); Vista, Cal., Municipal Code § 8.32.040 (general noise limits). California Penal Code § 415(2) is another tool, prohibiting "maliciously and willfully disturb[ing] another person by loud and unreasonable noise."

Porter also points to a local ordinance in Rio Rancho, New Mexico, as a viable alternative formulation for Section 27001. Rather than *prohibiting* all honking except in certain instances, as Section 27001 does, the Rio Rancho ordinance *permits* honking except when it is used "in such manner as to distract other motorists on the public way or in such a manner as to disturb the peace." *Martinez v. City of Rio Rancho,* 197 F. Supp. 3d 1294, 1300 (D.N.M. 2016) (quoting Rio Rancho Mun. Code § 12-6-12.18(5)). By narrowing the category of prohibited honking to actually disruptive honks, Rio Rancho's ordinance better targets honks that implicate the asserted governmental interests.

To be sure, Section 27001, which provides officers with broad discretion to cite the drivers of their choosing, may be easier and more efficient to enforce than those alternatives. But "the prime objective of the First Amendment is not efficiency." *McCullen v. Coakley,* 573 U.S. 464, 495 (2014). "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.*

Defendants have not made that showing. Protest honking is geographically predictable because it occurs in response to events at fixed locations. Thus, the practical difficulties of discerning and enforcing the appropriate local noise ordinance in the vicinity of any protest are few. The record here indicates that the Sheriff and the City had received multiple noise complaints about the weekly protest, so both the jurisdiction and the relevant noise ordinances were obvious. The geographic predictability of political honking can also facilitate the enforcement of the Penal Code or a statute like the Rio Rancho ordinance, as law enforcement resources purposefully can be dedicated to monitoring protest sites for willfully malicious and disruptive honks. In any event, any substantive difficulty in enforcing one of these ordinances or statutes would be an indication that the protest honking at issue was not disruptive or did not appreciably increase noise levels.

ii.

The majority also asserts that Section 27001 is narrowly tailored because it "plainly leaves open ample alternative channels for people to communicate their ideas and messages, including from their cars." Majority Op. 32. On this point, the facts underlying this case are again informative, as they demonstrate that Porter had no alternative to political honking on that day.

On October 17, 2017, Porter drove to the crowded protest, parked along the street, and participated in the protest for about half an hour. She then noticed that law enforcement officers were affixing parking citations on protesters' parked cars. Porter's car was parked close to a fire hydrant, so she decided to leave the protest to move her car and avoid a possible citation. By the time she found parking elsewhere and returned, she was unable to rejoin the protest because it was over.

Thus, the only opportunity Porter had to continue protesting was by honking her horn as she drove by. The alternative methods of communication the majority suggests were possible from the car—including "waving, giving a thumbs up, or raising a fist as they drive by", Majority Op. 33—would require the driver to take her hand off the wheel. Doing that would surely pose a greater threat to traffic safety than a honk easily understood as conveying a message of support for an already noisy, crowded protest.

"[D]ebate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v.*

Sullivan, 376 U.S. 254, 270 (1964). Here, Defendants insist that they can continue to ban Porter's political expressive conduct, but offer no cognizable argument that the conduct actually endangered either traffic safety or noise control in a manner that could not be sanctioned if those dangers actually arose.

III.

In sum, Section 27001 violates the First Amendment because Defendants have not shown that the statute furthers a significant government interest as applied to political protest honking, and because the statute is not narrowly tailored to exclude such honking. I would grant an injunction prohibiting the enforcement of Section 27001 against political protest honking.[7]

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[7] I would not extend the injunction to all "expressive" honking, as the term is too vague to be enforceable, *see* Fed. R. Civ. P. 65(d), and an injunction limited to political honking would cure the injury-in-fact Porter identifies. As discussed, Porter has stated that, in the future, she wishes to engage specifically in political protest honking. Others who wish to beep their horns to convey a specific message may seek similar relief, and an injunction could be tailored to cover their communication if the communication were determined to constitute expressive conduct.

APPENDIX

Alabama: "It shall be unlawful . . . for any person to use upon a vehicle any siren or for any person at any time to use a horn otherwise than as a reasonable warning." Ala. Code § 32-5-213(a).

Alaska: "The driver of a motor vehicle shall, when reasonably necessary to insure safe operation, give audible warning with his horn, but may not otherwise use the horn when upon a highway or other vehicular way or area." Alaska Admin. Code tit. 13, § 04.210(a).

Arizona: "If reasonably necessary to ensure the safe operation of a motor vehicle, the driver shall give an audible warning with the driver's horn but shall not otherwise use the horn when on a highway." Ariz. Rev. Stat. § 28-954(B).

Arkansas: "When reasonably necessary to ensure safe operation, the driver of a motor vehicle shall give audible warning with his or her horn but shall not otherwise use the horn when upon a public street or highway." Ark. Code Ann. § 27-37-202(a)(2).

California: "The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn. . . . The horn shall not otherwise be used, except as a theft alarm system." Cal. Veh. Code § 27001(a)-(b).

Colorado: "The driver of a motor vehicle, when reasonably necessary to ensure safe operation, shall give audible warning with the horn but shall not otherwise use such horn when upon a highway." Colo. Rev. Stat. § 42-4-224(1).

Delaware: "The driver of a vehicle shall, when reasonably necessary to insure safe operation, give audible warning with the horn but shall not otherwise use the horn for any other purpose." Del. Code Ann. tit. 21, § 4306(b).

Georgia: "The driver of a motor vehicle shall, when it is reasonably necessary to ensure safe operation, give audible warning with his or her horn but shall not otherwise use such horn when upon a highway." Ga. Code Ann. § 40-8-70(a).

Idaho: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn, but shall not otherwise use the horn when upon a highway." Idaho Code § 49-956(1).

Illinois: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use such horn when upon a highway." 625 Ill. Comp. Stat. 5 / 12-601(a).

Indiana: "The driver of a motor vehicle 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 when upon a highway." Ind. Code § 9-19-5-2.

Iowa: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with the horn but shall not otherwise use such horn when upon a highway." Iowa Code § 321.432.

Kansas: "The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn but shall not otherwise use such horn when upon a highway." Kan. Stat. Ann. § 8-1738(a).

Kentucky: "Every person operating an automobile or bicycle shall sound the horn or sound device whenever necessary as a warning of the approach of such vehicle to pedestrians or other vehicles, but shall not sound the horn or sound device unnecessarily." Ky. Rev. Stat. Ann. § 189.080.

Louisiana: "The driver of a motor vehicle shall, when reasonably necessary to ensure safe operation, give audible warning with his horn, but shall not otherwise use such horn when upon a highway of this state." La. Stat. Ann. § 32:351(A)(1).

Maine: "A person may not unnecessarily sound a signaling device or horn." Me. Rev. Stat. tit. 29-A, § 1903(2).

Maryland: "The driver of a motor vehicle shall, when reasonably necessary to insure safe operation, give audible warning with his horn, but may not otherwise use the horn when on a highway." Md. Code Ann., Transp. § 22-401(b).

Michigan: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use the horn when upon a highway." Mich. Comp. Laws § 257.706(a).

Minnesota: "The driver of a motor vehicle shall, when reasonably necessary to insure safe operation, give audible warning with the horn, but shall not otherwise use the horn when upon a highway." Minn. Stat. § 169.68(a).

Mississippi: "The driver of a motor vehicle shall, when reasonably necessary to insure safe operation, give audible warning with his horn but shall not otherwise use such horn upon a highway." Miss. Code Ann. § 63-7-65(1).

Missouri: "Such signaling device shall be used for warning purposes only and shall not be used for making any unnecessary noise, and no other sound-producing signaling device shall be used at any time." Mo. Rev. Stat. § 307.170(1).

Montana: "The driver of a motor vehicle shall when reasonably necessary to ensure safe operation give audible warning with the horn but may not otherwise use the horn when upon a highway." Mont. Code Ann. § 61-9-401(1).

Nebraska: "[I]t shall be unlawful. . . for any person at any time to use a horn, otherwise than as a reasonable warning." Neb. Rev. Stat. § 60-6,285.

Nevada: "A person driving a motor vehicle shall, when reasonably necessary to ensure safe operation, give audible warning with the horn, but shall not otherwise use the horn when upon a highway." Nev. Rev. Stat. § 484D.400(2).

New Jersey: "The driver of a motor vehicle shall, when reasonably necessary to insure safe operation,

give audible warning with his horn but shall not otherwise use such horn when upon a highway." N.J. Stat. Ann. § 39:3-69.

New Mexico: "The driver of a motor vehicle shall when reasonably necessary to ensure safe operation give audible warning with his horn but shall not otherwise use such horn when upon a highway." N.M. Stat. Ann. § 66-3-843(A).

New York: "[The] horn or device shall produce a sound sufficiently loud to serve as a danger warning but shall not be used other than as a reasonable warning nor be unnecessarily loud or harsh." N.Y. Veh. & Traf. Law § 375(1)(a).

North Carolina: "[I]t shall be unlawful . . . for any person at any time to use a horn otherwise than as a reasonable warning." N.C. Gen. Stat. § 20-125(a).

North Dakota: "Whenever reasonably necessary for safe operation, the driver of a motor vehicle upon a highway shall give audible warning with the vehicle's horn, but may not otherwise use the vehicle's horn while upon a highway." N.D. Cent. Code § 39-21-36(1).

Oregon: "A person commits the offense of violation of use limits on sound equipment if the person . . . [u]ses a horn otherwise than as a reasonable warning." Or. Rev. Stat. § 815.225(1)(b).

Rhode Island: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his or her horn but shall

not otherwise use the horn when upon a highway." R.I. Gen. Laws § 31-23-8.

South Carolina: "The driver of a motor vehicle shall, when reasonably necessary to insure safe operation, give audible warning with his horn but shall not otherwise use such horn when upon a highway." S.C. Code Aim. § 56-5-4960.

Tennessee: "[I]t is unlawful . . . for any person at any time to use a horn otherwise than as a reasonable warning." Tenn. Code Aim. § 55-9-201(a).

Texas: "A motor vehicle operator shall use a horn to provide audible warning only when necessary to insure safe operation." Tex. Transp. Code Ann. § 547.501(c).

Utah: "The operator of a motor vehicle . . . when reasonably necessary to insure safe operation, shall give audible warning with the horn; and . . . except as provided [herein], may not use the horn on a highway." Utah Code Ann. § 41-6a-1625(1)(c)(i)-(ii).

Vermont: "The operator of a motor vehicle, whenever reasonably necessary to ensure safe operation, shall give an audible warning with the horn of his or her vehicle but shall not otherwise use the horn when upon a highway." Vt. Stat. Arm. tit. 23, § 1131.

Virginia: "It shall. .. be unlawful for any person at any time to use a horn otherwise than as a reasonable warning." Va. Code Arm. § 46.2-1060.

Washington: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation

give audible warning with his or her horn but shall not otherwise use such horn when upon a highway." Wash. Rev. Code § 46.37.380(1).

West Virginia: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use such horn when upon a highway." W. Va. Code § 17C-15-33(a).

Wisconsin: "[N]o person shall at any time use a horn otherwise than as a reasonable warning." Wis. Stat. § 347.38(1).

Wyoming: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use the horn when upon a highway." Wyo. Stat. Ann § 31-5-952(a).

Uniform Vehicle Code: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with the horn but shall not otherwise use it." Unif. Veh. Code § 12-401(a) (Nat'l Comm. on Unif. Traffic Laws & Ordinances 2000).

APPENDIX B

FOR PUBLICATION

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; AMANDA RAY, as successor to Warren Stanley, in her official capacity as Commissioner of California Highway Patrol,

Defendants-Appellees,

and

WARREN STANLEY,

Defendant.

No. 21-55149

D.C. No. 3:18-cv-01221-GPC-LL

OPINION

Appeal from the United States District Court
for the Southern District of California
Gonzalo P. Curiel, District Judge, Presiding

Argued and Submitted March 7, 2022
Submission Vacated March 17, 2022
Resubmitted March 31, 2023
Pasadena, California

Filed April 7, 2023

Before: Marsha S. Berzon and Michelle T. Friedland, Circuit Judges, and Edward R. Korman,[*] District Judge.

Opinion by Judge Friedland;
Dissent by Judge Berzon

SUMMARY[**]

Civil Rights

The panel affirmed the district court's summary judgment in favor of the State of California in an action challenging a California law that prohibits honking a vehicle's horn except when reasonably

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[*] The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

necessary to warn of a safety hazard. Cal. Veh. Code § 27001.

Plaintiff was cited for misuse of a vehicle horn under Section 27001 after she honked in support of protestors gathered outside a government official's office. Although the citation was dismissed, Porter filed suit to block future enforcement of 27001 against any expressive horn use—including honks not only to "support candidates or causes" but also to "greet friends or neighbors, summon children or co-workers, or celebrate weddings or victories." She asserted that Section 27001 violates the First and Fourteenth Amendments as a content-based regulation that is not narrowly tailored to further a compelling government interest. Alternatively, she argued that even if the law is not content based, it burdens substantially more speech than necessary to protect legitimate government interests.

The panel first held that plaintiff had standing to challenge the law because, ever since she received a citation for impermissible horn use, she has refrained from honking in support of political protests to avoid being cited again.

Addressing the merits, the panel determined that at least in some 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. The panel next held that because section 27001 applies evenhandedly to all who wish to use a horn when a safety hazard is not present, it draws a line based on the surrounding factual situation, not based on the content of

expression. The panel therefore evaluated Section 27001 as a content-neutral law and applied intermediate scrutiny. The panel concluded that Section 27001 was narrowly tailored to further California's substantial interest in traffic safety, and therefore that it passed intermediate scrutiny. The panel noted that plaintiff had not alleged that the State has a policy or practice of improper selective enforcement of Section 27001, so the panel had no occasion to address that possibility here.

Dissenting, Judge Berzon would hold that Section 27001 does not withstand intermediate scrutiny insofar as it prohibits core expressive conduct, and is therefore unconstitutional in that respect. The majority's fundamental error was that it failed to sufficiently focus on the specific type of enforcement at the core of this case—enforcement against honking in response to a political protest. Honking at a political protest is a core form of expressive conduct that merits the most stringent constitutional protection, and is, in that respect, qualitatively different from warning honks and other forms of vehicle horn use. Section 27001 violates the First Amendment because defendants have not shown that the statute furthers a significant government interest as applied to political protest honking, and because the statute is not narrowly tailored to exclude such honking. Judge Berzon would grant an injunction prohibiting the enforcement of Section 27001 against political protest honking.

COUNSEL

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OPINION

FRIEDLAND, Circuit Judge:

Appellant Susan Porter brings a First Amendment challenge to a California law that prohibits honking a vehicle's horn except when reasonably necessary to warn of a safety hazard. We hold that Porter has standing to challenge that law because, ever since she received a citation for impermissible horn use, she has refrained from honking in support of political protests to avoid being cited again. Applying intermediate scrutiny, we affirm the district court's rejection of Porter's constitutional challenge.

I.

A.

California has regulated the use of automobile warning devices such as horns since the dawn of the automobile. In 1913, five years after the introduction of the Model T Ford, California adopted the first version of the law challenged here:

> Every motor vehicle shall be equipped with a bell, gong, horn, whistle or other device in good working order, capable of emitting an abrupt sound adequate in quality and volume to give warning of the approach of such vehicle to pedestrians and to the riders or drivers of animals or of other vehicles and to persons entering or leaving street, interurban and railroad cars. No person shall sound such bell, gong, horn,

> whistle or other device for any purpose except as a warning of danger.

Act of May 31, 1913, ch. 326, § 12, 1913 Cal. Stat. 639, 645; *see* Robert Casey, *The Model T: A Centennial History* 1 (2008). Today, the relevant provision of the California Vehicle Code provides:

> (a) The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn.
>
> (b) The horn shall not otherwise be used, except as a theft alarm system.

Cal. Veh. Code § 27001 ("Section 27001"). Section 27001 "applies to all vehicles whether publicly or privately owned when upon the highways." *Id.* § 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. Forty other states and the Uniform Vehicle Code provide similar limitations on the use of vehicle horns. *See* Appendix.

Section 27001 is in a division of the California Vehicle Code regulating the required equipment for vehicles in California. *See id.* div. 12 ("Equipment of Vehicles"). That division of the Code contains various other limitations on the use of equipment for safety purposes. *See, e.g., id.* § 25268 ("No person shall display a flashing amber warning light on a vehicle as permitted by this code except when an unusual traffic

hazard exists."); *id.* § 25269 ("No person shall display a flashing or steady burning red warning light on a vehicle except as permitted by Section 21055 or when an extreme hazard exists."). The Vehicle Code is enforced by the California Highway Patrol and by local law enforcement agencies.

B.

In 2017, Susan Porter drove her car past a group of protesters gathered outside a government official's office—a protest that, minutes earlier, she herself had been attending. As she drove down the street, which was located between a residential area and a six-lane freeway, Porter honked in support of the protesters. A sheriffs deputy pulled her over and gave her a citation for misuse of a vehicle horn under Section 27001. Porter's citation was later dismissed when the sheriff's deputy failed to attend Porter's traffic court hearing. Porter subsequently brought this action challenging the constitutionality of Section 27001.

Porter's Complaint seeks declaratory and injunctive relief against the Sheriff of San Diego County ("the Sheriff") and the Commissioner of the California Highway Patrol ("CHP") in their official capacities (collectively, "the State"[1]). She contends that Section 27001 violates the First and Fourteenth Amendments as a content-based regulation that is

[1] The Sheriff joins all of CHP's arguments about the constitutionality of Section 27001. Those arguments address all the issues we need to reach to affirm, so we do not consider any arguments that are specific to the Sheriff, including her argument that she is not liable under *Monell v. Department of Social Services,* 436 U.S. 658 (1978).

not narrowly tailored to a compelling government interest. Alternatively, she argues that even if the law is not content based, it is a content-neutral regulation that burdens substantially more speech than necessary to protect legitimate government interests. Porter alleges that she drives by rallies, protests, and demonstrations in San Diego County and elsewhere in California and would like to express her support for these events by honking. She alleges that she now refrains from using her horn for such purposes because she fears enforcement of Section 27001. Porter seeks to block enforcement of Section 27001 against what she calls "expressive" honking. In Porter's view, expressive horn use includes honks not only to "support candidates or causes" but also to "greet friends or neighbors, summon children or co-workers, or celebrate weddings or victories."

The State moved to dismiss Porter's First Amendment claim. The State argued that even if Section 27001 governs expressive activity, the law is content neutral and reasonably furthers California's interests in promoting traffic safety and reducing noise pollution. Applying intermediate scrutiny, the district court concluded that, on the pleadings at least, the State had "defaulted on [its] burden of showing that honks such as Plaintiff's undermine the government's interest in traffic safety and noise control." Accordingly, the district court refused to dismiss the First Amendment claim.

The parties proceeded to discovery and eventually filed cross-motions for summary judgment. In support of the noise-control rationale for Section 27001, the State submitted numerous government reports and

scientific articles discussing the contributions honking and other traffic sounds can make to noise pollution, and the dangers noise pollution poses to human health.

In support of the traffic-safety rationale, the State relied heavily on the expert testimony of Sergeant William Beck, a twenty-four-year veteran of CHP. Sergeant Beck opined that "when a vehicle horn is used improperly, it can create a dangerous situation by startling or distracting drivers and others," and that "the vehicle horn's usefulness as a warning device would be diminished if law enforcement officers were unable to enforce Vehicle Code section 27001." He explained:

> Absent Vehicle Code section 27001, people would be free to, and could be expected to, use the horn for purposes unrelated to traffic safety. That would, in turn, diminish the usefulness of the vehicle horn for its intended purpose, which is to be used as a warning or for other purposes related to the safe operation of a vehicle.

When asked in a deposition, Sergeant Beck admitted that he was unaware of any "specific accident or collision that was caused by the use of a vehicle horn." Porter's rebuttal expert, Dr. Peter Hancock, criticized Sergeant Beck's opinions about the link between Section 27001 and traffic safety as unsupported by scientific studies; relying in part on these criticisms, Porter moved unsuccessfully to exclude Sergeant

Beck's expert testimony under Federal Rule of Evidence 702.

The district court entered summary judgment in favor of the State. After holding that Porter had standing to bring a pre-enforcement challenge based on self-censorship, the district court repeated its earlier conclusion that Section 27001 is content neutral and subject to intermediate scrutiny. The court excluded the State's government and scientific reports as hearsay but held that, although the State "ha[d] offered little in the way of scientific studies that [wa]s not hearsay, ... history, consensus, common sense, and the declaration of Sergeant Beck support[] the [State's] proffered justification[s]." The court concluded that California's interests in maintaining traffic safety and reducing noise pollution are significant, and that Section 27001 is narrowly tailored to serve those interests.

Porter timely appealed.

II.

We evaluate standing de novo. *California v. Azar,* 911 F.3d 558, 568 (9th Cir. 2018). We also review de novo an order granting summary judgment. *Italian Colors Rest. v. Becerra,* 878 F.3d 1165, 1171 (9th Cir. 2018).

III.

To establish Article III standing, a plaintiff must show that she suffered an injury in fact, the injury is fairly traceable to the challenged conduct of the defendant, and it is likely that her injury will be

redressed by a favorable judicial decision. *Italian Colors Rest. v. Becerra,* 878 F.3d 1165, 1171 (9th Cir. 2018). "First Amendment challenges 'present unique standing considerations' because of the 'chilling effect of sweeping restrictions' on speech." *Id.* at 1171 (quoting *Ariz. Right to Life Pol. Action Comm. v. Bayless,* 320 F.3d 1002, 1006 (9th Cir. 2003)). "[W]here a plaintiff has refrained from engaging in expressive activity for fear of prosecution under the challenged statute, such self-censorship is a constitutionally sufficient injury as long as it is based on an actual and well-founded fear that the challenged statute will be enforced." *Libertarian Party of L.A. v. Bowen,* 709 F.3d 867, 870 (9th Cir. 2013) (alteration in original) (quoting *Human Life of Wash. Inc. v. Brumsickle,* 624 F.3d 990, 1001 (9th Cir. 2010)). To assess the credibility of a claimed threat of enforcement, we have looked to factors such as "(1) whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate [enforcement] proceedings, and (3) the history of past prosecution or enforcement under the challenged statute."[2] *Id.* (quoting *McCormack v. Hiedeman,* 694 F.3d 1004, 1021 (9th Cir. 2012)).

The State argues that Porter has not established a well-founded fear because she has not shown a concrete plan for expressive honking and she previously "honked only at the single protest at which she was cited." The State's argument is unpersuasive.

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[2] As discussed below, we conclude that honking can constitute expressive activity.

Porter testified: "[I]f I was driving down the freeway and there was a banner that said 'Support Our Veterans,' I now would not honk my horn because the CHP could pull me over." She also described driving by specific political protests where she had wished to honk to show her support but refrained from doing so to avoid receiving another citation. Porter's testimony is specific enough to show that her expressive activity is being chilled.

The State next argues that the odds of anyone being cited for honking are "vanishingly small." For example, CHP points out that it issues an average of eighty citations per year for Section 27001 violations. Similarly, evidence in the record shows that in recent years the Sheriff's Department has issued approximately eight citations per year under Section 27001. But both CHP and the Sheriff nevertheless do enforce Section 27001, and they do not disclaim their ability to do so in cases of expressive honking. That Porter was cited the one time she honked in support of a protest is "good evidence that the threat of enforcement is not 'chimerical.'" *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 164 (2014) (quoting *Steffel v. Thompson,* 415 U.S. 452, 459 (1974)). Whatever the statistical likelihood of any driver's receiving a Section 27001 citation, Porter's own experience supports "an actual and well-founded fear that the challenged statute will be enforced" against her. *Bowen,* 709 F.3d at 870 (quoting *Human Life,* 624 F.3d at 1001). Porter has thus shown a concrete injury in the form of self-censorship caused by Section 27001.

The State further argues that Porter's alleged injury is not redressable, contending that a statewide injunction to protect expressive honking would be unconstitutionally vague and would raise concerns about federalism. But those concerns go to the proper scope of any remedy, not the "constitutional minimum" of redressability, which "depend[s] on the relief that federal courts are *capable* of granting." *Kirola v. City & County of San Francisco,* 860 F.3d 1164, 1176 (9th Cir. 2017). Because the district court *could* declare Section 27001 unconstitutional and unenforceable in its entirety, thereby redressing Porter's alleged injury, we conclude that the redressability requirement is satisfied. We therefore proceed to the merits of Porter's First Amendment challenge.

IV.

The First Amendment "literally forbids the abridgment only of 'speech,'" but its protections "do[] not end at the spoken or written word." *Texas v. Johnson,* 491 U.S. 397, 404 (1989). Conduct—such as burning a flag, wearing a black armband, or staging a sit-in—"may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Id.* (quoting *Spence v. Washington,* 418 U.S. 405, 409 (1974) (per curiam)); *see also id.* at 406 (holding that burning an American flag at a political protest was protected expression); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 505-06 (1969) (holding that wearing black armbands to protest the war in Vietnam was protected expression); *Brown v. Louisiana,* 383 U.S. 131, 141-42 (1966) (holding that a silent sit-in to

protest racial segregation in a public library was protected expression). "Non-verbal conduct implicates the First Amendment when it is intended to convey a 'particularized message' and the likelihood is great that the message would be so understood." *Nunez v. Davis,* 169 F.3d 1222, 1226 (9th Cir. 1999) (quoting *Johnson,* 491 U.S. at 404)). That said, "a narrow, succinctly articulable message is not a condition of constitutional protection" for expressive conduct. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515* U.S. 557, 569 (1995).

In "quintessential public forums" such as streets, parks, and other "places which by long tradition ... have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed." *Perry Educ. Ass 'n v. Perry Loc. Educators ' Ass 'n,* 460 U.S. 37, 45 (1983). "The government bears the burden of justifying the regulation of expressive activity in a public forum." *Berger v. City of Seattle,* 569 F.3d 1029, 1035 (9th Cir. 2009) (en banc).

When considering a First Amendment challenge to a law regulating expression in a public forum, we ask first whether the law is content based or content neutral. *United States v. Swisher,* 811 F.3d 299, 311 (9th Cir. 2016) (en banc). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The "crucial first step in the content-neutrality analysis," the Supreme Court has instructed, is "determining whether the law is content neutral on its face"—that is, whether it "draws

distinctions based on the message a speaker conveys." *Id.* at 163, 165. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 165 (quoting *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429 (1993)). The second step in the content-neutrality analysis is to ask whether the law is content based in its justification. Even "facially content neutral" regulations will be considered content based if they "cannot be 'justified without reference to the content of the regulated speech'" or "were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* at 164 (alteration in original) (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989)).

The threshold content-neutrality question is often critical. "It is rare that a regulation restricting speech because of its content will ever be permissible," *United States v. Playboy Ent. Grp., Inc.,* 529 U.S. 803, 818 (2000), because such a regulation must satisfy strict scrutiny—that is, "the regulation is valid only if it is the least restrictive means available to further a compelling government interest," *Berger,* 569 F.3d at 1050. By contrast, a content-neutral regulation of expression must meet the less exacting standard of intermediate scrutiny. *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 642 (1994). For content-neutral rules governing expressive conduct, then, a regulation is constitutional "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression

of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien,* 391 U.S. 367, 377 (1968); *see Swisher,* 811 F.3d at 312.[3]

A.

The parties do not dispute that Section 27001 effectively forbids drivers from honking in public forums unless there is a traffic-safety reason to do so. That makes sense, because Section 27001 applies on public streets, which are "the archetype of a traditional public forum." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* 657 F.3d 936, 945 (9th Cir. 2011) (en banc) (quoting *Snyder v. Phelps,* 562 U.S. 443, 456 (2011)).[4]

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.

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[3] The *O'Brien* test is substantively equivalent to the requirement that a content-neutral time, place, or manner restriction on speech be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 293, 298 & n.8 (1984); *see Swisher,* 811 F.3d at 312 & n.7 (explaining that the two tests are equivalent). In the analysis that follows, we therefore rely on cases applying either test.

[4] Presumably because Section 27001 applies in some public forums, the State concedes that intermediate scrutiny applies to our evaluation of the statute's constitutionality. Given that concession, and because we conclude that the law survives intermediate scrutiny, we need not decide whether all the places in which Section 27001 applies are public forums.

Whether conduct such as honking is "sufficiently imbued with elements of communication" to be protected expression depends on "the nature of [the] activity, combined with the factual context and environment in which it was undertaken." *Spence,* 418 U.S. at 409-10. The protest at which Porter received a Section 27001 citation provides an example. Porter attended the protest and, while departing in her car, honked her horn in three clusters of short beeps, for a total of fourteen beeps. She later testified that her intent was to show support for the protest. The crowd cheered, suggesting that the group with which she had just been protesting understood her intended message. Porter's experience shows that, at least in some 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." *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 294 (1984). Of course, a honk is just a noise, so it may not always be understood—indeed, it may be particularly susceptible to being misunderstood given the inflexibility of the medium. A driver honking while passing by a protest might be expressing support, expressing disagreement, or signaling to another driver that continuing to change lanes could cause an accident. But the nature and circumstances of the honk will sometimes provide the necessary context for the message intended by the honk to be understood. Although we do not define today the full scope of expressive honking, we hold that enough honks will be understood in context to

treat Section 27001 as prohibiting some expressive conduct.[5]

B.

We next consider whether Section 27001 is a content-based regulation of expressive honking.[6]

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[5] Porter's Complaint purported to challenge Section 27001 both (1) on its face and (2) as applied to expressive horn use, though at times in the litigation she has seemed to use these phrases interchangeably. Those challenges are probably not entirely equivalent, because some horn use seems neither safety-related nor expressive. For example, a driver might honk along to the beat of music, or a child might reach over the driver to honk the horn for fun. Ultimately, however, we need not decide whether Porter's claim is best described as an as-applied or facial challenge (or both). Our constitutional analysis will be the same either way because "the substantive legal tests used in [facial and as-applied] challenges are 'invariant.'" *Hoye v. City of Oakland,* 653 F.3d 835, 857 (9th Cir. 2011) (quoting *Legal Aid Servs. of Or. v. Legal Servs. Corp.,* 608 F.3d 1084, 1096 (9th Cir. 2010)).

[6] The dissent argues that Section 27001 is unconstitutional as applied to *political* honking—specifically, "honking in response to a political protest." But Porter herself has not advanced that argument, contending instead that the statute is unconstitutional as applied to *all* expressive honking, which under her definition includes honking to communicate greetings and celebratory sentiments, among other things. Indeed, when pressed at oral argument on whether she sought to enjoin the statute as applied only to political honking, she expressly disavowed any such limitation of her argument, firmly replying that she south to enjoin enforcement against "against "all expressive conduct through use of a vehicle horn." Taking Porter at her word, we decide only whether the statute is unconstitutional on its face or as applied to all expressive honking. See Bell v. Wilmott Storage Servs., LLC, 12 F.4th 1065, 1071 n.8 (9th Cir. 2021) (declining to consider certain arguments where the defendant failed to make the relevant arguments in

Again, Section 27001 provides that "[t]he driver of a motor vehicle when reasonably necessary to [e]nsure safe operation shall give audible warning with his horn," but that "[t]he horn shall not otherwise be used, except as a theft alarm system."[7] Cal. Veh. Code § 27001. Porter argues that Section 27001 is content based "on its face" because it "draws distinctions based on the message a speaker conveys." *Reed,* 576 U.S. at 163.

We disagree. Even if we were to accept Porter's questionable assertion that honking to give a warning is a form of expression, the relevant distinction Section 27001 makes is not, as Porter suggests, between honks intended to convey warnings and honks intended to convey other messages. Rather, the law prohibits *all* driver-initiated horn use except when such use is "reasonably necessary to [e]nsure safe operation" of the vehicle. Thus, while it may be that Section 27001 prohibits some expressive conduct, the primary distinction the statute makes does not depend on the message that might be

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its briefing and disclaimed such arguments at oral argument); cf. Greenlaw v. United States, 554 U.S. 237, 243 (2008) ("[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."). We emphasize that although Porter's Article III standing stems from the citation she received after honking at a protest, that citation was dismissed, and no aspect of her current arguments or our analysis of them turns on the particular facts of that incident.

[7] Use of a horn as a theft alarm is part of an automatic system, not a honk initiated by the driver. *See* Cal. Veh. Code. § 28085. Porter does not argue that the exception for theft alarms is a content-based distinction.

conveyed. Section 27001 does not single out for differential treatment, for example, political honking, ideological honking, celebratory honking, or honking to summon a carpool rider. Instead, the law "applies evenhandedly to all who wish to" use the horn when a safety hazard is not present. *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 649 (1981). Section 27001 draws a line based on the surrounding factual situation, not based on the content of expression.[8]

Porter contends that Section 27001 is content based on its face because an officer must "'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley,* 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 383 (1984)). But to conclude that a honk complies with the statute, an officer need not examine the "content" of the honk the way one might read a sign or evaluate a spoken statement—he need only observe the traffic circumstances and determine if a safety risk is present. For instance, the sheriff's deputy who cited Porter explained that he "was

[8] It is true that, in those safety-related situations where honking is permitted, Section 27001 permits the driver to honk only to "give audible warning." But Porter has not argued that it violates the First Amendment to allow only warning, but not other, honks when a warning honk is "reasonably necessary to [e]nsure safe operation" of the vehicle. Moreover, Porter likely would not have standing to challenge an alleged content-based distinction in the context of a scenario where honking is "reasonably necessary to [e]nsure safe operation" of the vehicle. After all, the honk she was cited for did not occur in such a situation, and she never has claimed to want to give non-warning honks when a safety concern is present.

watching the traffic" and "didn't see an emergency" when Porter honked, so he decided to pull her over.

In any event, even if evaluating the traffic-related *context* of a honk involves listening to the sound of the horn—and thus could be seen as analogous to reading a sign to evaluate its content—the Supreme Court recently rejected as "too extreme an interpretation of [its] precedent" a rule "that a [sign] regulation cannot be content neutral if it requires reading the sign at issue." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC,* 142 S. Ct. 1464, 1471 (2022). In *City of Austin,* the Court considered a challenge to a city ordinance that distinguished between "off-premises" and "on-premises" signs—that is, "between signs (such as billboards) that promote ideas, products, or services located elsewhere and those that promote or identify things located onsite." *Id.* at 1469. The Court explained that the most recent case in which it had held a sign ordinance to be content based, *Reed v. Town of Gilbert,* had involved "a comprehensive sign code that 'single[d] out specific subject matter for differential treatment.'" *Id.* at 1471 (alteration in original) (quoting *Reed,* 576 U.S. at 169); *see also Reed,* 576 U.S. at 160-61 (discussing an ordinance with different rules for "ideological" signs, "political" signs, and "temporary directional" signs relating to events "sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization"). In *City of Austin,* by contrast, the Court held that the sign ordinance was content neutral because "the City's off-premises distinction require[d] an examination of speech only in service of drawing neutral, location-

based lines. It [was] agnostic as to content." 142 S. Ct. at 1471.

Indeed, the Supreme Court has "consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." *Id.* at 1473. As the Court emphasized in *City of Austin,* it has treated as content neutral regulations of solicitation—"that is, speech 'requesting or seeking to obtain something' or '[a]n attempt or effort to gain business,'" *Id.* (alteration in original) (quoting *Solicitation,* Black's Law Dictionary (11th ed. 2019))—even though enforcement requires an examination of the speaker's message. The Court explained:

> To identify whether speech entails solicitation, one must read or hear it first. Even so, the Court has reasoned that restrictions on solicitation are not content based and do not inherently present "the potential for becoming a means of suppressing a particular point of view," so long as they do not discriminate based on topic, subject matter, or viewpoint.

Id. (quoting *Heffron,* 452 U.S. at 649).

Under these cases, the fact that an officer, after hearing the sound of a honk, would need to look at the surroundings for a traffic hazard before deciding if the honk was "reasonably necessary to [e]nsure safe operation" of the vehicle, does not render the limitation on honking a content-based regulation of expression. Such an examination—like evaluating a

message to determine if it is solicitation, or reading a sign to see if it is on-premises or off-premises advertising—"do[es] not inherently present 'the potential for becoming a means of suppressing a particular point of view.'" *Id.* (quoting *Heffron,* 452 U.S. at 649).

Turning to the final step of the content-neutrality inquiry, we have no concern that Section 27001 "cannot be 'justified without reference to the content of the regulated speech'" or was "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed,* 576 U.S. at 164 (alteration in original) (quoting *Ward,* 491 U.S. at 791). Porter does not argue that Section 27001 is justified by anything other than the safe operation of motor vehicles and noise reduction, nor does she argue that the California legislature was motivated by disagreement with any particular expressive use of the vehicle horn. Aware of no evidence that would have supported such arguments, we proceed to evaluate Section 27001 as a content-neutral law, applying intermediate scrutiny.

C.

To survive intermediate scrutiny, a content-neutral regulation of expressive conduct must "further[] an important or substantial governmental interest," that interest must be "unrelated to the suppression of free expression," and the "incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *O'Brien,* 391 U.S. at 377. To be no more burdensome "than is essential to the

furtherance of" the government's interest, *id.,* a regulation "need not be the least restrictive or least intrusive means" of serving that interest. *Ward,* 491 U.S. at 798. But the "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 799. The regulation must also "leave open ample alternative channels for communication of the information." *Clark,* 468 U.S. at 293.

1.

We first consider whether Section 27001 furthers a substantial government interest that is unrelated to the suppression of free expression. The State asserts that Section 27001 furthers its interest in traffic safety. There can be no doubt that this interest is substantial. *See Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 507-08 (1981) (holding that traffic safety is a "substantial governmental goal[]"). And California's interest in traffic safety is unrelated to the suppression of free expression; Porter does not contend otherwise. But our inquiry does not end there, because when the government seeks to regulate expression, even incidentally, to address anticipated harms, it must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner,* 512 U.S. at 664. That is, we must be persuaded that the law actually furthers the State's asserted interests.

The asserted interest in traffic safety appears on the face of the statute itself. Section 27001's first

subsection provides that the driver of a motor vehicle shall, "when reasonably necessary *to [e]nsure safe operation,"* "give audible warning with his horn." Cal. Veh. Code § 27001(a) (emphasis added). The second subsection then dictates that "[t]he horn shall not otherwise be used, except as a theft alarm system." *Id. §* 27001(b). These twin commands make logical sense: For the horn to serve its intended purpose as a warning device, it must not be used indiscriminately.[9]

The State's expert testimony supports that logic. Drawing on his decades of experience working for the CHP, Sergeant Beck explained that "the horn itself is a great warning device for traffic safety" because it allows drivers to "communicate if there's a hazardous situation." He went on to opine that indiscriminate horn use could dilute the potency of the horn as a warning device, testifying that if law enforcement officers were unable to enforce Section 27001, "the public in general would . . . [think it was] okay to use your horn whenever you want for whatever purpose." He said that, as a result, "people would not recognize the horn as something that's used for safety or to warn them of a hazard" and "the effectiveness of the horn would be diminished." In other words, the more

[9] The dissent contends that this justification for Section 27001 is undercut by the statute's lack of enforcement. There is no evidence in the record, however, indicating that the statute is indeed rampantly underenforced. The State acknowledges that citations for violations of the statute are rare, but this says nothing about how frequently the statute is *violated—citations* could be rare for the simple reason that violations are rare. To the extent that the dissent relies on Lieutenant Munsey's comment to Deputy Klein as evidence of underenforcement, that comment's meaning is too hard to decipher to support the dissent's claim that "Section 27001 is pretty much a dead letter."

drivers honk in protest, or in greeting, or for no reason at all, the less likely people are to be alerted to danger by the sound of a horn.

Sergeant Beck also explained that indiscriminate horn use can distract other drivers and pedestrians. He opined that, "when a vehicle horn is used improperly, it can create a dangerous situation by startling or distracting drivers and others." Sergeant Beck explained that, in his own experience, the sound of a horn "makes me look up, take my eyes off what I'm doing, which could affect my safety." He also explained that honking can startle pedestrians in high-traffic areas, potentially putting them in harm's way.

Porter argues that the State has not met its burden to show that Section 27001 furthers traffic safety because it relied primarily on Sergeant Beck's testimony, which Porter contends was pure speculation and should not have been admitted. We disagree.

As an initial matter, the district court did not abuse its discretion in admitting Sergeant Beck's testimony under Federal Rule of Evidence 702. "The inquiry envisioned by Rule 702 is ... a flexible one." *Daubert v. Merrell Dow Pharms.,* 509 U.S. 579, 594 (1993). In evaluating expert testimony, the district court need not follow a "definitive checklist or test." *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 150 (1999) (quoting *Daubert,* 509 U.S. at 593). Where an expert offers non-scientific testimony, "reliability depends heavily on the *knowledge and experience* of the expert, rather than the methodology or theory

behind" the testimony. *Hangarter v. Provident Life & Acc. Ins. Co.,* 373 F.3d 998, 1017 (9th Cir. 2004) (quoting *United States v. Hankey,* 203 F.3d 1160, 1169 (9th Cir. 2000)); *see also Kumho Tire,* 526 U.S. at 150 (explaining that the reliability inquiry "may focus upon personal knowledge or experience" of the witness).

The district court carefully considered Sergeant Beck's knowledge and experience before concluding that his opinions were relevant, reliable, and helpful to the court. The court pointed, for example, to Beck's "extensive experience working for the CHP, responding to car accidents, and training CHP cadets." To be sure, "reliability becomes more, not less, important when the 'experience-based' expert opinion is perhaps not subject to routine testing, error rate, or peer review type analysis, like science-based expert testimony." *United States v. Valencia-Lopez,* 971 F.3d 891, 898 (9th Cir. 2020). But "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire,* 526 U.S. at 152. The district court appropriately exercised that discretion here in concluding that Sergeant Beck's opinions were relevant, reliably grounded in his training and experience, and helpful to the court.

Sergeant Beck's decades of experience in highway patrol allowed him to elucidate "the practical realities" of Section 27001's relationship to traffic safety. Given that Sergeant Beck's experience comes from a world in which Section 27001 does exist, he could not reasonably be expected to opine

authoritatively—contrary to what the dissent seems to suggest—on what traffic safety would be like in the absence of that statute.[10] He could, however, help the court assess the *current* relationship between Section 27001 and traffic safety.

Although Porter's expert criticized Sergeant Beck's opinions about the impact of enjoining Section 27001 enforcement against expressive activity, averring that they were "founded upon insufficiently representative observations" to be "scientifically reliable," he did not contend that Sergeant Beck's explanations were wrong—rather, he merely opined that "we don't have the science to support or deny" those explanations. In other words, studies on the issue simply do not exist. And Porter's own expert acknowledged that conducting a study to obtain such evidence would be both "very expensive" and "exceptionally difficult." Given the infeasibility of scientific studies on the topic, it was not inappropriate to treat Sergeant Beck as having gained expertise from his decades of experience enforcing traffic safety.

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[10] The dissent seems to assume that Section 27001 is effectively nonexistent. But Section 27001 does exist, and we take judicial notice of the fact that California's driver education materials, provided for anyone taking the test for a state driver's license, instruct that the horn should be used only "to let other drivers know you are there," "warn others of a hazard," "avoid collisions," or "alert oncoming traffic on narrow mountain roads where you cannot see at least 200 feet ahead"—all safety-related functions. *See* State of Cal. Dep't of Motor Vehicles, *California Driver's Handbook* 13 (2023), https://www.dmv.ca.gov/portal/file/california-driver-handbook-pdf.

Once properly admitted, Sergeant Beck's testimony assisted the State in meeting its burden under intermediate scrutiny. The Supreme Court has instructed that courts must "never accept[] mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 392 (2000). But "the quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the [law's] justification." *Id.* at 391. In a case applying strict scrutiny to content-based restrictions around polling places, for instance, the Supreme Court has considered "[a] long history, a substantial consensus, and simple common sense" to be sufficient evidence to support the justification of protecting the fundamental right to vote. *Burson v. Freeman,* 504 U.S. 191, 211 (1992).

There is nothing novel about Section 27001's traffic-safety justification—in fact, it seems the California legislature had traffic safety in mind when it first enacted a version of Section 27001 in 1913. That early version of the law prohibited honking "for any purpose except as a warning of danger." Act of May 31, 1913, ch. 326, § 12, 1913 Cal. Stat. 639, 645. The traffic-safety justification for restricting the use of the horn can also be seen in the vehicle codes of at least forty other states, indicating a near-nationwide consensus on the need for such laws. *See* Appendix; *see also, e.g.,* Del. Code Ann. tit. 21, § 4306(b) ("The driver of a vehicle shall, when reasonably necessary to insure safe operation, give audible warning with the horn but shall not otherwise use the horn for any other purpose."). This long history and consensus,

coupled with the common-sense inference that the horn's usefulness as a warning tool will decrease the more drivers use it for any other function, support the State's asserted interest in traffic safety.

"Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner,* 512 U.S. at 665. Here—where the law has existed since the dawn of the automobile, forty other states have similar laws, the law's justification is so logical, and conducting the relevant studies would be prohibitively difficult and expensive—California does not need to produce new empirical evidence to justify Section 27001. "There might, of course, be [a] need for a more extensive evidentiary documentation" if Porter "had made any showing of [her] own to cast doubt" on the State's justifications. *Nixon,* 528 U.S. at 394. But Porter has done nothing to cast doubt on Sergeant Beck's testimony that Section 27001 helps guard against distracting honking, or 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. *See* Aesop, *The Shepherd Boy and the Wolf, in* Aesop's Fables 74, 74 (Boris Artzybasheff ed., Viking Press 1947) (1933) (telling the tale of a boy who cried "Wolf!" to trick local villagers so many times that later, when a wolf actually arrived and the boy "cried out in earnest," the

"neighbors, supposing him to be at his old sport, paid no heed to his cries").[11]

Accordingly, we conclude that Section 27001 "furthers an important or substantial governmental interest" that is "unrelated to the suppression of free expression." *O'Brien,* 391 U.S. at 377.

2.

We are also persuaded that Section 27001 is narrowly tailored to further California's interest in traffic safety. The statute encourages the use of a vehicle's horn "when reasonably necessary to [e]nsure safe operation" and prohibits honking in all other circumstances—because, as explained above, honking when there is no hazard both dilutes the horn's usefulness as a safety device and creates dangers of its own. To be sure, most non-warning honks do not create distractions resulting in accidents, but we discern no plausible means by which California could permit non-distracting honks while prohibiting distracting honks.[12] And, regardless, *any* honking

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[11] Contrary to Porter's suggestion, the exception for theft alarms does not undermine California's anti-dilution justification for Section 27001. Theft alarms sound very different from honking initiated by the driver, so they are unlikely to be mistaken for warning honks.

[12] Porter points to a local ordinance in Rio Rancho, New Mexico, which provides: "No person shall ... operate a motor vehicle's equipment, including but not limited to the vehicle horn or lights, in such manner as to distract other motorists on the public way or in such a manner as to disturb the peace." Rio Rancho Mun. Code § 12-6-12.18(5). She argues that such a law would be more narrowly tailored to promoting traffic safety. Although "the existence of obvious, less burdensome alternatives

other than "when reasonably necessary to [e]nsure safe operation" of the vehicle undermines the effectiveness of the horn when used for its intended purpose of alerting others to danger. Thus, by banning horn use in all other circumstances, the State "did no more than eliminate the exact source of the evil it sought to remedy." *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 808 (1984).

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is 'a relevant consideration in determining whether the fit between ends and means is reasonable,'" the State need not adopt "'the least restrictive or least intrusive means' available to achieve [its] legitimate interests." *Berger,* 569 F.3d at 1041 (first quoting *Cincinnati,* 507 U.S. at 417 n.13, then quoting *Ward,* 491 U.S. at 798). In any event, we are not persuaded that this sort of alternative law would achieve California's interest in traffic safety. A law against distracting honking might be counterproductive if it discouraged honking to warn others of danger. And, as the State notes, New Mexico has a statewide law similar to California's that instructs drivers to honk only when reasonably necessary to ensure traffic safety, but not otherwise—suggesting that the local ordinance does not need to achieve the same traffic safety goals as Section 27001, because a statewide law already has those goals covered. N.M. Stat. Ann. § 66-3-843(A).

The dissent also contends that local noise ordinances or California Penal Code § 415(2), which prohibits "maliciously and willfully disturb[ing] another person by loud and unreasonable noise," could allow the State more narrowly to achieve its interests in traffic safety and noise control. But Porter has offered no argument that such noise control provisions would achieve the State's goal of ensuring traffic safety. In any event, our holding rests on the state's interest in traffic safety alone. Because we conclude that Section 27001 is narrowly tailored to advancing California's substantial interest in traffic safety, we do not address the parties' arguments about the State's separate interest in noise control.

Finally, Section 27001 plainly leaves open ample alternative channels for people to communicate their ideas and messages, including from their cars. Porter argues that Section 27001 prevents spontaneous communication by drivers about protests or other events, but common sense and Porter's own testimony indicate otherwise. As Porter herself has done on numerous occasions, drivers can park their cars and attend political demonstrations on foot. They can also express agreement with protestors from their cars by waving, giving a thumbs up, or raising a fist as they drive by.[13] They can put bumper stickers on their cars. Although some people may find it more satisfying to honk in certain circumstances, "[w]e will not invalidate a regulation merely because it restricts the speaker's preferred method of communication." *United Bhd. of Carpenters & Joiners v. NLRB,* 540 F.3d 957, 969 (9th Cir. 2008); *see also Taxpayers for Vincent,* 466 U.S. at 812 ("[T]he First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places.").

We hold that Section 27001 is narrowly tailored to advancing California's substantial interest in traffic safety, and therefore that it passes intermediate scrutiny.

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[13] The dissent theorizes that these options "would surely pose a greater threat to traffic safety than a honk." But there is no basis for the conclusion that briefly taking a hand off the wheel is more dangerous than startling others by honking.

* * *

We make one final observation: It appears that Section 27001 citations are not common, and officers are taught to use "sound professional judgment" in deciding whether to give a warning or a citation for a violation of Section 27001. As the dissent aptly observes in footnote 6, such broad discretion *could* open the door to selective enforcement. Porter does not allege, however, that the State has a policy or practice of improper selective enforcement of Section 27001, so we have no occasion to address that possibility here.

V.

For the foregoing reasons, we affirm the district court's summary judgment in favor of the State.

BERZON, Circuit Judge, dissenting:

The majority today upholds a ban on a popular form of political expressive conduct—honking horns to support protests or rallies. Political protest "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown,* 447 U.S. 455, 467 (1980). Defendants' enforcement of California Vehicle Code Section 27001 prohibited Susan Porter from exercising her right to participate in political protest by honking in support of a demonstration against an elected official.[1] Yet, there

[1] The majority refers to the defendants, the Sheriff of San Diego County and the Commissioner of the California Highway Patrol,

is no evidence in the record (or elsewhere, as far as I can determine) that such political expressive horn use jeopardizes traffic safety or frustrates noise control.

I therefore respectfully dissent. I would hold that Section 27001 does not withstand intermediate scrutiny insofar as it prohibits core expressive conduct, and is therefore unconstitutional in that respect.

I.

As a preliminary matter, but one critical to my larger concerns, I would hold—contrary to the majority's conclusion—that the district court's admission of the expert testimony of California Highway Patrol (CHP) officer Sergeant William Beck in support of Defendants' motion for summary judgment was an abuse of discretion.

"Before admitting expert testimony into evidence, the district court must perform a 'gatekeeping role' of ensuring that the testimony is both 'relevant' and 'reliable'" under Federal Rule of Evidence 702. *United States v. Ruvalcaba-Garcia,* 923 F.3d 1183, 1188 (9th Cir. 2019) (quoting *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 597 (1993)). The majority assumes that Beck's experience working for the CHP provided a reliable basis for his opinions as to Section 27001's impact on road safety. *See* Majority Op. 25-27. But "reliability becomes more, not less, important when the 'experience-based' expert opinion is . . . not subject to routine testing, error rate, or peer review

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collectively as "the State." *See* Majority Op. 8. I use the term "Defendants" instead.

type analysis, like science-based expert testimony." *United States v. Valencia-Lopez,* 971 F.3d 891, 898 (9th Cir. 2020). An examination of the record reveals that Beck utterly failed to explain how his general law enforcement experience supported the specific opinions he enunciated regarding the impact of Section 27001—especially with regard to political protest honking—on traffic safety.

Beck declared that his opinions were based on his "24 years of experience working for the California Highway Patrol." Based on that experience alone, he opined that the improper use of a vehicle horn can create danger by startling or distracting others. But when asked during his deposition for the basis of this opinion, Beck couldn't articulate a reasoned explanation for the connection between his experience and that opinion. He did not provide a single example of an accident caused by *any* type of horn honking, let alone honking in support of a political protest.

Of the three examples he was able to give in which he was personally distracted by horn honking, two of the examples were safety-related honks, permissible under Section 27001, used to notify drivers "backing out" who "don't see other people that are behind them." In reciting the third example, Beck explained that he has been briefly startled "when I'm writing a citation" or "working a traffic collision" and "somebody blasts their horn for a reason." In none of these examples did Beck report any actual danger created by the honk. And, in any case, those examples were based on Beck's personal experience, no different from anyone else's experience with horn honking and so unrelated to any "scientific, technical,

or other specialized knowledge" or experience. *Compare* Fed. R. Evid. 701(c), *with* 702(a). The examples are therefore not admissible as a basis for expert opinion.

Beck also conjectured that a horn's usefulness as a warning device would be diminished if law enforcement officers were unable to enforce Section 27001. People, he supposed, would think it "okay to use your horn whenever you want for whatever purpose and I feel that people would not recognize the horn as something that's used for safety." He analogized the enforcement of Section 27001 to speeding laws and bicycle helmet laws, opining that "more people break [the] law if we're not out enforcing it."

One problem with this speculative testimony is that nothing in Beck's specific experiences as a CHP officer provides a basis for determining the effect of non-enforcement of traffic laws. He did not suggest that he has done, or read, any studies demonstrating a correlation between the degree of enforcement of speeding or bike helmet laws and the prevalence of violations of those laws. Nor did he aver, even anecdotally, that he had observed in his experience that fewer people speed or more people wear bike helmets in areas where the relevant statutes are enforced.

Moreover, and more importantly, Beck reported that, in his twenty-four-year career, he had stopped people for a Section 27001 violation only "four or five times" and the last time he wrote a citation was "several years ago . . . probably around 2013, 2014."

Thus, his opinion as to the salutary effect of actually enforcing Section 27001's ban on non-safety-related horn honking has no grounding in his own experience, as he has exceedingly rarely enforced the statute.

Finally, Beck opined that other laws, including local noise ordinances and California Penal Code Section 415(2), are inadequate alternatives to Section 27001.[2] But he stated that "I have not generally enforced local ordinances," that he was not aware of any local noise ordinances, and that he was not aware of any specific situation where enforcement of a local noise ordinance was an inadequate substitute for the absolute prohibition contained in Section 27001. He also stated that he had never personally enforced, nor seen an officer enforce, Section 415(2) against horn honking, nor was he aware of any specific problems that would arise were an officer to attempt to do so.

When an expert witness "is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Fed. R. Evid. 702 advisory committee's note to 2000 amendment. Although Beck's "qualifications and experience are relevant ... the record contains no evidence as to why that experience, by itself, equals reliability for his testimony." *Valencia-Lopez,* 971 F.3d at 898, 900. An

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[2] Penal Code Section 415(2) provides that "[a]ny person who maliciously and willfully disturbs another person by loud and unreasonable noise .. . shall be punished" by imprisonment or fine.

expert "must establish that reliable principles and methods underlie the particular conclusions offered." *United States v. Hermanek,* 289 F.3d 1076, 1094 (9th Cir. 2002). Beck could point to nothing specific in his experience as a CHP officer to substantiate his general speculations about the effect of horn honking on traffic safety, or any basis for supposing that the inclusion of political protest honking in Section 27001 enhances traffic safety. As a result, that testimony does not satisfy the reliability requirement of Rule 702.

The district court thus abused its discretion when it admitted Beck's expert testimony. That error was far from harmless. As discussed later, Beck's testimony was the *only* evidence upon which the district court relied, and which the majority opinion emphasizes, to conclude that Section 27001 passes intermediate scrutiny as applied to horn honking as a medium for political protest.

II.

Turning now to the merits of Porter's First Amendment challenge, I would hold that Section 27001 is unconstitutional as applied to political expressive conduct such as Porter's. The majority's fundamental error, in my view, in concluding otherwise is that it does not sufficiently focus on the specific type of enforcement at the core of this case—enforcement against honking in response to a political protest.

Generally, when a statute has both constitutional and unconstitutional applications, we "enjoin only the unconstitutional applications ... while leaving other

applications in force." *Ayotte v. Planned Parenthood of N. New England,* 546 U.S. 320, 329 (2006). Porter was cited for honking in support of a political protest, and she asserted in her deposition that the threat of enforcement has chilled her future plans only for such political honking; she did not aver an intent to engage in any other honking she characterizes as "expressive." So the particular "subset of the statute's applications" cognizably challenged here is the enforcement of Section 27001 against political protest honking. *Hoye v. City of Oakland,* 653 F.3d 835, 857 (9th Cir. 2011).

The requested relief in Porter's complaint does include enjoining Defendants from enforcing Section 27001 against "protected speech or expression." The complaint and her briefs on appeal assert that "expressive" honking can include using a vehicle horn to "express support or approval of parades, protests, rallies, demonstrations, or fundraising or for other expressive purposes such as greeting a relative, friend, or acquaintance." Relying on this expansion of the requested relief beyond Porter's own past experience and desired future actions, the majority states that, because Porter seeks to enjoin enforcement against all expressive honking, "we decide only whether the statute is unconstitutional on its face or as applied to all expressive honking." Majority Op. 18 n.6.

But we are not bound by the scope of a party's requested remedy. *See, e.g., Hoye,* 653 F.3d at 856-57 (crafting narrow declaratory relief despite plaintiff's broad facial challenge to ordinance); *N. Cheyenne Tribe v. Norton,* 503 F.3d 836, 842-44 (9th Cir. 2007)

(affirming partial rather than blanket injunction requested by parties). Porter's actual injury, past and future, which provides her Article III standing, is narrower than the scope of the injunctive relief she requested. *See* Majority Op. 11-13. Moreover, as will appear, I would conclude that "expressive horn use" is a fairly narrow subset of horn beeping, of which political protest honking is the most obvious example.

For these reasons, I concentrate this dissent on the application of Section 27001 to political protest honking.

A.

I agree with the majority that "at least some of the honking prohibited by Section 27001 is expressive for First Amendment purposes," Majority Op. 16, and that Section 27001 is content neutral, *id.* at 18-22. It is important to clarify, however, that honking at a political protest is a *core* form of expressive conduct that merits the most stringent constitutional protection, and is, in that respect, qualitatively different from warning honks and other forms of vehicle horn use.

Expressive conduct that merits protection under the First Amendment is "characterized by two requirements: (1) an intent to convey a particularized message and (2) a great likelihood that the message would be understood by those who viewed it." *Edge v. City of Everett,* 929 F.3d 657, 668 (9th Cir. 2019) (cleaned up). Porter's political protest honking meets both criteria.

The incident that gave rise to this lawsuit is illustrative. Porter honked "in three clusters of short beeps" while driving by a political protest, and "her intent was to show support for the protest." Majority Op. 17. The crowd cheered, suggesting that her intended message was understood. *Id.* The officers' body-worn camera footage shows that many other drivers honked as they drove by the protest that day, with protesters cheering in response. More generally, honking is a widespread, long-established form of political protest.[3]

Political honking is thus "imbued with elements of communication." *Spence v. State of Wash.,* 418 U.S. 405, 409 (1974). As the majority explains, such honking "carr[ies] a message that 'is intended to be communicative and that, in context would reasonably be understood by the [listener] to be communicative.'" Majority Op. 17 (quoting *Clark v. Cmty. For Creative Non-Violence,* 468 U.S. 288, 294 (1984)). "The expressive, overtly political nature of [Porter's] conduct was both intentional and overwhelmingly apparent." *Texas v. Johnson,* 491 U.S. 397, 406 (1989).

But most other honking is not equally expressive. As the majority notes, ordinarily, "a honk is just a noise." Majority Op. 17. Thus, whether any given honk is "sufficiently imbued with elements of communication" to constitute protected expression

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[3] *See, e.g.,* Kirk Johnson, *Honk if You Agree There Is a Difference Between Free Speech and Noise,* N.Y. Times, Nov. 18, 2011, https://www.nytimes.com/2011/11/19/us/is-honking-free-speech-or-just-noise-pollution.html; *Honk for Peace Cases,* ACLU of Minnesota, https://www.aclu-mn.org/en/cases/honk-peace-cases; Honk for Justice Chicago, https://honkforjusticechicago.com/.

depends on "the nature of [the] activity, combined with the factual context and environment in which it was undertaken." *Id.* at 16-17 (quoting *Spence,* 418 U.S. at 409-10). "It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 570, (1991) (quoting *Dallas v. Stanglin,* 490 U.S. 19, 25 (1989)).

Warning honks, for example, are, in my view, not expressive conduct.[4] A person's reaction to hearing a warning honk is to look up or toward the source of the noise. But "given the inflexibility of the medium," Majority Op. 17, the hearer cannot tell if the honk conveys some specific traffic direction—for example, whether it means "slow down" or "speed up." Instead, a warning honk is just a loud noise that grabs the attention of the hearer. Once engaged, the hearer can notice the traffic situation and determine an appropriate course of action. This attention-grabbing function is why the Vehicle Code requires vehicle horns to be loud, "capable of emitting sound audible under normal conditions from a distance of not less than 200 feet." Cal. Veh. Code § 27000(a). And it is also why a warning honk does not carry a "great" likelihood of conveying a "particularized message," *Johnson,* 491 U.S. at 404-it is just a noise.

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[4] The majority leaves this issue (slightly) open, simply noting that Porter's "assertion that honking to give a warning is a form of expression" is "questionable." Majority Op. 19.

Because of the attention-alerting nature of a warning honk, determining whether a honk qualifies as a warning honk does not require evaluating and differentiating honks based on their content. A law enforcement officer seeking to determine whether a beep on the horn was a warning honk, as the majority explains, "need only observe the traffic circumstances and determine if a safety risk is present." Majority Op. 20. I therefore agree that "Section 27001 draws a line based on the surrounding factual situation, not based on the content of expression." *Id.* at 17.

I would go further: In *many* contexts, a honk conveys no comprehensible expressive message. Porter asserts that honks to "greet friends or neighbors" or "summon children or co-workers" are expressive honks. But even in those instances, honks are used to grab the hearer's attention, not to convey any articulable message. A greeting honk, for example, emits a loud noise that causes the listener to look up; the honk itself is not a greeting message, but it causes the listener to look up, notice, and identify the honker as a friend. Similarly, a honk to summon a child does not itself convey a message; it grabs the child's attention, so she notices that her parent is waiting for her.

Honking at a political protest, on the other hand, is a use of a vehicle horn that definitely *does* constitute message-conveying expressive conduct and so merits First Amendment protection. When Susan Porter honked while passing a protest against U.S. Representative Darrell Issa, she was not just making noise to attract attention. She was conveying a distinct message—agreement with the protesters'

objections to Darrell Issa's stance on gun control. And that message was understood, as the protesters cheered when she beeped. The protesters did not have to be startled into looking up to understand what Porter was honking about; in the context, they understood the message immediately.

Because political protest honking conveys a distinct message, one that implicates core First Amendment values, it is the banning of this message that should be—but in the majority opinion is not—the focus of the First Amendment analysis. The constitutionality of Section 27001 must be weighed specifically in light of the restrictions it places on political expression. *See, e.g., Johnson,* 491 U.S. at 402-20 (analyzing constitutionality of a statute prohibiting flag burning based on its restriction of an individual's political protest regarding the renomination of Ronald Reagan for president).

B.

Beginning from that premise, I cannot agree with the majority's conclusion that Defendants have sufficiently demonstrated that Section 27001's restriction on political protest honking furthers a significant government interest.[5]

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[5] I assume for purposes of this dissent that intermediate scrutiny applies. But I am not certain that categorization is correct. As Section 27001, in my view, mostly applies to non-expressive conduct, the content neutrality rubric adopted by the majority, *see* Majority Op. 13-16, seems inapplicable. Rather, once again, the focus should be on the ban of political protest honking—a ban that viewed discretely would surely trigger strict scrutiny. *See, e.g., Meyer v. Grant,* 486 U.S. 414, 420 (1988).

The asserted government interests in traffic safety and noise control are substantial. However, the fact "[t]hat the Government's asserted interests are important in the abstract does not mean . . . that [a challenged statute] will in fact advance those interests." *Turner Broad. Sys., Inc. v. F.C.C.,* 512 U.S. 622, 664 (1994). "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms," the government has the burden to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* "[M]erely invoking interests in regulating traffic" or noise control "is insufficient." *Kuba v. 1-A Agric. Ass'*n, 387 F.3d 850, 859 (9th Cir. 2004).

I would hold that Defendants have not met their burden to show that the asserted harms caused by political honking are real. Sergeant Beck's testimony is the *only* evidence upon which the district court relied. As I have explained, I would hold that evidence inadmissible as not meeting the standards for competent expert testimony. With that evidence out of the case, there is no basis whatever in the record for concluding that the asserted governmental interests supporting a ban on political horn honking are substantial.

Even if Beck's testimony were admissible, my conclusion would be the same. Beck hypothesized that without Section 27001, "the public in general would ... [think it was] okay to use your horn whenever you want" and "the effectiveness of the horn would be diminished." Yet, as discussed above, in his twenty-

four-year career with the CHP, Beck did not know of a single accident caused by any type of horn honking, let alone the political honking at issue here. And he did not purport to offer any opinions as to the impact of horn honking on noise control concerns.

Defendants offered no other evidence deemed admissible by the district court to demonstrate that political horn honking endangers its asserted interests. For example, no evidence was introduced about the frequency of political honking, the relationship between political honking and increased traffic danger, or its geographic scope. Where "[t]here is no record of harm or safety concerns caused by such activity," this "void in the record belies" the significance of the state interest. *Kuba,* 387 F.3d at 860.

Despite this lack of evidence, the majority asserts that the relationship between Section 27001 and a governmental interest in traffic safety makes "logical sense: For the horn to serve its intended purpose as a warning device, it must not be used indiscriminately." Majority Op. 24. This conclusion is too glib. Common sense also indicates that people *do* honk their horns for non-safety reasons all the time, and that they are not cited for it.

This lack of enforcement is borne out by the record and undermines the purported importance of Section 27001 in furthering the asserted governmental interests. Any enforcement of Section 27001 is left to the broad discretion of peace officers. The result of that discretion? Section 27001 is almost never enforced, even though violations are

legion. Defendants assert, for example, that of the nearly 4.3 million citations issued by CHP between 2016 and 2018, only 180 were for a Section 27001 violation, and that "the odds of anyone being cited by CHP for violating Section 27001 under any circumstances—much less at a protest—are *de minimis.*"

The facts of this case bear out what everyone who drives in California knows: Section 27001 is pretty much a dead letter. The honking of horns for non-safety reasons is rampant and hardly ever sanctioned. As Deputy Klein was issuing the citation to Porter, his supervisor, Lieutenant Munsey, told him, "Oh illegally honking the horn? If you want to um, because everybody does it, if you feel like it and don't have any cites, warn them, if you don't, well, it's up to you." Klein only wrote one citation for a Section 27001 violation that day, even though he heard many people honking their horns.[6] Were there really a substantial

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[6] Jaywalking is a salient illustration that, where a generic traffic law is on the books but not enforced, it may well be because there's no real government interest underlying it. Jaywalking was, until recently, illegal in California, but also "endemic" and "rarely result[ed] in arrest." *Nieves v. Bartlett,* 139 S. Ct. 1715, 1727 (2019); *see* Cal. Stats. 2022, ch. 957 (A.B. 2147). Based in part on evidence that people of color and low-income individuals are disproportionately cited for jaywalking violations, a selective enforcement danger that arises where officers have probable cause to make arrests but typically exercise their discretion not to do so, the California legislature recently amended its jaywalking laws to permit a peace officer to stop a jaywalker only if "a reasonably careful person would realize there is an immediate danger of a collision with a moving vehicle." *See, e.g.,* Cal. Stats. 2022, ch. 957 (A.B. 2147), § 11(b)(1); Cal. Veh. Code § 21955 (2023); *see* Colleen Shalby, *Jaywalking Is Decriminalized in California Under New Law,* L.A. Times, Oct.

state interest in curbing non-safety-related beeping of car horns—let alone the protest or political honking protected by the First Amendment—surely there would be some serious attempt to sanction noncompliance.

C.

Even if we assume Defendants did provide sufficient support for their asserted interests in traffic safety and noise control, Section 27001's near-complete ban on honking is unconstitutional because it is not narrowly tailored to serve those interests. *Clark,* 468 U.S. at 293.

1.

To satisfy the narrow tailoring requirement, Defendants must show that the statute "does not 'burden substantially more speech than is necessary'" to further the asserted governmental interests. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* 657 F.3d 936, 948 (9th Cir. 2011) (quoting *Turner,* 512 U.S. at 665). "In particular, [a statute's] expansive language can signal that the [government] has burdened substantially more speech than effectively advances its goals." *Cuviello v. City of Vallejo,* 944 F.3d 816, 829 (9th Cir. 2019).

Downplaying the broad sweep of the statute, the majority asserts that Defendants "did no more than eliminate the exact source of the evil it sought to remedy." Majority Op. 31 (quoting *Members of the*

1, 2022, https://www.latimes.comicalifornia/story/2022-10-01/jaywalking-decriminalized-in-california-under-new-law.

City Council v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984)). I would hold that Section 27001's ban on almost all honking burdens substantially more speech than necessary, because it prohibits political honking that does not implicate traffic safety or noise control concerns.

At a basic level, Section 27001-if enforced—could contribute to noise control and driver distraction; prohibiting drivers from honking in nearly all circumstances does reduces noise levels, and noise may be distracting. But a sweeping ban on nearly all honking prohibits political expression—"the core of speech protected by the First Amendment"—without regard to whether such expression actually jeopardizes the asserted governmental interests. *Sanders Cnty. Republican Cent. Comm. v. Bullock,* 698 F.3d 741, 745 (9th Cir. 2012).

The facts of this case show why this is so. Porter was cited for honking at a political protest on the sidewalk in front of a politician's office. The protest was a weekly, organized event; on this particular day, it had a sign-in table, and volunteers in vests helped pedestrians cross the street. Deputy Klein perceived that a "couple hundred" protesters were present. The protesters had a megaphone and a drum, and they held picket signs, chanted, and sang. A counter-protester stood across the street and played amplified music through big speakers to drown out the protesters. Porter honked her horn in support of the protest as she drove by—as many others did—and Deputy Klein heard "people cheering . . . someone on a loud speaker, a microphone."

Whatever the governmental interests may be in noise control or curbing driver distraction, there's just no record evidence that Porter's political honking at an already noisy event endangered those interests. A political protest is *designed* to be noticed. As Deputy Klein testified, "it was loud." Political honking was hardly a significant source of noise or distraction in that environment. There is no basis for supposing that anyone was confused or distracted by the honking. Instead, Porter's honking was understood as political expression by the protesters, who cheered in response.

A statute is overinclusive when it prohibits expression, especially core political expression, "without any specifications or limitations that may tailor [the statute] to situations involving the most serious risk to public peace or traffic safety." *Cuviello,* 944 F.3d at 830. *Cuviello* held, for example, that a permitting requirement for using sound-amplifying devices was likely not narrowly tailored, noting that it applied to a public sidewalk next to a Six Flags theme park, an "already [] noisy area, where patrons flock in droves." *Id.* "Amidst all the noise, the sound of one bullhorn likely would not cause an additional disturbance to traffic safety or public peace." *Id.*

So here. Porter's honking was in response to an already noisy—and undoubtedly distracting to passersby and drivers—political protest. The point of such protests is to draw attention to the cause supported. As in *Cuviello,* Section 27001's broad ban on noisy, distracting political expression serves no governmental purpose where there is already cacophony and flurry. The statute therefore is not

narrowly tailored to the circumstances in which such purposes could be served.

The minimal enforcement of Section 27001 is further evidence that the statute sweeps too broadly. When police officers exercise their discretion not to enforce a statute, the fair inference is that they have concluded that no governmental interest would be served by doing so. And where, as here, the statute is almost never enforced, one can only conclude that it is vastly overbroad, and that a narrower, targeted ban would suffice.

2.

The majority recognizes that "most non-warning honks do not create distractions resulting in accidents," but holds that Section 27001 is narrowly tailored because "we discern no plausible means by which California could permit non-distracting honks while prohibiting distracting honks." Majority Op. 30. I disagree with the take-off point of this analysis, as well as with its conclusion.

As I've explained, much honking is just noise, *not* First Amendment-protected communication. *See supra* Part II.A. The obvious way to eliminate the statutory overbreadth as applied to First Amendment-protected honking is to except such beeping from the statute's reach. As Section 27001 has no such exception, an injunction against enforcement of the statute against political protest honking is an appropriate remedy for Porter's injury here. *See Ayotte,* 546 U.S. at 328—29.

Contrary to Defendants' submission, law enforcement officers should have no difficulty differentiating between non-expressive honks and political protest honks. Again, conduct is expressive only if an "intent to convey a particularized message [is] present, and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who view[] it." *Spence,* 418 U.S. at 410-11. Many honks do not communicate a particularized message and so, as I have explained, do not meet this standard. Honking in response to a political protest, in contrast, is generally understood by listeners—including law enforcement officers-as communicating a message.

i.

To the extent Defendants maintain that political protest honking itself must be regulated because such honking can be disruptive, there are alternate methods for doing so. To satisfy the narrow tailoring requirement, a statute "need not be the least restrictive or least intrusive means" of furthering legitimate governmental interests, *Ward v. Rock Against Racism,* 491 U.S. 781, 798 (1989), but "an assessment of alternatives can still bear on the reasonableness of the tailoring," *Long Beach Area Peace Network v. City of Long Beach,* 574 F.3d 1011, 1025 (9th Cir. 2009) (quoting *Menotti v. City of Seattle,* 409 F.3d 1113, 1131 n.31 (9th Cir. 2005)). "Even under the intermediate scrutiny 'time, place, and manner' analysis, we cannot ignore the existence of . . . readily available alternatives." *Comite de Jornaleros,* 657 F.3d at 950.

Porter has identified various other laws that would allow Defendants to achieve the asserted governmental interests in traffic safety and noise control. Local noise ordinances are designed to regulate "[d]isturbing, excessive or offensive noise." San Diego, Cal., Code of Regulatory Ordinances ch. 4, § 36.401; *see, e.g., id. §* 36.410 (sound level limitations on impulsive noise); Vista, Cal., Municipal Code § 8.32.040 (general noise limits). California Penal Code § 415(2) is another tool, prohibiting "maliciously and willfully disturb[ing] another person by loud and unreasonable noise."

Porter also points to a local ordinance in Rio Rancho, New Mexico, as a viable alternative formulation for Section 27001. Rather than *prohibiting* all honking except in certain instances, as Section 27001 does, the Rio Rancho ordinance *permits* honking except when it is used "in such manner as to distract other motorists on the public way or in such a manner as to disturb the peace." *Martinez v. City of Rio Rancho,* 197 F. Supp. 3d 1294, 1300 (D.N.M. 2016) (quoting Rio Rancho Mun. Code § 12-6-12.18(5)). By narrowing the category of prohibited honking to actually disruptive honks, Rio Rancho's ordinance better targets honks that implicate the asserted governmental interests.

To be sure, Section 27001, which provides officers with broad discretion to cite the drivers of their choosing, may be easier and more efficient to enforce than those alternatives. But "the prime objective of the First Amendment is not efficiency." *McCullen v. Coakley,* 573 U.S. 464, 495 (2014). "To meet the requirement of narrow tailoring, the government

must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.*

Defendants have not made that showing. Protest honking is geographically predictable because it occurs in response to events at fixed locations. Thus, the practical difficulties of discerning and enforcing the appropriate local noise ordinance in the vicinity of any protest are few. The record here indicates that the Sheriff and the City had received multiple noise complaints about the weekly protest, so both the jurisdiction and the relevant noise ordinances were obvious. The geographic predictability of political honking can also facilitate the enforcement of the Penal Code or a statute like the Rio Rancho ordinance, as law enforcement resources purposefully can be dedicated to monitoring protest sites for willfully malicious and disruptive honks. In any event, any substantive difficulty in enforcing one of these ordinances or statutes would be an indication that the protest honking at issue was not disruptive or did not appreciably increase noise levels.

ii.

The majority also asserts that Section 27001 is narrowly tailored because it "plainly leaves open ample alternative channels for people to communicate their ideas and messages, including from their cars." Majority Op. 31. On this point, the facts underlying this case are again informative, as they demonstrate that Porter had no alternative to political honking on that day.

On October 17, 2017, Porter drove to the crowded protest, parked along the street, and participated in the protest for about half an hour. She then noticed that law enforcement officers were affixing parking citations on protesters' parked cars. Porter's car was parked close to a fire hydrant, so she decided to leave the protest to move her car and avoid a possible citation. By the time she found parking elsewhere and returned, she was unable to rejoin the protest because it was over.

Thus, the only opportunity Porter had to continue protesting was by honking her horn as she drove by. The alternative methods of communication the majority suggests were possible from the car—including "waving, giving a thumbs up, or raising a fist as they drive by", Majority Op. 31—would require the driver to take her hand off the wheel. Doing that would surely pose a greater threat to traffic safety than a honk easily understood as conveying a message of support for an already noisy, crowded protest.

"[D]ebate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). Here, Defendants insist that they can continue to ban Porter's political expressive conduct, but offer no cognizable argument that the conduct actually endangered either traffic safety or noise control in a manner that could not be sanctioned if those dangers actually arose.

III.

In sum, Section 27001 violates the First Amendment because Defendants have not shown that

the statute furthers a significant government interest as applied to political protest honking, and because the statute is not narrowly tailored to exclude such honking. I would grant an injunction prohibiting the enforcement of Section 27001 against political protest honking.[7]

[7] I would not extend the injunction to all "expressive" honking, as the term is too vague to be enforceable, *see* Fed. R. Civ. P. 65(d), and an injunction limited to political honking would cure the injury-in-fact Porter identifies. As discussed, Porter has stated that, in the future, she wishes to engage specifically in political protest honking. Others who wish to beep their horns to convey a specific message may seek similar relief, and an injunction could be tailored to cover their communication if the communication were determined to constitute expressive conduct.

APPENDIX

Alabama: "It shall be unlawful . . . for any person to use upon a vehicle any siren or for any person at any time to use a horn otherwise than as a reasonable warning." Ala. Code § 32-5-213(a).

Alaska: "The driver of a motor vehicle shall, when reasonably necessary to insure safe operation, give audible warning with his horn, but may not otherwise use the horn when upon a highway or other vehicular way or area." Alaska Admin. Code tit. 13, § 04.210(a).

Arizona: "If reasonably necessary to ensure the safe operation of a motor vehicle, the driver shall give an audible warning with the driver's horn but shall not otherwise use the horn when on a highway." Ariz. Rev. Stat. § 28-954(B).

Arkansas: "When reasonably necessary to ensure safe operation, the driver of a motor vehicle shall give audible warning with his or her horn but shall not otherwise use the horn when upon a public street or highway." Ark. Code Ann. § 27-37-202(a)(2).

California: "The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn. . . . The horn shall not otherwise be used, except as a theft alarm system." Cal. Veh. Code § 27001(a)-(b).

Colorado: "The driver of a motor vehicle, when reasonably necessary to ensure safe operation, shall give audible warning with the horn but shall not otherwise use such horn when upon a highway." Colo. Rev. Stat. § 42-4-224(1).

Delaware: "The driver of a vehicle shall, when reasonably necessary to insure safe operation, give audible warning with the horn but shall not otherwise use the horn for any other purpose." Del. Code Ann. tit. 21, § 4306(b).

Georgia: "The driver of a motor vehicle shall, when it is reasonably necessary to ensure safe operation, give audible warning with his or her horn but shall not otherwise use such horn when upon a highway." Ga. Code Ann. § 40-8-70(a).

Idaho: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn, but shall not otherwise use the horn when upon a highway." Idaho Code § 49-956(1).

Illinois: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use such horn when upon a highway." 625 Ill. Comp. Stat. 5 / 12-601(a).

Indiana: "The driver of a motor vehicle 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 when upon a highway." Ind. Code § 9-19-5-2.

Iowa: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with the horn but shall not otherwise use such horn when upon a highway." Iowa Code § 321.432.

Kansas: "The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn but shall not otherwise use such horn when upon a highway." Kan. Stat. Ann. § 8-1738(a).

Kentucky: "Every person operating an automobile or bicycle shall sound the horn or sound device whenever necessary as a warning of the approach of such vehicle to pedestrians or other vehicles, but shall not sound the horn or sound device unnecessarily." Ky. Rev. Stat. Ann. § 189.080.

Louisiana: "The driver of a motor vehicle shall, when reasonably necessary to ensure safe operation, give audible warning with his horn, but shall not otherwise use such horn when upon a highway of this state." La. Stat. Ann. § 32:351(A)(1).

Maine: "A person may not unnecessarily sound a signaling device or horn." Me. Rev. Stat. tit. 29-A, § 1903(2).

Maryland: "The driver of a motor vehicle shall, when reasonably necessary to insure safe operation, give audible warning with his horn, but may not otherwise use the horn when on a highway." Md. Code Ann., Transp. § 22-401(b).

Michigan: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use the horn when upon a highway." Mich. Comp. Laws § 257.706(a).

Minnesota: "The driver of a motor vehicle shall, when reasonably necessary to insure safe operation, give audible warning with the horn, but shall not otherwise use the horn when upon a highway." Minn. Stat. § 169.68(a).

Mississippi: "The driver of a motor vehicle shall, when reasonably necessary to insure safe operation, give audible warning with his horn but shall not otherwise use such horn upon a highway." Miss. Code Ann. § 63-7-65(1).

Missouri: "Such signaling device shall be used for warning purposes only and shall not be used for making any unnecessary noise, and no other sound-producing signaling device shall be used at any time." Mo. Rev. Stat. § 307.170(1).

Montana: "The driver of a motor vehicle shall when reasonably necessary to ensure safe operation give audible warning with the horn but may not otherwise use the horn when upon a highway." Mont. Code Ann. § 61-9-401(1).

Nebraska: "[I]t shall be unlawful. . . for any person at any time to use a horn, otherwise than as a reasonable warning." Neb. Rev. Stat. § 60-6,285.

Nevada: "A person driving a motor vehicle shall, when reasonably necessary to ensure safe operation, give audible warning with the horn, but shall not otherwise use the horn when upon a highway." Nev. Rev. Stat. § 484D.400(2).

New Jersey: "The driver of a motor vehicle shall, when reasonably necessary to insure safe operation,

give audible warning with his horn but shall not otherwise use such horn when upon a highway." N.J. Stat. Ann. § 39:3-69.

New Mexico: "The driver of a motor vehicle shall when reasonably necessary to ensure safe operation give audible warning with his horn but shall not otherwise use such horn when upon a highway." N.M. Stat. Ann. § 66-3-843(A).

New York: "[The] horn or device shall produce a sound sufficiently loud to serve as a danger warning but shall not be used other than as a reasonable warning nor be unnecessarily loud or harsh." N.Y. Veh. & Traf. Law § 375(1)(a).

North Carolina: "[I]t shall be unlawful . . . for any person at any time to use a horn otherwise than as a reasonable warning." N.C. Gen. Stat. § 20-125(a).

North Dakota: "Whenever reasonably necessary for safe operation, the driver of a motor vehicle upon a highway shall give audible warning with the vehicle's horn, but may not otherwise use the vehicle's horn while upon a highway." N.D. Cent. Code § 39-21-36(1).

Oregon: "A person commits the offense of violation of use limits on sound equipment if the person . . . [u]ses a horn otherwise than as a reasonable warning." Or. Rev. Stat. § 815.225(1)(b).

Rhode Island: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his or her horn but shall

not otherwise use the horn when upon a highway." R.I. Gen. Laws § 31-23-8.

South Carolina: "The driver of a motor vehicle shall, when reasonably necessary to insure safe operation, give audible warning with his horn but shall not otherwise use such horn when upon a highway." S.C. Code Ann. § 56-5-4960.

Tennessee: "[I]t is unlawful . . . for any person at any time to use a horn otherwise than as a reasonable warning." Tenn. Code Ann. § 55-9-201(a).

Texas: "A motor vehicle operator shall use a horn to provide audible warning only when necessary to insure safe operation." Tex. Transp. Code Ann. § 547.501(c).

Utah: "The operator of a motor vehicle . . . when reasonably necessary to insure safe operation, shall give audible warning with the horn; and . . . except as provided [herein], may not use the horn on a highway." Utah Code Ann. § 41-6a-1625(1)(c)(i)-(ii).

Vermont: "The operator of a motor vehicle, whenever reasonably necessary to ensure safe operation, shall give an audible warning with the horn of his or her vehicle but shall not otherwise use the horn when upon a highway." Vt. Stat. Ann. tit. 23, § 1131.

Virginia: "It shall. .. be unlawful for any person at any time to use a horn otherwise than as a reasonable warning." Va. Code Ann. § 46.2-1060.

Washington: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation

give audible warning with his or her horn but shall not otherwise use such horn when upon a highway." Wash. Rev. Code § 46.37.380(1).

West Virginia: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use such horn when upon a highway." W. Va. Code § 17C-15-33(a).

Wisconsin: "[N]o person shall at any time use a horn otherwise than as a reasonable warning." Wis. Stat. § 347.38(1).

Wyoming: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use the horn when upon a highway." Wyo. Stat. Ann § 31-5-952(a).

Uniform Vehicle Code: "The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with the horn but shall not otherwise use it." Unif. Veh. Code § 12-401(a) (Nat'l Comm. on Unif. Traffic Laws & Ordinances 2000).

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SUSAN PORTER, Plaintiff, v. WILLIAM D. GORE, Sheriff of San Diego County, in his official capacity; and WARREN STANLEY, Commissioner of California Highway Patrol, in his official capacity, Defendants	Case No.: 18-cv-1221-GPC-LL **JUDGMENT AND ORDER: 1. DENYING PLAINTIFF'S MOTION TO EXCLUDE DEFENDANTS' EXPERT OPINIONS; 2. GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; AND 3. DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [FCF Nos. 65-68]**

California has regulated the use of automobile horns since 1913 and its restrictions have remained substantially unchanged since 1931. The current version of the statute, California Vehicle Code Section 27001 ("Section 27001"), is nearly identical to the one that is part of the Uniform Vehicle Code. (ECF No. 75-1 at 2.[1]) Plaintiff Susan Porter challenges Section 27001 as a law that violates her First Amendment rights by preventing or deterring her from using her horn to express her approval at a public demonstration. Based upon its review of the facts and application of the law, the Court concludes that Section 27001 passes intermediate scrutiny and is an appropriate regulation on the time, place, or manner of the protected speech and expression.

Before the Court are motions for summary judgment ("MSJs") filed by Defendant Warren Stanley, Plaintiff Susan Porter, and Defendant William D. Gore, and the corresponding response and reply briefs. (ECF Nos. 66-68, 74-76, 80, 83, 84.) Plaintiff also filed a Motion to Exclude Defendants' Expert Opinions. (ECF No. 65.) For the reasons detailed below, the Court **DENIES** Plaintiff's Motion to Exclude Defendants' Expert Opinions, **GRANTS** Defendants' Motions for Summary Judgment, (ECF Nos. 66, 68,) and **DENIES** Plaintiff's Motion for Summary Judgment, (ECF No. 67.)

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[1] References to specific page numbers in a document filed in this case correspond to the page numbers assigned by the Court's Electronic Case Filing ("ECF") system.

I. BACKGROUND

A. Factual Background

1. California Vehicle Code Section 27001

For purposes of this lawsuit, the relevant parts of the state's regulation on honking are found in California Vehicle Code Sections 27000 and 27001.

California Vehicle Code Section 27000 states, in part: "A motor vehicle ... shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than 200 feet, but no horn shall emit an unreasonably loud or harsh sound." Cal. Veh. Code § 27000(a).

At issue here is California Vehicle Code Section 27001 which provides as follows: "(a) The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn. (b) The horn shall not otherwise be used, except as a theft alarm system which operates as specified in Article 13 (commencing with Section 28085) of this chapter." *Id.* § 27001.

Both the California Highway Patrol ("CHP") and the San Diego County Sheriff's Department have the authority to enforce Section 27001. Whether to enforce a particular violation and what enforcement action to take is a matter within the officer's discretion. (ECF No. 67-18 at 5; ECF No. 75-1 at 9-10.)

2. The Protest and Plaintiff's Citation

Following the November 2016 election through April 2018, weekly protests were held each Tuesday, starting at 9 or 10 a.m. and ending around 11 a.m., in front of then-Representative Darryl Issa's ("Representative Issa") district office at 1800 Thibodo Road, Vista, California. (ECF No. 75-1 at 37.) Initially, the San Diego County Sheriff's Department did not have a full-time presence at the protests but would respond to the area if called. However, as the group of protestors began to increase in size and issues arose among the protestors, counter-protestors, and other people in the area, Lieutenant Michael Munsey ("Lieutenant Munsey") was assigned to be on site each week as the Department's liaison with the groups and to keep the peace. (*Id.* at 38.) There is no evidence that any CHP officer was present at any of the protests against Representative Issa. (*Id.* at 6.)

A few weeks before the subject October 17, 2017 protest date, the Captain of the Vista Patrol Station (part of the San Diego County Sheriff's Department) attended a meeting of a homeowner's association held in a neighborhood close to Representative Issa's office. (*Id.* at 38-39.) At the meeting, the homeowners complained about parking, traffic issues, and noise arising from the protests. (*Id.*)

Plaintiff, Ms. Susan Porter, had regularly participated in these weekly protests since her retirement in July 2017. (*Id.* at 38.) Specifically, she

attended the weekly protest on October 17, 2017. (*Id.* at 39.)

That day, Lieutenant Munsey corresponded with the San Diego County Sheriff's Department regarding the size of the protest groups, various parking and traffic issues (in which Lieutenant Munsey stated the traffic situation was "a bit more chaotic that day than usual"), and whether the enforcement posture should remain the same. (*Id.* at 40; ECF No. 68-3 at 3.) At some time in the morning of October 17,2017, he radioed for the traffic deputy on duty to come assist with enforcement of the traffic laws, and Deputy Kyle Klein ("Deputy Klein") from the Vista Patrol Station responded and arrived in the area. (ECF No. 75-1 at 40.) Deputy Klein was wearing his department-issued body-worn camera while he was at the protest area. (*Id.* at 41.)

Deputy Klein issued multiple citations that day for parking violations. For example, he issued a citation to the owner of a motorcycle parked across the street from Representative Issa's office wearing a "Make America Great Again" ball cap and a shirt bearing a patch reading "Trump Motorcycle Guy," and holding up a "Trump" sign. (*Id.* at 41, 43.)

At some point during the protest on October 17, 2017, Plaintiff decided to move her vehicle to another parking area because she feared receiving a ticket for parking near a fire hydrant. As she was driving to another location and past the protesters, she honked her horn 11-15 times in a row. (*Id.* at 44.) Deputy Klein's body-worn camera shows Plaintiff honking her horn 14 times. (*Id.* at 5.) Afterwards, she was

pulled over by Deputy Klein. (ECF No. 74-1 at 8.) Deputy Klein explained that he pulled her over for sounding her horn in violation of Section 27001. (*Id.*; ECF No. 75-1 at 45.) In response, Plaintiff stated to Deputy Klein that "lots of people use their horns to support the protestors." (ECF No. 68-4 at 3-4.)

As Deputy Klein was writing the citation, Lieutenant Munsey approached and asked what the nature of the citation was. When Lieutenant Munsey learned that it was for the unlawful use of the vehicle horn, Lieutenant Munsey stated: "Oh, illegally honking the horn? If you want to, um, because everybody does it, if you feel like it and don't have any cites, warn them, if you don't write them, it's up to you. Whatever you choose to do, it's your choice and I'll back your play." (ECF No. 74-1 at 8-9; ECF No. 75-1 at 46.) Deputy Klein issued the citation to Plaintiff. (ECF No. 75-1 at 46.)

The issued citation listed a traffic court hearing date of December 12,2017. On that date, Plaintiff appeared in court to contest it, but the citation was dismissed by the court when Deputy Klein did not appear for the hearing. (*Id.* at 48.)

3. Follow-Up with the San Diego County Sheriffs Department

Plaintiff's counsel sent a letter, dated November 9, 2017, to the San Diego County District Attorney and the San Diego County Sheriff's Department. (ECF No. 67-14.) In the letter, Plaintiff's counsel stated that he is "seeking assurance that section 27001 will not be enforced against individuals engaging in protected speech," and "asking the Sheriff

to refrain from enforcing section 27001 against protected speech or confirm if section 27001 will continue to be enforced as it was against Ms. Porter." (*Id.* at 2, 4.)

Through counsel, the San Diego County Sheriff's Department sent a letter in response, dated November 29, 2017. (ECF No. 67-15.) The response letter stated that "Ms. Porter's citation was not issued as a content-based regulation of speech, but rather a straight forward violation of the Vehicle Code," and that "[w]hether or not [Plaintiff's] legal theory is valid or not is something that is best left for a court to decide." (*Id.*)

B. Procedural History

1. Complaint and Motion to Dismiss

On June 11, 2018, Plaintiff filed the Complaint, alleging in part a 42 U.S.C. § 1983 claim under the First Amendment against both Defendants. (ECF No. 1.) Plaintiff sued Defendant Warren Stanley in his official capacity as Commissioner of the California Highway Patrol ("Defendant CHP") and Defendant William D. Gore in his official capacity as Sheriff of San Diego County ("Defendant Sheriff Gore").[2]

The Complaint alleges that on its face or as applied, Section 27001 violates the First Amendment

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[2] "An official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

for several reasons. First, Section 27001 constitutes an overbroad restriction on the use of a vehicle horn for speech or expression. Second, Section 27001 constitutes a content-based restriction that is not narrowly tailored to a compelling government interest. And third, even if Section 27001 is considered content-neutral, it burdens substantially more speech or expression than necessary to protect legitimate government interests. Plaintiff seeks both declaratory and injunctive relief, requesting the Court to declare that the enforcement of Section 27001 "against protected expression" is unlawful and to enjoin both Defendants from enforcing the statute "against protected speech or expression." (*Id.* at 6-7.)

On August 13, 2018, Defendant CHP moved to dismiss the Complaint, which Defendant Sheriff Gore joined. (ECF Nos. 12, 13.) Plaintiff responded to the motion, and Defendant CHP replied. (ECF Nos. 17, 19.)

The Court ultimately denied Defendant CHP's Motion to Dismiss regarding Plaintiff's First Amendment claims. *Porter v. Gore*, 354 F. Supp. 3d 1162 (S.D. Cal. 2018) (ECF No. 26). The Court first held that, while honking can be expressive conduct, Section 27001 is a content-neutral regulation and the government may place reasonable time, place, and manner restrictions on the expression. However, Defendant CHP failed to meet the evidentiary and persuasive burden necessary to demonstrate that Section 27001, as applied, was narrowly tailored to address the government's interests (of traffic safety and noise reduction)—especially at the motion to dismiss stage of the lawsuit. And because Plaintiff's

First Amendment challenge to Section 27001 could proceed as applied, the Court did not address Plaintiff's facial challenge to Section 27001.

2. Sergeant William Beck as Defendants' Expert Witness

To support their defense, Defendant CHP retained Sergeant William Beck ("Sergeant Beck") as an expert witness. (ECF No. 65-3.) Sergeant Beck has submitted a Declaration in support of Defendant CHP's Motion for Summary Judgment, (ECF No. 66-15), and was deposed by Plaintiff on May 26, 2020, (ECF No. 66-6.)

On August 18, 2020, Plaintiff filed a Motion to Exclude Defendants' Expert Opinions. (ECF No. 65.) Plaintiff's Motion argues that the opinions offered by Sergeant Beck should be excluded pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Defendant CHP responded to the Motion, and Plaintiff replied. (ECF Nos. 73, 82.)

3. Motions for Summary Judgment

On August 18, 2020, Defendant CHP filed the first MSJ. (ECF No. 66.) The MSJ argues that: (1) Plaintiff's as-applied First Amendment challenge is barred based on ripeness and standing; (2) Plaintiff's as-applied challenge against CHP fails because there is no evidence that CHP has done (or threatens to do) anything wrong; (3) Section 27001 is a reasonable time, place, and manner restriction; and (4) Section 27001 is not facially overbroad.

Plaintiff also filed an MSJ. (ECF No. 67.) Plaintiff's MSJ contends that: (1) Plaintiff has standing to challenge Section 27001 and the challenge is ripe; (2) Plaintiff's use of the vehicle horn constituted expressive conduct protected by the First Amendment; (3) Section 27001 restricts expressive conduct in the traditional public forum of a public street; (4) it is unconstitutional to enforce a categorical ban on expressive honking; and (5) the Court may issue declaratory and injunctive relief against Defendants in their official capacities.

Defendant Sheriff Gore joined Defendant CHP's MSJ. (ECF No. 69.) At the same time, Defendant Sheriff Gore filed his own MSJ as well, to challenge Plaintiffs as-applied challenge specific to him because: (1) Deputy Klein himself did not violate the First Amendment when issuing a citation for Plaintiff; and (2) regardless of Deputy Klein's action, his discretionary decision cannot be a basis for a municipality to be liable. (ECF No. 68.)

Responses and Replies to each MSJs were filed. (ECF Nos. 74–76, 80, 83, 84.) Of note, Plaintiff filed one combined Response to Defendant CHP and Defendant Sheriff Gore's MSJs. (ECF No. 75.)

II. MOTION TO EXCLUDE DEFENDANTS' EXPERT

A. Testimony by Sergeant Beck

In his Declaration, Sergeant Beck states that he has been employed by the CHP for 24 years, been assigned to the CHP Academy training cadets for approximately four years, and been assigned to the Academy Vehicle Code Unit and the Accident

Investigations Unit. Sergeant Beck explains that CHP officers are charged with enforcing the law, including the Vehicle Code, and commonly patrol the state highways and respond to motor vehicle accidents and other situations that threaten public health or safety. (ECF No. 66-15 at ¶¶ 2-3.)

Sergeant Beck opined that when a vehicle horn is used improperly, it can create a dangerous situation by startling or distracting drivers and others. (*Id.* at ¶ 5.) In addition, Sergeant Beck offered that a vehicle horn's usefulness as a warning device would be diminished if law enforcement officers were unable to enforce Vehicle Code Section 27001. (*Id.* at ¶6.) Further, absent Section 27001, people would be free to, and could be expected to, use the horn for purposes unrelated to traffic safety which would, in turn, diminish the usefulness of the vehicle horn for its intended purpose. (*Id.*)

Sergeant Beck also formed the opinion that local noise ordinances are not adequate or practical substitutes for Section 27001 because there are 58 counties and hundreds of cities in California and CHP officers are not instructed on, or in the ordinary course provided with copies of, local noise ordinances—nor would it be practical to do so. (*Id.* at ¶ 7.) Moreover, since much of the CHP's enforcement activities take place on highways, it would not always be clear to a CHP officer which local jurisdiction's ordinances would apply to a specific enforcement action. (*Id.*) Under state law, all vehicles in California are required to have horns and it makes sense that their use should be subject to a single state-wide standard, not piecemeal local ordinances. (*Id.*)

Sergeant Beck also opined that Penal Code Section 415(2), the disturbing the peace statute, was an inadequate substitute for Vehicle Code Section 27001 because Section 415(2) requires proof that the offender acted with malice and that a specific victim was disturbed by the noise. (*Id.* at ¶ 8.) Under this law, CHP would have to receive a complaint and then investigate rather than proceed based upon an officer's observations of the improper use of a horn in the course of his duties. (*Id.*)

B. Applicable Law

The trial judge must act as the gatekeeper for expert testimony by carefully applying Federal Rule of Evidence 702 to ensure specialized and technical evidence is "not only relevant-but reliable." *Daubert v. Pharm., Inc.*, 509 U.S. 579, 589 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (discussing the "gatekeeping obligation" of the trial judge). An expert witness may testify if: (1) the expert's specialized knowledge will help the trier of fact; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert reliably applied such principles and methods. Fed. R. Evid. 702. "It is the proponent of the expert who has the burden of proving admissibility." *Lust By & Through Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

It is generally stated that "[disputes as to the strength of [an expert's] credentials, faults in his use of [a particular] methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility of his testimony." *Kennedy v. Collagen*

Corp., 161 F.3d 1226, 1231 (9th Cir. 1998) (quoting *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995)).

C. Analysis

Plaintiff challenges Defendant CHP's expert Sergeant Beck, on the basis that: (1) he is not qualified; (2) his testimony does not "help" the fact-finder; (3) his opinions are not based on "sufficient facts or data"; (4) his opinion is not the product of reliable principles or methods; and (5) he did not reliably apply the principles and methods to the facts of the case. (ECF No. 65.) Defendant CHP responds that Plaintiff's challenges, at most, go to the weight of the testimony, and are not objectionable under the law. (ECF No. 73.)

Sergeant Beck meets the requirements of Federal Rule of Evidence 702 and is qualified. Sergeant Beck's opinions are reliably founded upon his training and experience as a law enforcement officer who has conducted traffic accident investigations and has trained CHP officers. His opinions are not mere "speculation." "[T]here are many different kinds of experts, and many different kinds of expertise." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999). Where experts are retained to offer non-scientific testimony, the reliability inquiry will "depend[] heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) (quoting *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000)). Sergeant Beck is qualified to testify on Section 27001's implication on traffic safety and

the law's utility for enforcement officers, given his extensive experience working for the CHP, responding to car accidents, and training CHP cadets.

Plaintiff questions whether Sergeant Beck's opinions "fit" the issues that are presented in the pending motions. The Court finds that Sergeant Beck's opinions "fit" because they help the Court assess the relationship between Section 27001 and traffic safety, and gauge the availability of alternatives to Section 27001. Specifically, his opinions present the practical realities of how the state may (or may not) achieve its goal of traffic safety without enforcing Section 27001. Sergeant Beck's opinion assists the Court in addressing whether Plaintiff's requested "as-applied" remedy (of never enforcing Section 27001 against expressive honking) is workable.

The Court agrees with Plaintiff that experts cannot provide legal conclusions. *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008). However, Sergeant Beck's testimony is not a legal opinion. Instead, his testimony concerns, in part, whether other laws can function as "practical substitutes." (ECF No. 66-15 at 3.) Discussing the practical realities of enforcing alternatives to Section 27001 is different from commenting on Section 27001's legality, or even the alternative provisions' legality.

Consequently, the Court **DENIES** Plaintiff's motion to exclude Sergeant Beck's opinions. Ultimately, any limitations or deficiencies raised by

Plaintiff go to the weight of the testimony rather than the admissibility of the opinion.[3]

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material when it "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The initial burden of establishing the absence of any genuine issues of material fact falls on the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the non-moving party's case; or (2) by demonstrating that the non-moving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See id.* at 322-23. Once the moving party has satisfied its initial burden, the non-moving party cannot rest on the mere allegations or denials of its pleading. The non-moving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324.

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[3] Plaintiff's challenges to Sergeant Beck's testimony based on lack of foundation or authentication are similarly overruled.

In determining whether there are any genuine issues of material fact, the court must "view[] the evidence in the light most favorable to the nonmoving party." *Fontana v. Haskin*, 262 F.3d 871, 876 (9th Cir. 2001) (citation omitted). In addition, cross-motions for summary judgment are decided independently. *Fair Hous. Council of Riverside Cnty., Inc. v Riverside Two*, 249 F.3d 1136 (9th Cir. 2001).

IV. DISCUSSION

A. Article III Justiciability

Defendant CHP contends that Plaintiff has failed to demonstrate standing or ripeness to bring this lawsuit. (ECF No. 66-1 at 14–15.) As a threshold issue, the Court finds that Plaintiff retains standing and that her First Amendment challenges are ripe.[4] To demonstrate standing, a plaintiff must show: (1) an "'injury in fact,' which is an 'actual or imminent' invasion of a legally protected interest that is 'concrete and particularized'"; (2) causation, in that the injury must be "fairly traceable" to the challenged conduct; and (3) redressability, that plaintiff's injury is likely to be redressed by a favorable decision. *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1171 (9th Cir. 2018) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Defendant CHP argues that it had no role in issuing a citation or a warning for honking. (ECF No. 66-1 at 11.) CHP points to the lack of evidence that any CHP officer was present at any of the protests

[4] Plaintiff's challenges to Sergeant Beck's testimony based on lack of foundation or authentication are similarly overruled.

against Representative Issa, including at the time when Plaintiff received the citation. (*Id.*) Further, Plaintiff testified in deposition that she had no evidence of any CHP employee enforcing Section 27001 in retaliation of any person's participation in protest activities, in retaliation of any person's exercise of his/her First Amendment rights, or to silence any person's exercise of his/her First Amendment rights. (*Id.*) Nor does she have reason to believe so. (*Id.*) Finally, it is undisputed that CHP has no general policy to enforce the California Vehicle Code, let alone a policy directed to enforce Section 27001. (*Id.* at 12.)

Notwithstanding Defendant CHP's points, the Court finds that Plaintiff's claims meet the requirements for Article III justiciability.[5] In the context of a First Amendment challenge, the standing analysis is "unique" because of the "chilling effect" of restrictions on speech—therefore, plaintiffs may seek "preventative relief." *Id.* (citing *Ariz. Right to Life Political Action Comm. ["ARLPAC"] v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003)). As long as there is an intent to engage in the conduct at-issue and a credible threat of enforcement, Plaintiff satisfies standing; "an actual arrest, prosecution, or other enforcement action is not a prerequisite." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014).

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[5] Relatedly, the Court finds that it was appropriate for Plaintiff to name Defendant CRP as one of the Defendants in this lawsuit. *See Hartmann v. California Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013); *Pouncil v. Tilton*, 704 F.3d 568, 576 (9th Cir. 2012).

In determining whether a credible threat of enforcement exists, courts have considered three factors: (1) "likelihood that the law will be enforced against the plaintiff'; (2) a "concrete detail" on whether plaintiff intends to violate the challenged law; and (3) whether the law applies to the plaintiff. *Italian Colors*, 878 F.3d at 1171-72 (citation omitted).

The Court concludes that Plaintiff's present case meets the three factors to establish a credible threat of enforcement. On the first factor, there is likelihood that the law will be enforced against Plaintiff since her October 17, 2017 citation "is good evidence that the threat of enforcement is not 'chimerical,'" *Susan B. Anthony List*, 573 U.S. at 164. While Defendant CHP asserts that it has never enforced Section 27001 against Plaintiff, it has nonetheless affirmed that the enforcement of Section 27001 at a political protest will "depend on the circumstances," and that CHP reserves the right to enforce Section 27001 against someone "who uses a vehicle horn other than when reasonably necessary to ensure safe operation or when the horn is used as a theft alarm system." (ECF No. 83-1 at 8.) Therefore, even without CHP enforcing Section 27001 against Plaintiff, it is reasonable that Plaintiff has self-censored and refrained from expressive honking to avoid a ticket given her past experience and CHP's reservation of its right to enforce the law. (See ECF No. 67-5 at 28-29.) Courts have understood such "self-censorship" as direct injury and as a "reasonable risk" of being subject to penalties under a statute. *ARLPAC v. Bayless*, 320 F.3d 1002, 1006-07 (9th Cir. 2003).

Plaintiff meets the second and third factors as well. Plaintiff has testified that she regularly drives her vehicle in areas where Defendants are responsible for traffic enforcement, and while doing so, observes protests in which she wishes to express her support by honking but has abstained for fear of a ticket. (ECF No. 83-1 at 9.) Further, Plaintiff testified: "if I was driving down the freeway and there was a banner that said 'Support Our Veterans,' I now would not honk my horn because the CHP could pull me over." (ECF No. 83-1 at 12.) *Cf. Italian Colors*, 878 F.3d at 1174 (finding a sufficient "concrete plan" when the declarations made clear that if it were legal to do so, plaintiffs would engage in the prohibited activity).[6] And as discussed above, to the extent that Section 27001 could be enforced against honking when it is not used to ensure safe operation or as a theft alarm, the provision could apply to Plaintiff's desired conduct.

Defendant CHP's Reply brief presents a similar, but slightly different standard which preserves the "concrete plan" factor but replaces the other two with "whether the prosecuting authorities have communicated a specific warning or threat" and "history of past prosecution or enforcement." *See Libertarian Party of Los Angeles Cnty. v. Bowen*, 709

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[6] Defendant CHP's argument that Plaintiff's declaration is less specific and concrete in detail, (ECF No. 83 at 8,) is unpersuasive. If the operative concern is whether a plaintiff has identified the "when," "whom," "where," and "under what circumstances," *see Italian Colors*, 878 F.3d at 1174, Plaintiff's declaration clearly meets this concern (when driving down a freeway and if there is a banner that says "Support Our Veterans").

F.3d 867, 870 (9th Cir. 2013) (citation omitted). This standard is typically used to identify the credible threat of enforcement in general—including contexts outside of the First Amendment. In fact, *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1129-30 (9th Cir. 1996), expressly flagged this distinction. The Court applies a more "relaxed" inquiry in First Amendment cases,[7] because the alleged harm at issue is the "chilling effect" (in the form of self-censorship), "a harm that can be realized even without an actual prosecution." *Id.* (citations omitted). Regardless, the two factors are effectively satisfied where: (1) Plaintiff received a citation for the conduct at issue; (2) CHP has reserved the right to enforce Section 27001; and (3) Plaintiff has self-censored herself after the citation. "[W]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *ARLPAC v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). Accordingly, Plaintiff has established standing under either standard.

Plaintiff's actions are ripe as well. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 n.5 (2014) (discussing how in pre-enforcement challenges, standing and ripeness "boil down to the same question"); *Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1153 (9th Cir. 2017) ("Constitutional ripeness is often treated under the rubric of standing because 'ripeness coincides squarely with standing's injury in

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[7] *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000), concerned the First Amendment as well, but the alleged harm was not self-censorship. Instead, the dispute was over laws that prohibit discrimination in rental housing based on marital status. *Id.* at 1139.

fact prong.'"). As previously discussed, Plaintiff has suffered the constitutional injury of self-censorship. This makes Plaintiffs claims "necessarily ripe for review." *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003). "In the context of First Amendment speech, a threat of enforcement may be inherent in the challenged statute, sufficient to meet the constitutional component of the ripeness inquiry." *Wolfson v. Brammer*, 616 F.3d 1045, 1059 (9th Cir. 2010). Therefore, contrary to Defendant CHP's arguments, (ECE No. 66-1 at 16-18.) Plaintiff's claims are ripe for review.

B. Nature and Scope of the First Amendment Challenge

"The First Amendment applies to state laws and regulations through the Due Process Clause of the Fourteenth Amendment." *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1053 (9th Cir. 2000). "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Grp. Inc.*, 529 U.S. 803, 816 (2000). Two types of First Amendment challenges may be brought against a law: facial, and as-applied. *Hawkins v. City & Cnty. of Denver*, 170 F.3d 1281, 1286 (10th Cir. 1999).

A facial challenge must show either that "'no set of circumstances exists under which [the challenged law] would be valid,' or that it lacks any 'plainly legitimate sweep.'" *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1314 15 (9th Cir. 2015) (alteration in original) (quoting *United States v.*

Salerno, 481 U.S. 739, 745 (1987)). In contrast, if plaintiffs' challenge is "as applied," then they must show only that the statute unconstitutionally regulates plaintiffs' own speech. *See Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1174-75 (9th Cir. 2018); *see also N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677 n.5 (10th Cir. 2010) ("[An] 'as-applied' challenge to a law acknowledges that the law may have some potential constitutionally permissible applications, but argues that the law is not constitutional as applied to [particular parties].").

However, "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. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010); *see John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) (noting as to the parties' disagreement regarding whether the claim at issue "is properly viewed as a facial or as-applied challenge," that "[t]he label is not what matters"). *See generally* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321 (2000) ("There is no single distinctive category of facial, as opposed to as-applied, litigation. All challenges to statutes arise when a litigant claims that a statute cannot be enforced against her.").

The Complaint challenges Section 27001 both on its face and as applied. (ECF No. 1 at 7.) However, Plaintiff's MSJ only presents arguments and case law to support an "as applied" challenge. (ECF No. 67 at 15.) Meanwhile, Plaintiff's Response to Defendant

CHP's MSJ states that Plaintiff "respectfully preserves her position that Section 27001 is unconstitutional on its face as a content based or overbroad prohibition on speech or expressive conduct." (ECF No. 75 at 55.) Given that Plaintiff has not supported a facial challenge in her MSJ, the Court will limit its analysis to an as-applied challenge. Accordingly, the Court will address whether the restriction of the protected activity was "unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *Kuba v. 1-A Agr. Ass'n*, 387 F.3d 850, 856 (9th Cir. 2004) (quoting *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998)).

1. Expressive Activity in a Public Forum

Before Defendants are required to defend Section 27001, Plaintiff must demonstrate that the law abridges "speech," as it is understood in First Amendment jurisprudence. *See* U.S. Const, amend. I (prohibiting laws "abridging the freedom of speech" (emphasis added)). Here, Plaintiff submits that a "honk" is protected "speech" as expressive conduct. For a conduct to be expressive, it requires "(1) 'an intent to convey a particularized message' and (2) a 'great' 'likelihood ... that the message would be understood by those who viewed it.'" *Edge v. City of Everett*, 929 F.3d 657, 668 (9th Cir. 2019) (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)), *cert, denied sub nom*. *Edge v. City of Everett, Washington*, 140 S. Ct. 1297 (2020). Plaintiff does not need to show

that others understood the message—only that there is "great likelihood." *Id.* at 668-69.

Plaintiff has produced sufficient evidence to support the position that her honking was expressive conduct. Plaintiff testified that she honked with the intent "to signify support of the protest," and that the honking was met with protesters cheering. (ECF No. 67-5 at 6, 26.) Plaintiff informed Deputy Klein that she was honking for the protestors as well. (ECF No. 67-7 at 48.) Deputy Klein also heard other people honking at the protest, and when Lieutenant Munsey said "everybody does it," Deputy Klein understood Lieutenant Munsey's statement to mean "that all the protestors have been honking their horn or people in support of or whatever." (ECF No. 67-7 at 32, 46.) Without any contravening affirmative evidence presented by Defendant CHP, the Court concludes that Plaintiff's honking intended to convey a particular message which had a great likelihood to be understood by the audience. *Cf. Mitchell v. Maryland Motor Veh. Admin.*, 450 Md. 282, 309 (2016) (describing the dialogue between a vanity plate and a responsive honk from a passing motorist as protected under the First Amendment), *as corrected on reconsideration* (2016).

The Court also finds that the expressive conduct occurred in a traditional public forum. It is undisputed that when Plaintiff was cited for honking in violation of Section 27001, she was driving on a public street. Plaintiff also testified of her desire to express support for protests by honking when she regularly drives by the public street where Defendants are responsible for traffic enforcement.

(ECF No. 67-2 at 2; ECF No. 67-5 at 28-29.) Public streets are "the archetype of a traditional public forum." *Comite de Jomaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 945 (9th Cir. 2011) (quoting *Snyder v. Phelps*, 562 U.S. 443, 456 (2011)).

2. Content-Neutral Restriction

"The government's right to limit expressive activity in a public forum 'is 'sharply' circumscribed.'" *S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136 (9th Cir. 1983) (quoting *Perry Educ. Ass 'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)), *as amended by* 160 F.3d 541 (9th Cir. 1998). The applicable standard of review depends on whether the restriction is content-based or content-neutral.

The Court concludes that Section 27001 is content-neutral. (ECF No. 26). The "principal inquiry is 'whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'" *Colacurcio v. City of Kent*, 163 F.3d 545, 551 (9th Cir. 1998) (citation omitted). If the regulation's aim is to control "secondary effects resulting from the protected expression, rather than at inhibiting the protected expression itself," content neutrality is met. *Id.* (citation omitted). As other courts have discussed, which this Court finds persuasive:

> The ordinance does not attempt to regulate the "content" of horn-honking. Rather, it prohibits all horn-honking, except in cases of imminent danger, regardless of the user's intended

> meaning.... [T]he law neither discriminates among messages nor limits the expression of any particular message. It is based on the manner of expression, not on its content.

Weil v. McClough, 618 F. Supp. 1294, 1296 (S.D.N.Y. 1985); *accord Martinez v. City of Rio Rancho*, 197 F. Supp. 3d 1294, 1313 (D.N.M. 2016).

Because Section 27001 does not discriminate based on the "content" of honking, and because Section 27001 regulates the secondary effects of the expression with no reference to the content, Section 27001 is content-neutral and triggers an intermediate scrutiny standard of review. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968).

Under *O'Brien*, a content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. To meet this standard, a regulation need not be the least speech restrictive means of advancing the government interests. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994). "Rather, the requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Narrow tailoring in this context requires that the

means chosen does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.*

Under the intermediate scrutiny standard:

> the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 945 (9th Cir. 2011) (quoting *Ward*, 491 U.S. at 791); *see also Berger v. City of Seattle*, 569 F.3d 1029, 1059 (9th Cir. 2009) (discussing the analysis as "an intermediate level of scrutiny").

C. Analysis Under the Intermediate Scrutiny Standard

1. Significant Government Interest

Defendant CHP has identified two significant government interests advanced by Section 27001: (1) traffic safety, and (2) reducing noise pollution. (ECF No. 66-1 at 21-22). These interests have long been recognized as significant and Plaintiff agrees, at least

in the abstract,[8] (ECF No. 67 at 20,) and the Court does too. *See Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (discussing how the government has "substantial interest in protecting its citizens from unwelcome noise," and how it may regulate "even such traditional public forums as city streets and parks from excessive noise"); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 823 (9th Cir. 2013) ("Promoting traffic safety is undeniably a substantial government interest."); *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998) (reiterating that the "oft-invoked and well-worn [state] interests of ... promoting traffic and pedestrian safety" are substantial); *Weinberg v. City of Chicago*, 310 F.3d 1029, 1038 (7th Cir. 2002) ("There is no doubt the City has a legitimate interest in protecting its citizens and ensuring that its streets and side-walks are safe for everyone. Its interest in maintaining the flow of pedestrian traffic is intertwined with the concern for public safety." (citation omitted)); *Kuba v. 1-A Agr. Ass'n*, 387 F.3d at 858 (discussing how interests in pedestrian and traffic safety, as well as in preventing traffic congestion, are significant).

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[8] Plaintiff argues that when the government articulates a significant government interest, it must also prove that the communicative activity also endangers those interests. (ECF No. 67 at 20; ECF No. 75 at 30.) While this is a valid concern, it is better addressed in the subsequent "narrow tailoring" aspect of the discussion, *infra* Section IV.C.2. That is because the intermediate scrutiny analysis requires the challenged law to be "narrowly tailored to serve a significant government interest." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816-17 (2000).

The Court finds that Section 27001 advances a significant interest. However, merely invoking interests in regulating traffic is insufficient by itself. *Weinberg*, 310 F.3d at 1038. The government must also show that the proposed communicative activity endangers those interests. *Id.* at 1039.

2. Narrow Tailoring

The burden is on the Defendants to prove that Section 27001 is narrowly tailored. *Comite de Jomaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 948 (9th Cir. 2011). To meet this requirement, the contested law "need not be the least restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). Rather, there are two primary considerations: (1) whether the significant government interest would be achieved less effectively without the regulation; and (2) whether the regulation burdens substantially more speech than necessary. *See id.*

As a starting point, Defendants must show that Plaintiff's honking endangered traffic safety and produced noise pollution. The critical question in analyzing the second prong is what form of proof is required to satisfy Defendants' burden. Defendant CHP argues that, at this stage of the lawsuit, it has produced "undisputed evidence" based on scientific articles, reports, legislative records, and expert testimony that Section 27001 is narrowly tailored. (ECF No. 66-1 at 22.) While Defendant CHP has offered numerous scientific articles and reports, the articles constitute inadmissible hearsay and cannot be considered in deciding the pending motions.

Plaintiff argues that "Defendants have produced nothing but anecdotal speculation." (ECF No. 67 at 21.) The primary thrust of Plaintiff's arguments is that Defendants must provide evidence on the harms of *expressive honking specifically*. (*See, e.g.*, ECF No. 67 at 21-22; ECF No. 75 at 30-32; ECF No. 80 at 15-17.) Plaintiff goes to great lengths to identify the dearth of admissible evidence regarding the legislative history for Section 27001 or studies gauging the impact of horn-honking.[9] While Defendants have offered little in the way of scientific studies that is not hearsay, the Court finds that history, consensus, common sense, and the declaration of Sergeant Beck supports the Defendants' proffered justification.

In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001), the Supreme Court examined how a party may establish the relationship between the harm that underlies the state's interest in regulating commercial speech and the means identified by the state to advance that interest. "This burden is not satisfied by mere speculation or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). At the same time,

> we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information.... [W]e

[9] The Court is aware that both parties submitted reams of evidentiary objections. To the extent that the objected-to evidence is admissible and relied on, the Court overrules the objections. To the extent that the objected-to evidence is not referenced in this Order, the Court overrules the objections as moot.

> have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense."

Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995) (citations omitted); cf. *Cuviello v. City of Vallejo*, 944 F.3d 816, 828 (9th Cir. 2019) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986)) (discussing how the First Amendment does not require a government, before enacting a law, to conduct new studies or produce evidence independent of that already generated); *Phillips v. Borough of Keyport*, 107 F.3d 164, 178 (3d Cir. 1997) (discussing how insistence on the creation of a legislative record to defend against challenge of legislation is an unwarranted intrusion into the internal affairs of the legislative branch of governments).

The Court concludes that Defendant CHP produced sufficient evidence on how (1) accomplishing traffic safety and reducing noise pollution would be less effective without Section 27001; and (2) Section 27001 does not burden more speech than necessary.

a. Less Effective Absent the Regulation

Without Section 27001, traffic safety and reducing noise pollution would be less effective. In addition, common sense informs us why there is a consensus and need for restrictions on horn use. Sections 27000 and 27001 were designed to further

traffic safety by designating horns as warning devices. Being audible at a distance of 200 feet, the honk of a horn commands the attention of motorists and pedestrians in a substantially wide area. Commanding attention of those in listening distance necessarily forces the listener to focus on the source of the honk and attempt to determine the purpose of the honk. A distraction created by the honk reduces a motorist's ability to drive defensively which increases the likelihood of an accident. Therefore, Section 27001 improves traffic safety by confining the use of a horn to safety and theft-control purposes.

Further, the substance of Section 27001 has been in place in one form or another since 1913 and is not a recent solution to a local problem. It is an analogue of the recommended law in the Uniform Vehicle Code and has been followed by a number of states throughout the nation.[10] It is nearly universally accepted as a means to reduce the incidence of vehicular accidents.

Plaintiff argues that a horn may be used at varying frequency and volume and that Defendants have presented no evidence to suggest that mere expressive use of a horn necessarily threatens traffic safety regardless of frequency, volume, or context. (ECF No. 67 at 22.) While there is no specific evidence relating to the level of decibels that Plaintiff's horn produced, it is reasonable to assume that her car horn complied with Section 27000, was thus audible at a

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[10] *See, e.g.*, Ark. Code Ann. § 27-37-202(a)(2); Del. Code Ann. tit. 21, § 4306(b); N.Y. Veh. & Traf. Law § 375.1.(a); Tex. Transp. Code Ann. § 547.501(c).

distance of 200 feet, and was therefore capable of drawing the attention of all of the motorists and pedestrians within the range of the honk. With respect to frequency, the record discloses that Plaintiff honked her horn 14 times which would have constituted an extended and continuing distraction. Finally, with respect to context, the fact that the honk is delivered as expressive conduct does not reduce the distraction or the risk of causing an accident.

In addition, when used for purposes other than a warning or warding off would-be car thieves, common sense shows that the unauthorized use of a horn creates noise levels that contribute to noise pollution. Therefore, Section 27001 would at least directly contribute to reducing environmental noise pollution by mitigating one of the sources of road traffic noise. These are not hypothetical problems as Plaintiff wishes to portray. The homeowner's association expressed frustration about the noise arising from the protests to the San Diego County Sheriffs Department's representative. (See ECF No. 75-1 at 38-39.)

Defendant CHP has well-explained that there are no obvious alternatives to Section 27001 in meeting the government's objectives. The Court is especially concerned as to how Plaintiff's requested remedy of "not enforcing Section 27001 against expressive honking" would work in practice. The Court understands that an injunction does not need to be laser-focused in terms of its specificity. However, it still must be "reasonably understandable." *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681, 685 (9th Cir. 1988). And

the breadth of First Amendment case law reveals that, in practice, it will be extremely difficult, if not impossible, to apply Section 27001 in a workable manner when a honk must be assessed in context in order to be elevated as a protected expression. *Edge v. City of Everett*, 929 F.3d 657, 668-69 (9th Cir. 2019), *cert, denied sub nom. Edge v. City of Everett, Washington*, 140 S. Ct. 1297 (2020) (context is everything when deciding whether others will likely understand an intended message conveyed through expressive conduct).

The Court is also persuaded that alternative provisions to Section 27001 do not adequately address traffic safety and noise control. Plaintiff first makes a blanket assertion that "local noise ordinances" solve the problem. (ECF No. 67 at 26; ECF No. 75 at 53; ECF No. 80 at 21-22.) There is no discussion on what these noise ordinances look like, or how these ordinances will survive a different wave of constitutional challenges when someone will inevitably proclaim that he or she was making excessive noises for expressive purposes. *Cf. Cuviello v. City of Vallejo*, 944 F.3d 816, 830 (9th Cir. 2019) (finding an ordinance constitutionally problematic because it "requires a permit for any use of a sound-amplifying device at any volume by any person at any location—without any specifications or limitations that may tailor the permit requirement to situations involving the most serious risk to public peace or traffic safety" (emphases in original)). Sergeant Beck's testimony is instructive on this issue. There are 58 counties and hundreds of cities in California, and in highways it would be much less clear which local ordinance would apply. (ECF No. 66-15 at 3.) If

choice-of-law issues haunt litigants and courts all the time, it is easy to imagine what logistical nightmare that reliance on a patchwork of ordinances would bring, with its countless variations and permutations. This goes beyond "administrative convenience," "ignorance," or excuse from "lack of resources," as Plaintiff characterizes CHP's response. (ECF No. 80 at 21.)

The Penal Code is not an adequate alternative either. As Sergeant Beck testified, enforcing and prosecuting California Penal Code Section 415(2) presents its own challenges. To establish liability under Section 415(2), there must be an identifiable victim, and the mens rea of both malice and willfulness. (ECF No. 66-15 at 3.) Such elements make prosecution more difficult than ones under Section 27001 due to: (1) the fleeting nature of noise, (2) cars being mobile, and (3) the general fact that many times frivolous honking is not motivated by "malice." (ECF No. 74 at 27.) More importantly, the additional evidentiary burden would likely result in under-prosecution of horn-honking and reduce the level of protection to the public that is provided by Section 27001.

Plaintiff argues that establishing such elements are not difficult obstacles. For example, Plaintiff states that the identifiable victim can be the officers themselves. (ECF No. 80 at 20.) In addition, because "malice" only means "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act," it is apparently much easier to establish than what Defendant CHP argues. (*Id.*) But ultimately, Section 415(2) would, by virtue of the additional

liability elements, decrease the safety benefits produced by Section 27001 by making a prosecution under Section 415(2) more difficult. As such, honking prosecutions will fall if Section 415(2) is the only available enforcement mechanism. *Cf. McCullen v. Coakley*, 573 U.S. 464, 495 (2014) (discussing that to satisfy the First Amendment, the less burdensome alternatives would need to fail to achieve the government's interests, not simply that the government's chosen route is easier). This proves that Section 415(2) is not as effective in accomplishing the goals of traffic safety and noise control as Section 27001 does.

b. Does Not Burden More Speech Than Necessary

Second, Defendant CHP adequately proved that Section 27001 does not burden more speech than necessary. The noise from the vehicle horn is not a byproduct of the prohibited activity. Instead, the noise "is created by the medium itself." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984). The fact that there is no obvious way to substitute the enforcement of Section 27001 also demonstrates Section 27001's appropriate scope of not burdening more speech than what is needed.

Plaintiff relies on *Cuviello v. City of Vallejo*, 944 F.3d 816, 830 (9th Cir. 2019) to argue that Section 27001 covers more speech than necessary to achieve its ends. (ECF No. 75 at 39; ECF No. 80 at 19-20.) However, *Cuviello* is easily distinguishable from the current facts. *Cuviello* concerned a regulation that

required a permit to use a sound amplifying device in the city. Such "prior restraint" on speech is treated as inherently suspect under First Amendment jurisprudence. 944 F.3d at 831-32. Further, Plaintiffs attempt to characterize Section 27001 as a "blanket ban" on expressive honking, (ECF No. 75 at 39,) begs the question of what qualifies as expressive honking. Contrary to *Cuviello*'s recognition that sound-amplifying devices are "'indispensable instruments' of public speech," 944 F.3d at 825, honking does not necessarily rise to that level and inherently depends on the context.

The fact that at least two sister court cases agree that honking ordinances survive First Amendment challenges reassures the Court's conclusion. First, *Weil v. McClough*, 618 F. Supp. 1294, 1295 (S.D.N.Y. 1985) upheld the constitutionality of a honking ordinance that provided: "No person shall operate or use or cause to be operated or used any claxon installed on a motor vehicle, except as a sound signal of imminent danger." The language appears quite similar to that of Section 27001, which also prohibits honking other than when for a warning or a theft alarm. In fact, *Weil* illustrates how little the court needed for the government to justify the honking ordinance's legitimacy, because the ills of honking were self-evident. *Id.* at 1296 ("In this Court's view, any effort to dim the seemingly unending crescendo of honking horns on New York's city streets is to be commended.").

Second, *Martinez v. City of Rio Rancho*, 197 F. Supp. 3d 1294, 1299 (D.N.M. 2016) upheld the constitutionality of an ordinance that prohibited die

use of vehicle horn or lights in a manner that would "distract other motorists" or "disturb the peace." Plaintiff attempts to use this law to argue that a more targeted regulation exists. (ECF No. 67 at 26.) This does not move the Court for two reasons. One, intermediate scrutiny does not require the least restrictive means to address a problem, so the fact that a law narrower in scope exists is irrelevant. *See Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). Two, if the Court applies the arguments that Plaintiff has been making throughout her briefs, this ordinance fails Plaintiff's test as well. The *Martinez* ordinance would still be unconstitutional because in theory someone could honk in a manner that would disturb the peace but also for expressive purposes.

One other honking case deserves the Court's attention. *Goedert v. City of Ferndale*, 596 F. Supp. 2d 1027 (E.D. Mich. 2008) was also a case that implicated honking, but one where the court found the ordinance unconstitutional. However, the facts are distinguishable in two ways. First, Goedert primarily concerned an ordinance that prohibited signs asking motorists to honk their horns for a protest. The court found the regulation on signs to be content discriminatory because "[s]igns with the word 'honk' contained in it are treated differently than other signs." *Id.* at 1033. Second, *Goedert* took issue with the selective enforcement of the statute. *Id.* at 1035 ("The City of Ferndale selectively enforces the application of the 'Honk Statute.' Ferndale permits non-traffic related expressive horn-honking throughout the year for several events [such as celebratory honking after sporting events or

weddings]."). The dispute in front of this Court is not a selective enforcement issue.

3. Ample Alternative Channels of Communication

Finally, it is apparent that Section 27001 leaves ample alternative channels of communication. *See Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1201-02 (9th Cir. 2016) ("[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."). Like Lone Star, where the appellants were "free to disseminate their messages through myriad other channels," *Id.* at 1202, Plaintiff was able to participate in the protests in many other ways.

Plaintiff is correct that "an alternative is not ample if the speaker is not permitted to reach the intended audience." *Berger v. City of Seattle*, 569 F.3d 1029, 1049 (9th Cir. 2009); *see also United Bhd. of Carpenters & Joiners of Am. Local* 586 *v. NLRB*, 540 F.3d 957, 969 (9th Cir. 2008), *as corrected* (Oct. 28, 2008). But such is not the case here. Plaintiff attended the weekly protests against Representative Issa multiple times, and the only time she ever honked at the protest was on the day of October 17, 2017. (ECF No. 75-1 at 4-5.) This demonstrates that she expressed herself and reached the audience in ways other than honking. Just because the enforcement of Section 27001 that day restricted Plaintiff's preferred method of communication in the one instance is not a reason to invalidate Section 27001 on First Amendment grounds. *Cf. G.K. Ltd. Travel v. City of*

Lake Oswego, 436 F.3d 1064, 1074–75 (9th Cir. 2006) (upholding a law that banned the "entire medium" of pole signs because "other non-sign-based forms of communication" were available).

* * *

The Court concludes that Section 27001 is constitutional as applied to Plaintiff's expressive conduct. The law passes intermediate scrutiny and therefore is an appropriate regulation on the time, place, or manner of the protected speech and expression. Section 27001 is narrowly tailored to serve a significant government interest, namely traffic safety and noise pollution. The Court finds that the alternative ways of regulating honking would be less effective than what is provided in Section 27001. Finally, Section 27001 leaves open ample alternative channels for communication, given Plaintiff's other actions attending the protests without honking.[11]

V. CONCLUSION

For the reasons discussed above, this Court **GRANTS** Defendants Warren Stanley and William D. Gore's Motions for Summary Judgment, (ECF Nos. 66, 68,) and **DENIES** Plaintiff Susan Porter's Motion to Exclude Defendants' Expert Opinions and Motion for Summary Judgment, (ECF Nos. 65, 67.) As none of Plaintiff's claims against Defendants survive

[11] Having established that Section 27001 is constitutional as applied to Plaintiff's set of facts, it is unnecessary to address whether Defendant Sheriff Gore is liable under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978).

summary judgment, the Clerk of Court is **DIRECTED** to close the case.

IT IS SO ORDERED.

Dated: February 5, 2021

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Hon. Gonzalo P. Curiel
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SUSAN PORTER, Plaintiff, **v.** **WILLIAM D. GORE, Sheriff of San Diego County, in his official capacity; and WARREN STANLEY, Commissioner of California Highway Patrol, in his official capacity,** Defendants	18-cv-1221-GPC-LL **DECLARATION OF WILLIAM BECK IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

DECLARATION OF WILLIAM BECK

I, William Beck, declare as follows:

1. I have personal knowledge of the facts set forth herein and, if called as a witness, would and could competently testify to the truth thereof.

2. I have been employed by the California Highway Patrol (CRP) for 24 years. For approximately four years I have been assigned to the CHP Academy that trains CHP cadets. As I testified at deposition, I am assigned to the Academy Vehicle Code Unit, the Accident Investigations Unit and the Spanish Language Unit. I supervise officers in those units who instruct at the Academy, and I also give lectures to cadets. Other than in this litigation, I have not given expert testimony.

3. CHP officers are charged with enforcing the law, including the Vehicle Code. They commonly patrol the state highways, enforcing the law and responding to accidents and other situations that threaten public health or safety. In the course of their duties, CRP officers respond to and investigate many accidents involving motor vehicles. The vehicle horn is one of the items of safety equipment that all vehicles are required by law to have.

4. My opinions are based on my 24 years of experience working for the California Highway Patrol.

5. It is my opinion that, when a vehicle horn is used improperly, it can create a dangerous

situation by startling or distracting drivers and others.

6. It is my opinion that the vehicle horn's usefulness as a warning device would be diminished if law enforcement officers were unable to enforce Vehicle Code section 27001. Absent Vehicle Code section 27001, people would be free to, and could be expected to, use the horn for purposes unrelated to traffic safety. That would, in turn, diminish the usefulness of the vehicle horn for its intended purpose, which is to be used as a warning or for other purposes related to the safe operation of a vehicle.

7. It is my opinion that local noise ordinances are not adequate or practical substitutes for Vehicle Code section 27001. CHP officers may enforce laws in general, including local ordinances. But they are not instructed on, or in the ordinary course provided with copies of, local noise ordinances, and it would not be practical to do so. There are 58 counties and hundreds of cities in California. Moreover, since much of the CHP's enforcement activities take place on highways, it would not always be clear to a CHP officer which local jurisdiction's ordinances would apply to a specific enforcement action. Under state law, all vehicles in California are required to have horns and those horns must be loud – capable of being heard at a distance of no less than 200 feet; it makes sense that their use should be subject to a single state-wide standard, not piecemeal local ordinances.

8. It is my opinion that Penal Code section 415(2) also is not an adequate substitute for

Vehicle Code section 27001. Section 415(2) requires that the offender act maliciously and that there be a specific victim who is disturbed by the noise. That typically would mean that CHP would have to receive a complaint and then investigate, not a situation in which an officer in the course of his duties observes improper use of a horn. Section 415(2) is more appropriate to a situation where, for example, a neighbor with a grudge is sounding the vehicle horn habitually or for a sustained period. Improper use of a horn could startle or distract drivers and pose a safety issue even if that use did not violate section Penal Code section 415(2). Thus, while there are circumstances in which section 415(2) could be used in an enforcement action for improper horn use, it is not an adequate substitute for section 27001.

I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct. Executed in West Sacramento, CA on August 17, 2020.

_____

William Beck

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SUSAN PORTER, Plaintiff, v. WILLIAM D. GORE, Sheriff of San Diego County, in his official capacity; and WARREN STANLEY, Commissioner of California Highway Patrol, in his official capacity, Defendants	Case No.: 18-cv-1221-GPC-LL **DECLARATION OF SUSAN PORTER IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

DECLARATION OF SUSAN PORTER

I, Susan Porter, declare as follows:

1. I am the Plaintiff in this lawsuit. I have personal knowledge of each of the facts set forth below, and if called to testify, could and would testify competently thereto.

2. I make this Declaration in support of the Motion for Summary Judgment filed concurrently herewith.

3. I regularly drive my vehicle in areas where the San Diego Sheriff's Department and California Highway Patrol are responsible for traffic enforcement, including on the public streets and highways of San Diego County.

4. Former Representative Issa's Vista office is located in an office building at 1800 Thibodo Road, Vista, California, 92081. The office building has no adjacent neighbors, faces a main arterial road, and is flanked in the back by California Route 78, a six-lane freeway. Across the road from the building is a wooded slope with houses at the top.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed on August 18, 2020, at Vista, California.

By:_____
Susan Porter

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SUSAN PORTER, Plaintiff, **v.** **WILLIAM D. GORE, Sheriff of San Diego County, in his official capacity; and WARREN STANLEY, Commissioner of California Highway Patrol, in his official capacity,** Defendants	18-cv-1221-GPC-LL

EXCERPTS OF DEPOSITION OF SERGEANT WILLIAM BECK
Conducted virtually May 26, 2020, 9:38 a.m.,
by Debby M. Gladish, CSR No. 9803,
www.aptusCR.com

* * *

[pp. 16:1–18:18]

Q. Understood. That makes perfect sense. Thank you.

Sergeant Beck, do you do any research?

A. I --

MS. O'GRADY: Objection. Vague and ambiguous.

THE WITNESS: Yeah, can you be more specific?

BY MR. JEW:

Q. Yes, I can. Do you currently do any research work?

A. Currently, no.

Q. Have you ever done any research work?

A. I don't know if it's research work. Not specifically that I can think of research. No, I can't think of anything specific. I mean, I've looked things up, like, vehicle codes or laws and things like that, but no research work, per se.

Q. Have you done any testing?

MS. O'GRADY: Objection. Vague and ambiguous.

THE WITNESS: What do you mean by "testing"?

BY MR. JEW:

Q. Have you ever done any scientific testing

to test any hypotheses?

A. No, sir.

Q. Have you done any testing related to anything you do with the CHP?

MS. O'GRADY: Same objection.

THE WITNESS: In regards to research testing or little –

BY MR. JEW:

Q. Yes.

A. -- little unclear what you mean there.

Q. Research testing related to any topic of the CHP, related to the CHP.

A. Not that I can think of, no.

Q. Sergeant Beck, have you ever attended any seminars related to the opinions that you are giving in this case?

A. No.

Q. Have you ever taken any courses or received any education regarding your expert opinions in this case?

A. I'm sorry. You said "taken any courses"?

Q. Yes. Let me -- sorry. That was -- let me ask that separate -- differently.

Have you ever taken any courses regarding your expert opinion in this case?

A. I'm not sure I understand the question.

Q. Let me rephrase.

Have you ever received any education regarding the expert opinions that you are going to provide in this case?

MS. O'GRADY: Objection. Vague and ambiguous.

THE WITNESS: The only -- the only education I've received is just basically my academy training and then my experience on the job.

BY MR. JEW:

Q. Have you ever taken any classes regarding the expert opinions that you going to give in this case outside of the academy?

A. No.

Q. And, Sergeant Beck, do you realize that you have been designated an expert in this case?

A. Yes.

* * *

[pp. 20:3–22:9]

Q. And do you know what expert opinions you will be providing in this case?

A. Yes.

Q. Which expert opinions are those?

A. I believe there's four. One was, in essence, whether or not horn honking can be distracting. The second one was if horn honking is legalized or it wasn't against the law and officers could not enforce it, would it lose its effect as a warning device for the safe operation of a motor vehicle.

The other one was in regards to, is the state statute of 27001, which is honk honking to ensure safe operation of the vehicle, is that a better statute to enforce than a local ordinance.

And the last one was, in essence, the difference between 27001 of the vehicle code and 415(2) of the penal code and basically the difference between the two in regards to enforcing them.

Q. Anything else?

A. That's all I'm aware of.

Q. And do you anticipate offering these same expert opinions at trial if we get to trial?

A. Yeah. Sure. Yes.

Q. Any other opinions you might offer at trial?

A. I don't have any opinions except basic for the ones you guys asked me. That's it.

Q. Understood. Thank you.

As of the time of your expert designation, Sergeant Beck, what steps have you taken to support these opinions?

A. You know, I -- I'm just -- I'm just testifying based on my own experiences and my own opinions.

Q. Have you done any research?

A. No.

Q. Any reading?

A. No, just the vehicle code section itself and the penal code section, but no research or anything like that related to this.

Q. Any interviewing of anybody?

A. No.

Q. Anything else that I'm missing that you've done to prepare for your expert opinion?

A. No. I'm just coming in with what's in my head from experience and my own knowledge. That's it.

Q. Understood. And -- and earlier, Sergeant Beck, you said that when I -- when I had asked you that was all that you would be testifying to in terms of your expert opinions, you said, "That's all I'm aware of." What is the basis of your awareness?

A. Well, those four thing that I just mentioned, that's all that I'm aware of that I'm testifying to.

* * *

[pp. 58:19–60:6]

Q. And other than everything we've just discussed, did you do anything else to prepare for today?

A. Not that I can think of.

Q. Have you received any additional assignments regarding this particular case?

A. No.

Q. Regarding your expert work in this case?

A. No.

Q. So nothing else -- nothing else you did to prepare for today other than what we've just covered?

A. That's correct.

Q. You didn't interview anybody?

MS. O'GRADY: Asked and answered.

THE WITNESS: No, I did not.

BY MR. JEW:

Q. Did you review any reports -- did you review any reports of others?

A. No.

Q. Did you review any textbooks?

A. No.

Q. Any periodicals or journals?

A. No.

Q. Any studies, surveys or other kinds of data sets?

A. No.

Q. Did you inspect the scene of the incident?

A. No.

Q. And by "incident," Sergeant Beck, I mean the protests where plaintiff Susan Porter was cited?

A. No.

Q. Did you have anybody inspect the incident?

A. No.

Q. And asking one last time, have you told me everything you did to prepare for this deposition today that you can recall?

A. That I can recall.

* * *

[pp. 63:11–66:7]

BY MR. JEW:

Q. Okay. And have you prepared an expert report in this case?

A. No. I'm -- I don't know what that is so I'm going to say no.

Q. Have -- have you been asked to prepare any written reports in regards to this case?

A. No.

Q. Do you plan to prepare any written reports in regards to this case?

A. Not unless I'm told to, but I -- I haven't planned on preparing any, no.

Q. And did you know that you were going to be serving as an expert at the time of your prior deposition?

A. No. I – I - I believe Sharon had mentioned that that was a possibility in the future, but I can't -- I didn't know for sure until afterwards.

Q. How soon after your prior deposition were you aware that you were going to be an expert in this case?

A. I don't I don't know. I'm not even sure how much time has been in between. I -- I don't know.

Q. And other than your 24 years of experience as a CHP officer, what other documents or materials form the basis of your expert opinions in this case?

A. I don't have -- I just have the -- my opinion based on experience and the vehicle code.

Q. Any discussions with anybody that form your opinion today?

A. No.

Q. Sergeant Beck, did you prepare any summaries, verbal or written, regarding the expert opinions in this case?

A. No.

Q. Do you plan to provide any verbal or written summaries regarding your expert opinions in this case outside of this deposition testimony and outside of court?

A. Let me -- on that last question. I don't even know what is -- what's a summary? I'm not sure what that is.

Q. Just a verbal summary of what your -- what your expert opinions are in this case.

A. Just talking with Sharon. That's it.

Q. You don't need to report anything up to anybody else in CHP?

A. I haven't been told to, no.

Q. Did you take any notes during your review of this case at all at any time prior to today?

A. No.

Q. You didn't write any notes to yourself, any personal notes?

A. Personal notes? No.

Q. Did you prepare any form of writings with regards to your expert opinions in this case?

A. No.

Q. Did you perform any fact investigation with regards to your opinions in this case?

A. No.

Q. Including your deposition testimony and your participation in your prior deposition, how much time would you ballpark that you spent on this case in total?

A. Say a couple hours. That's a -- that's a big ballpark. I'm going to eight hours, maybe, thinking about it or testifying or not -- think about testifying or, you know, thinking about these four categories, maybe eight hours total, counting the meetings we had.

* * *

[pp. 72:2–80:9]

Q. That makes sense. Thank you.

Okay. Sergeant Beck, I'm going to share my screen with you again. It's going to be the same Exhibit 1 that I showed you previously.

A. Okay.

Q. Let me get it up and you can let me know once you see it.

A. All right.

Q. Okay. Sergeant Beck, are you looking at this document now titled, "DEFENDANT COMMISSIONER STANLEY'S AMENDED EXPERT WITNESS DESIGNATION"?

A. Yes.

MS. O'GRADY: Can you make it a tiny bit larger or is that not --

MR. JEW: Yeah, I can do that.

BY MR. JEW:

Q. Is that better?

A. That's better.

Q. Okay. We're going to focus on the expert opinions described in this document now, Sergeant Beck. So let me scroll down to the first -- here we are.

So starting at page 2, line 4, of Exhibit 1, it says, "Sergeant Beck is expected to testify on the subject of the state's interest in being able to enforce Vehicle Code section 27001 as a matter of public safety. His testimony will be based on his 24 years of experience working for the California Highway Patrol."

Do you see that, Sergeant Beck?

A. Yes.

Q. And earlier you testified that you did not participate in preparing this document; is that correct?

MS. O'GRADY: Objection. Mischaracterizes his testimony.

THE WITNESS: Yeah, so the four subjects that we're going to talk about, I reviewed that after it was prepared.

BY MR. JEW:

Q. After it was prepared, but did you inform your counsel of the substance of these four points prior to this document's preparation?

MS. O'GRADY: Objection. Attorney-client privilege.

MR. JEW: Okay.

MS. O'GRADY: He's testified he discussed the subject matter with counsel already.

BY MR. JEW:

Q. Sorry. I'm just looking at my notes, Sergeant Beck. You haven't lost me.

A. Yeah, no problem.

Q. So going back to this specific paragraph here, starting at page 2, line 4, in addition to the 24 years of experience with working for the California Highway Patrol, did you rely on anything else to form your opinion here described here?

A. No.

Q. Is any of your expert opinion described here in this paragraph based on any scientific data or research?

A. No.

Q. Is it based on any studies or surveys?

A. No.

Q. Is it based on any written or recorded facts or evidence?

A. No.

Q. Are you aware of how decibel levels work, Sergeant Beck?

A. No.

Q. Are you aware of what decibel level human hearing starts to be negatively impacted?

A. No.

Q. Are you aware of the physiological impact of noise on human health?

A. No.

Q. Are you aware of the mental impact of noise on human health?

A. Scientifically, no.

Q. Is there any other way you would understand it other than scientifically?

A. Well, to be honest with you, when my kids are playing Xbox at night and I can't sleep because they're being loud, that's the first thing I thought of. Sorry, guys.

Q. Fair enough. Fair enough.

A. Yes, in -- yeah, okay.

Q. Anything else? Any other way you would understand the mental impact of noise on human health other than your kids playing Xbox?

A. Just -- you know, that's probably a bad example, but just noise in general. I think it prevents people from sleeping, which, you know, in my opinion, can cause -- cause some mental fatigue. So . . .

Q. But you're not an expert in this; is that correct?

A. I am not.

Q. And are you aware of the health impact of noise on animal health?

A. No.

Q. And how do you think public safety would be affected if CHP wasn't allowed to enforce Vehicle Code section 27001?

A. I -- in my opinion, the horn itself is a great warning device for traffic safety. It's a great device. It's how, in essence, you know, most people that are driving an automobile, for example, on our highways can communicate if there's a hazardous situation. So I think if we're not able to enforce it, I think that the public in general would -- you know, they would, in essence, be okay to use your horn whenever you want for whatever purpose and I feel that people would not recognize the horn as something that's used for safety or to warn them of a hazard.

Q. Anything else?

A. Yeah, I -- I just think that it's -- it's used as a warning device to protect people from dangerous situations on the roadways, the effectiveness of the horn would be diminished.

Q. Is that your expert opinion?

A. Yeah, that's my opinion.

Q. That's your lay -- layperson or is that your expert opinion?

MS. O'GRADY: Objection. He's here today as an expert.

THE WITNESS: Yeah.

BY MR. JEW:

Q. I just want to clarify for the record.

A. It's based on my experience a highway patrolman and also personal experience as well, but so, yeah, that's my expert opinion.

Q. And the basis for your expert opinion is based on your personal experience?

A. As a high patrolman and also just in personal life, yes.

Q. Is there any other basis for your expert opinion that you just described?

A. Not that I can think of right now.

Q. In your 24 years of experience with the CHP, Sergeant Beck, are you aware of any specific accident or collision that was caused by the use of a vehicle horn, in general?

A. No.

Q. Are you aware of any accident that was caused by the use of a horn to express support for a political protest?

A. No.

Q. Any accident caused by the use of a vehicle horn to express support for a political candidate?

A. No.

Q. Any accident caused by the use of a vehicle horn to express a greeting?

A. No.

Q. What about to support a charitable cause?

A. No.

Q. Going back to Exhibit 1, Sergeant Beck, second page, line -- beginning at line 16 here, it says, "Sergeant Beck is expected to opine, based on his experience as a member of the CHP, that when a vehicle horn is used improperly, it can create a dangerous situation by startling or distracting drivers or others."

Do you see that?

A. Yes.

Q. Is that your expert opinion today?

A. Yes.

Q. And is your opinion today based on anything other than your experience with the CHP?

A. Yeah, just my experience and -- and like I mentioned before also my personal experience.

Q. But you haven't read any studies or any -¬any research regarding the danger -- the possibility of a dangerous situation created by startling or distracting drivers through the use of a vehicle horn?

A. That's correct, I have not.

Q. Are you aware of any study that has been conducted to determine whether when a vehicle horn is used improperly it creates a dangerous situation by startling or distracting drivers and others?

A. No. I'm not aware of any studies.

Q. Are you aware of any reports?

A. No.

Q. Legislative analysis?

A. No.

Q. Research?

A. No.

Q. And, Sergeant Beck, would you agree that drivers can be startled by other sources of loud noises?

A. Yes.

Q. For example, the screech from rusty brakes?

A. That could distract somebody, sure.

Q. What about a driver yelling out of his or her window?

A. That could distract somebody, sure.

Q. What about a passenger in a car sounding a blow horn as he's passing by?

A. That could distract somebody.

Q. What about a car stereo system that's blasting loud music?

A. I don't know if it's distracting --distracting, per se. I think that's -- I think that's a little more common. I mean, I guess it could, but I think that's more common where it may not distract people as much.

* * *

[pp. 93:6–97:11]

BY MR. JEW:

Q. Sure. And -- and if Vehicle Code section 27001 was struck down as a result of this lawsuit, do you believe that this would change the way people would be using their horns?

A. I don't know.

Q. But, Sergeant Beck, isn't it your professional opinion here that if there was no section 27001 people would be free to and could be expected to use the horn for purposes unrelated to traffic safety?

MR. WHITE: Objection.

THE WITNESS: It's possible, yeah. I think it's both.

BY MR. JEW:

Q. Right.

A. It's possible that it could be used that way, but I also think that, you know, it may not. Maybe some people will just use it for traffic safety.

BY MR. JEW:

Q. Right. But what I'm trying to understand here, Sergeant Beck, is your specific expert opinion that I'm highlighting right here that says people could be expected to use their horn for purposes unrelated to traffic safety if there was no section 27001. I'm trying to understand why you believe people would be expected to.

A. I think it's could be expected to. I think it's a -- it's a possibility that people could be expected to. If there was no law, then there's nothing -- there's no, you know, repercussion for using your horn for other purposes than traffic safety and there's -- if that law never's enforced, then people could be expected to use it for any purpose they feel they need to.

Q. And are you aware of any studies that have been conducted in order to determine if people would be and could be expected to use their horns for purposes unrelated to traffic safety absent Vehicle Code section 27001?

A. No.

Q. Any reports?

A. No.

Q. Legislative analysis?

A. No.

Q. Okay. So if we go to the third page, Sergeant Beck, of your -- of this Exhibit 1, beginning at line 1. Says, "Sergeant Beck is expected to opine, based on his experience as a member of the CHP, that local noise ordinances are not adequate or practical substitutes for Vehicle Code section 27001. CHP

officers may enforce laws in general, including local ordinances. But they are not instructed on, or in the ordinary course provided with copies of, local noise ordinances and it would not be practical to do so.

"There are 58 counties and hundreds of cities in California. Moreover, since much of the CHP's enforcement activities take place on highways, it would not always be clear to a CHP officer which local jurisdiction's ordinances would apply to a specific enforcement action.

"Under state law, all vehicles in California are required to have horns and those horns must be loud - capable of being heard at a distance of no less than 200 feet; it make sense that their use should be subject to a single state-wide standard, not piecemeal local ordinances."

Do you see that, Sergeant Beck?

A. Yes.

Q. And is your opinion here based on anything other than your experience as a CHP officer?

A. Just my experience and -- and personal opinion.

Q. And what is the basis for your expert opinion that local noise ordinances are not adequate or practical substitutes for Vehicle Code section 27001?

A. I think, you know, the state of California is such a big state, not only geographically, but populationwise, our traffic volume is immense. And I think having one stabilized standard -- one stabilized

standard under the vehicle code, which applies anywhere in the state, is -- is great for traffic safety.

It creates consistency and not only for the public, but also for the CHP, which is primarily responsible for traffic safety throughout the entire state. So I think it works well for the public and for the CHP.

Local -- local noise ordinances, there's so many jurisdictions in California, whether it be counties or cities, that it would be very complex to enforce, you know, if unnecessary use of a horn was just a noise ordinance. It would be confusing possibly for the public and also for law enforcement.

Q. Anything else?

A. I --

Q. Anything else?

A. I'd just -- I'd just like to tell you -- I just think that having that statewide law for that, you know, I think it's better for efficiency, traffic safety for the public and for law enforcement. That's it.

* * *

[pp: 105:3–24]

Q. Yes, please.

A. Yeah. So I don't want to diminish the state law or the First Amendment. That's not what I'm saying. I'm simply saying that the state law is there for us to enforce. We would want people to use sound professional judgment when it comes to enforcing that law. And I believe it's a good law, because, like I said,

it's -- I think it's efficient, because it's a statewide standard and it helps protect the public and prevent traffic safety issues. But I would ask anybody, including my officers to use sound professional judgment when they're enforcing that law.

Q. And, Sergeant Beck, are you aware of any studies that have been conducted regarding the practicality of enforcing local noise ordinances in lieu of the vehicle code?

A. No.

Q. Any reports?

A. No.

Q. Legislative analysis?

A. No.

* * *

[pp: 119:1–125:7]

Q. Thank you.

And going back to page 3 of Exhibit 1, top paragraph here, starting at line 1, says, "Sergeant Beck is expected to opine, based on his experience as a member of the CHP, that local noise ordinances are not adequate or practical substitutes for Vehicle Code section 27001."

Same question. Are there any specific events that come to mind or that inform your opinion here on this expert opinion today?

A. No. I have not generally enforced local ordinances in the past on rare occasions, but, like I said, having that statewide standard of that vehicle code, that would apply statewide and my opinion is would be more effective for law enforcement.

Q. Are you personally aware of any situation where enforcement of a local noise ordinance was inadequate -- was an inadequate substitute for a vehicle code section?

A. No.

Q. Thank you.

So going back to this third page. If we go down to the last paragraph here. I believe -- yeah -- this is the last point that you were going to make in your expert opinion. It says -- starting at line 13, page 3 of Exhibit 1, "Sergeant Beck is expected to opine, based on his experience as a member of the CHP, that Penal Code section 415(2) also is not an adequate substitute for Vehicle Code section 27001.

"Section 415(2) requires that the offender act maliciously and that there be a specific victim who is disturbed by the noise. That typically would mean that CHP would have to receive a complaint and then investigate, not a situation in which an officer in the course of his duties observes improper use of a horn.

"Section 415(2) is more appropriate to a situation where, for example, a neighbor with a grudge is sounding the vehicle horn habitually or for a sustained period. Moreover, section 415(2) is a criminal statute, the violation of which is a misdemeanor, while violation of Vehicle Code section

27001 is an infraction. Where the lesser penalty, like that of section 27001, will be sufficient to serve the public interest, that is a better approach than prosecuting an offender for a misdemeanor.

"Further, improper use of a horn could startle or distract drivers and pose a safety issue even if that use did not violate section Penal Code section 415(2). Thus, while there are circumstances in which 415(2) could be used in an enforcement action for improper horn use, it is not an adequate substitute for section 27001."

Do you see that, Sergeant Beck, this paragraph?

A. Yes.

Q. And is your opinion here based on anything other than your experience as a CHP officer?

A. No.

Q. And what is the basis, Sergeant Beck, for your opinion that Penal Code section 415(2) is not an adequate substitute for Vehicle Code section 27001?

A. Well, like -- like it says in there, like you just read, probably the biggest thing, in my opinion, is the fact that you're going to need -¬you're going to need a -- a victim of somebody that's being actually disturbed by the sound of the horn, whereas in the vehicle code section you do not need a victim. It could just be, in essence, improper use of the horn for reasons other than traffic safety.

Q. Do you have any specific event that comes to mind that informs your experience here as to the

inadequacy of Penal Code section 415(2) used in substitute of Vehicle Code section 27001?

A. Mr. Jew, can you just re-explain, like, where I've observed it -- or maybe rephrase it. I'm sorry.

Q. Yeah. So is there any specific event that comes to mind where you observed someone enforce Vehicle Code -- I'm sorry -- Penal Code section 415(2) in lieu of Vehicle Code section 27001?

A. No.

Q. Have you ever encountered any issues with someone doing as such in the CHP?

A. Where they used 415(2) instead of 27001? Is that what you're asking?

Q. Correct.

A. I have not.

Q. Are you aware of any issues that may have arisen with regards to the use of Penal Code section 415(2) instead of Vehicle Code section 27001?

A. No.

Q. Are CHP law enforcement personnel instructed to favor imposing an infraction over a misdemeanor violation when both are equally available for the conduct at issue?

A. Well, no, not necessarily. I -- I think -- I think they're two separate -- I think they're two separate issues.

27001 is going to be a vehicle code infraction that's applying on a highway or a street, whereas 415(2) is out of the penal code and it's more general -- generally it's going to be more if -- if you want to compare it to horn honking, it'd be where, in essence, someone's on private property maybe honking their horn willfully, maliciously, annoying another person. We get a complaint. We go there. We're going to use 415(2).

If it's out on a public street or a highway where somebody's using their horn, you're going to -- most -- us, as a department, we're going to look more towards 27001. I think it's easier to prove. It doesn't mean you couldn't use 415(2) if there was -- you know, if it was willful and malicious and it was disturbing another person, but routinely, I think, we would go with 27001 more more often.

Q. So 27001 can be enforced even when there's no victim?

A. That's correct.

Q. And it can be enforced even when there's no safety risk?

A. It's -- the law says "to ensure safe operation of the vehicle." So to me that means it's used to ensure safer operations so there alleviates that there's a potential hazard.

Q. So when you bring up that "safe operation of the vehicle" language of the -- of the statute, is it your opinion that another CHP expert on the vehicle code

may have a differing opinion than yours on what it means to be -- what -- what "safe operation" means?

MS. O'GRADY: Objection. Calls for speculation. Lacks foundation.

THE WITNESS: I think my interpretation is one. I -- I think it's fair to say that somebody else may have a different interpretation of -- of a particular event if that was safe or not.

BY MR. JEW:

Q. Sergeant Beck, are you aware of any studies that have been conducted regarding whether Penal Code section 415(2) is an adequate substitute for Vehicle Code section 27001?

A. No.

Q. What about any reports?

A. No.

Q. Any legislative analysis?

A. No.

Q. And, Sergeant Beck, what is the basis of your expert opinion that improper use of a horn could startle or distract drivers impose a safety issue?

A. Just my own experience.

* * *

[pp. 128:25–129:8]

Q. And, Sergeant Beck, are you aware of any studies that have been conducted regarding whether improper use of a horn can startle or distract drivers and pose a safety issue?

A. No.

Q. Are you aware of any reports?

A. No.

Q. Any legislative analysis?

A. No.

* * *

[pp. 131:18–24]

Q. Are you aware of anyone ever being injured -- or -- I'm sorry.

Let me rephrase that question.

Are you aware of any incident where a pedestrian was injured through the improper use of a vehicle horn?

A. No.

* * *

[pp. 132:10–113:16]

Q. Have you ever seen someone jump into traffic because of a horn honk?

A. I have not, no.

Q. Are you personally aware of any time that's ever happened in your 24 years of experience with the CHP?

A. No.

Q. And, Sergeant Beck, I'm sorry if we already covered this. I just want to be absolutely sure here.

Do you intend to provide any expert opinion on the state's interest in curbing noise pollution caused by horn honking?

A. No.

Q. And turning to just kind of recent events -- or not even recent events, just anything that's happened in your personal experiences in your 24 years of working with the CHP. Have you ever investigated an accident caused by the use of a vehicle horn?

A. No. Not specifically by the horn. No.

Q. Have you reviewed any reports of accidents caused by the use of a vehicle horn?

A. I've never been an accident review officer, so I haven't -- I haven't had that background, per se. I don't know if that made sense.

Q. Are you aware -- that makes sense. Thank you.

Are you aware of whether any reports exist regarding accidents caused by horn honking?

A. No. No. Not specifically horn honking. No.

* * *

[pp. 210:1–25]

I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were duly sworn; that a record of the proceedings was made by me using machine shorthand, which was thereafter transcribed under my direction; that the foregoing transcript is a true record of the testimony given.

Further, that if the foregoing pertains to the original transcript of a deposition in a federal case, before completion of the proceedings, review of the transcript [ ] was [X] was not requested.

I further certify I am neither financially interested in the action nor a relative or employee of any attorney or party to this action.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: May 28, 2020

_____

Debby M. Gladish
RPR, CLR, CCRR, CSR No. 9803
NCRA Realtime Systems Administrator

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SUSAN PORTER, Plaintiff, **v.** **WILLIAM D. GORE, Sheriff of San Diego County, in his official capacity; and WARREN STANLEY, Commissioner of California Highway Patrol, in his official capacity,** Defendants	18-cv-1221-GPC-LL

EXCERPTS OF DEPOSITION OF SUSAN PORTER

Taken at 600 West Broadway, Suite 1800, San Diego, California, November 6, 2019, 8:30 a.m., by Lisa Jones, CSR No. 8142, of Esquire Deposition Solutions

[pp. 9:3 – 11:3]

Q. The complaint alleges that you participated in protests at Representative Darrell Issa's office on October 17, 2017, correct?

A. Yes.

Q. And how long were you at that protest?

A. Approximately an hour.

Q. And were you just in your car? Were you marching? What were your activities?

MR. JEW: Objection. Compound.

You can answer.

THE WITNESS: Okay.

A. Initially I parked my car and I went to the rally. Then quite a few sheriff's department officers showed up and started writing tickets for everything like your wheels weren't turned the right way or whatever. So where I had parked was a little unclear because there was a fire hydrant and I wasn't sure if I was far enough away from the fire hydrant, so I went back to my car to move my car, and that's when I drove past the protest and beeped my horn.

BY MS. O'GRADY:

Q. And approximately how many people were at the protest?

A. I can only give you a ballpark figure. Say maybe 50 to 75.

Q. And were there -- and what was the protest about?

A. These were ongoing protests about the objections of Darrell Issa's actions in congress.

Q. And so they were directed at Representative Issa in particular?

A. They -- sometimes they were directed at him. Sometimes it was just, say, if there had been a shooting, it might be -- the subject of that protest might just be gun violence. But, again, it would usually go back to Darrell Issa's stance on gun control.

Q. And were there also counterprotesters at the protest?

A. There was usually one person -- no, two people across the street.

Q. And on October 17, 2017, in particular, were there counterprotests?

A. Yes. I believe there was only two people. There could have been a few more.

Q. And according to the complaint, you received a citation. And that's correct, right?

A. Yes.

Q. And the deputy that issued the citation was Deputy Klein?

A. Yes.

* * *

[pp. 14:6 – 17:18]

Q. And at the time of the incident you were in fact honking, correct?

A. At the time of the incident, yes, I did honk my horn.

Q. And how many times did you honk it?

A. I think three, beep, beep, beep. I think I did that twice.

Q. And you intended by your honking to signify support of the protest; is that correct?

A. That is correct.

Q. And that was the only reason you honked your horn?

A. That is correct.

Q. So there was no traffic safety reason why you were honking your horn?

A. No.

MR. WHITE: Can I just get a clarification?

Did you say that you honked your horn three times twice? So six beeps total?

THE WITNESS: Yeah.

MR. WHITE: Okay. Thank you.

THE WITNESS: It was like a beep, beep, beep.

MR. JEW: Not a beep, beep, beep, but a beep, beep, beep.

THE WITNESS: Yeah, beep, beep, beep.

MR. WHITE: This will show up great on the transcript.

BY MS. O'GRADY:

Q. So you believe you honked your horn six times.

A. I believe so. It's been two years, so yes.

Q. And were there other people near you also honking their horn?

A. Yes.

Q. How many others?

A. Truthfully, I would have no clue. People honk their horn at every protest. Sometimes we'd maybe have ten people honk their horns. Sometimes we'd have five people honk their horns. So it just depended, you know.

Q. Pretty noisy?

A. Well, let me clarify noisy is that there was a -- the counterprotester was a DJ, and he would bring his huge speakers and megaphone and blast the protesters. That's what was noisy. It wasn't so much the horns that were noisy.

Q. So tell me about -- so the counterprotester was there -- and right know I'm just asking about October 17. So if I say "the day of the incident" or "the incident," you'll understand that's what I mean?

A. Um-hum.

Q. Okay. And he's an individual who has typically shown up at the protests?

A. Correct.

Q. And what was he doing on that occasion?

A. He was doing what he always did. He would set up his sound booth or whatever it was and his truck with his big speakers, and he would blast messages. He would blast sometimes songs. And that's what he did to try to drown out the protesters.

Q. And what were the protesters doing when he was doing that?

A. We were trying to proceed with the program that had been set forth for us that day.

Q. And what was the program?

A. Well, it would vary from week to week, so it would -- one week it might be gun control. One week

it may be healthcare. Depends on whatever topical issue there was that week.

Q. Do you know what the -- as you sit here

today, do you recall what the issue was on October 17, the day of the incident?

A. No, I don't.

Q. And how did the protesters implement that program? What was happening on that side of the road?

MR. JEW: Objection. Compound.

A. You mean that particular day?

BY MS. O'GRADY:

Q. Yes.

A. Well, the protesters had a -- I guess you'd kind of call it a flatbed truck, and they would have speakers get up and talk, so different speakers. And we would sing hymns and sometimes do a chant.

Q. And was there sound amplification on the truck?

A. Just a megaphone held by the -

Q. Just a --

A. I believe it was just a megaphone.

* * *

[pp. 60:19 – 61:22]

Q. Did your -- when I say "your side," the side protesting against Congressman Issa. Does that make sense?

A. Yes.

Q. Okay. Do you recall if your side had amplified sound at the protest that day?

A. Well, we had a megaphone. I'm not sure if

the megaphone was amplified or not.

Q. Do you recall whether on at least some of the days where you attended those protests, whether your side had amplified sound beyond a megaphone, such as speakers?

A. They might have had speakers.

Q. Do you recall anybody on your side of the protest having any instruments or other noise-producing devices that were played, whether or not they were amplified electronically?

A. One guy had a drum.

Q. And at the protest was there chanting and singing from your side at times?

A. Yes.

Q. Did anybody -- strike that.

At the protest were protesters holding picket signs?

A. Yes.

Q. Do you recall at the protest if there were anything set up on the sidewalks, like tables or audio equipment, canopies, those type of things?

A. There was a sign-in table. That was it.

* * *

[pp. 66:1 – 69:3]

Q. While you were at the scene that day before you got back in your car to move it, did you see any sheriff law enforcement activity --

A. Yes.

Q. -- that day?

Okay. What did you see?

A. I saw a swarm of officers come down the street start writing tickets.

Q. Okay. How many sheriff deputies do you recall seeing writing tickets on October 17, 2017?

A. I can't give you an exact number. I would say more than five, less than ten.

Q. And was that all going on at one time?

A. Yes.

Q. Did you speak with anybody who received a parking -- strike that -- who received a ticket for their vehicle while their vehicle was parked that day?

A. No.

Q. Did your vehicle have front and rear license plates that day?

A. Yes.

Q. Now, is it your belief that at the time of your horn honk that there was a counterprotester playing amplified music or messages at that time?

A. Yes.

Q. And was that something that was audible from across the street?

A. Yes.

Q. You said that it drowned out the protesters?

A. He attempted to, yes.

Q. Do you know who the counterprotester was?

A. No.

Q. Or is?

A. No.

Q. But he was at the scene that day?

A. Yes.

Q. Do you recall any type of setup that he may have had, whether equipment or canopies or signs or anything to that effect?

A. He had a truck. I think he had a canopy. He had great big speakers and a sound system.

Q. And did you speak to anyone about that counterprotester, anyone from the City or the sheriff's department?

A. No.

Q. Do you know if anyone else spoke with the City or the sheriff's department about the counterprotester and his noise?

A. I don't know.

Q. Why did you honk your horn on the date of the incident while driving past the protest area?

A. Because other people had been honking their horn all day, and when I started to go past, I was going to honk my horn to show my support also.

Q. Do you recall if there were any signs visible from the roadway such as "Honk in Support of the Protest" or anything to that effect?

A. No.

Q. Where were you with respect to the assembled group of protesters when you honked the horn?

A. I honked the horn twice because -- because we weren't allowed to go on the grass, the protest would be very long along the sidewalk, so I did the first beep, beep, beep towards the front of the protesters, and then when I got kind of towards the middle, I beeped again.

Q. Do you recall whether you received any response from either side of the --

A. Oh, yeah.

Q. -- the protesters?

A. The protesters all cheered.

Q. Was that the first time that you had ever honked at that protest?

A. Yes.

Q. Why was that the first time you had ever honked for this protest?

A. Because I had never driven past it while it was in progress before.

* * *

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REPORTER'S CERTIFICATION

I, Lisa Jones, a Certified Shorthand Reporter in and for the State of California, do hereby certify:

That the foregoing witness was by me duly sworn; that the deposition was then taken before me at the time and place herein set forth; that the testimony and proceedings were reported stenographically by me and later transcribed into typewriting under my direction; that the witness has requested a review pursuant to Rule 30(e)(2); that the

foregoing is a true record of the testimony and proceedings taken at that time.

IN WITNESS WHEREOF, I have subscribed my name this 5th day of November, 2019.

_____

Lisa Jones, CSR No. 8142

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. 1

Amendment 1, Religious and Political Freedom

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.

CAL. VEH. CODE § 27001

§ 27001. Use of horns

(a) The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn.

(b) The horn shall not otherwise be used, except as a theft alarm system which operates as specified in Article 13 (commencing with Section 28085) of this chapter.