No. 21-55149

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN PORTER,

Plaintiff-Appellant,

v.

WILLIAM D. GORE, in his official capacity as Sheriff of San Diego County, and AMANDA RAY, as successor to Warren Stanley, in her official capacity as Commissioner of California Highway Patrol,

Defendants-Appellees.

Appeal from the Judgment of the United States District Court
For the Southern District of California
District Court No. 3:18-cv-01221-GPC-LL
Honorable Gonzalo P. Curiel

BRIEF OF *AMICUS CURIAE* FIRST AMENDMENT COALITION

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

The First Amendment Coalition is a non-profit corporation that offers no stock; there are no parent corporations or publicly owned corporations that own 10 percent or more of this entity's stock.

/s/ G.S. Hans

G.S. Hans

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STATEMENT OF INTEREST

The First Amendment Coalition ("FAC") is a nonprofit advocacy organization based in San Rafael, California, dedicated to freedom of speech and government transparency and accountability. FAC's members include news media outlets, both national and California-based, traditional media and digital, together with law firms, journalists, community activists, and ordinary citizens.

FAC submits this brief pursuant to Fed. Rule App. P. 29(a), and does not repeat arguments made by the parties. No party's counsel authored this brief, or any part of it. No party's counsel contributed money to fund any part of the preparation or filing of this brief. FAC files this brief with the consent of the parties.

INTRODUCTION

Political protests serve as paradigmatic examples of what the First Amendment's speech and assembly protections defend. Because the district court incorrectly held that the government's actions in this case did not violate Susan Porter's speech rights, other protesters who choose to engage in political action by honking their car horns — a common and longstanding method of expressing support at protests — face liability merely for expressing their views. This Court should thus reverse the district court's holding that the government's actions pass constitutional scrutiny, as the district court failed to apply precedent which dictates that the government violated Porter's speech rights by enforcing California Vehicle Code Section 27001 against her protected expression.

This case resounds beyond the instant situation. Though Porter's challenge to Section 27001 is properly characterized as an as-applied challenge, a ruling upholding the lower court's holding would implicate large numbers of protesters who could be improperly cited for violating Section 27001 in similar circumstances. Honking to express a view on the message of a protest or rally is both longstanding and newly important, given the public health concerns raised by COVID-19 for large in-person gatherings and the widespread adoption of vehicular protests. The lower court's misapplication of First Amendment case law and the chilling effects that its ruling will have for other speakers who merely want to

express support for particular messages at protests demonstrate the need to reverse the lower court's holding.

ARGUMENT

I. The District Court's Decision Would Lead to Chilling Effects on a Longstanding Means of Core Political Expression that Has Recently Become an Especially Important Medium of Protest.

The importance of this case extends beyond Susan Porter's citation for violating Section 27001. Upholding the district court's ruling would open the door to punishment of expressive conduct that is clearly protected under Supreme Court precedent, chilling speakers who would otherwise express support for political and social movements.

It is well established that chilling effects are a central concern of First Amendment cases. *Americans for Prosperity Found. v. Bonta*, No. 19-251, 2021 WL 2690268, at *12 (U.S. July 1, 2021) ("The risk of a chilling effect on association is enough, '[b]ecause First Amendment freedoms need breathing space to survive.'") (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)); *Reno v. Amer. Civil Liberties Union*, 521 U.S. 844 (1997) ("The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."); *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.").

Because this case presents an as-applied challenge to enforcement of Section 27001 against expressive horn use, a ruling for the government would create a chilling effect upon other potential speakers who might fear citation by law enforcement for engaging in similar expression.

This is not an abstract concern, as Porter's expressive conduct — honking in support of a cause — is both longstanding in American social life and common in the contexts of protests and rallies. *State v. Immelt*, 267 P.3d 305, 308 (Wash. 2011) ("A moment's reflection brings to mind numerous occasions in which a person honking a vehicle horn will be engaging in speech intended to communicate a message that will be understood in context."). Therefore, a ruling for the government here would mean that anyone who honks in support of a protest would be subject to liability for expressing their views, in contravention of First Amendment doctrine that upholds above all else the right to engage in political speech. *See, e.g., Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d. 1011 (9th Cir. 2009) ("Political speech is core First Amendment speech, critical to the functioning of our democratic system."); *Garrison v. Louisiana*, 379 U.S. 64, 74–5 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). Conversely, a ruling for Porter would eliminate an unconstitutional chilling effect for the numerous Californians who express support for social and political causes by honking.

There are multiple reasons that a speaker might choose to express support for a cause by honking instead of participating outside of an automobile. A speaker may happen upon a protest by chance while driving and respond to a sign asking for encouragement or support. A rally might spring up organically without advance notice, and a supportive motorist might not be able to join on foot but still choose to express support.

The COVID-19 pandemic demonstrates how alternative methods of protest such as expressive horn use have become more common and important. Because of safety and public health concerns, "car caravans" — in which individuals participate in rallies or protests solely from their vehicles— occurred to allow for demonstrations without necessitating physical, close gathering in the manner of more traditional assembly. *See, e.g.*, Camila Domonoske, *Caravan For Justice: Cars Offer Socially Distanced Protesting During Pandemic*, NPR (June 5, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/05/870904208/caravan-for-justice-cars-offer-socially-distanced-protesting-during-pandemic (interviewing protesters who chose to protest from their cars due to health conditions and describing protests in California, Connecticut, Michigan, and Wisconsin). Such protests encompass a wide range of political messages and perspectives. *See, e.g.,* Sara Tabin, *Utahns Protest George Floyd's Death with Car Caravan*, Salt Lake Tribune (March 6, 2021),

https://www.sltrib.com/news/2021/03/07/utahns-protest-george/; Patrick Wilson, *Protesters Circle Capitol Square in Honking Vehicles Calling on Northam to Ease Coronavirus Shutdown*, Richmond Times-Dispatch (Apr. 22, 2020), https://richmond.com/news/virginia/protesters-circle-capitol-square-in-honking-vehicles-calling-on-northam-to-ease-coronavirus-shutdown/article_a434ce58-a56f-5406-828f-8c999c6cb791.html (describing how drivers honked horns in order to support a variety of political causes). In these settings, drivers are limited in the ways in which they can protest, as they can hardly hold a sign, flag, or banner while driving and their voices would go unheard from inside their vehicle. Honking, therefore, serves an essential expressive function at these protests. Beyond public health reasons, other justifications — fear of retribution by law enforcement, immigration consequences, or safety — may explain why speakers choose to express themselves by using horns from their vehicles rather than holding signs on the sidewalk.

Section 27001, as part of the California Vehicle Code, regulates the operation of automobiles — an important safety consideration. But reversing the district court would protect First Amendment rights without imperiling public safety. Because Porter challenges Section 27001 on an as-applied basis, a ruling for Porter would not prevent the government from enforcing Section 27001 in all cases. The government would still have ample means to promote its interests by

enforcing the statute *only* in cases in which the driver was *not* engaging in expressive conduct, thus protecting the speech rights of the public while allowing the government to address its concerns. While the government may claim that it is difficult to pursue its goals without infringing speech, as the Supreme Court has observed, "First Amendment standards… 'must give the benefit of any doubt to protecting rather than stifling speech.'" *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310, 327 (2010) (citing *Federal Election Comm'n. v. Wisconsin Right to Life*, 551 U.S. 449, 469 (2007)). That maxim applies in the instant case and in the countless other situations in which drivers express their views by honking.

II. The District Court Erred in Not Applying Strict Scrutiny

A. *Reed v. Town of Gilbert* Mandates Strict Scrutiny, Which the Government Cannot Satisfy

Surprisingly and incorrectly, the district court failed to apply *Reed v. Town of Gilbert* after properly determining that Porter's honk was expressive conduct. Citation to District Court. *Reed* held that a law that distinguished between content on its face or could not be justified without reference to the content of regulated speech was definitionally content-based, even if lacking animus to the disfavored speech. *Reed v. Town of Gilbert*, 576 U.S. 155, 164–66 (2015) ("An innocuous justification cannot transform a facially content-based law into one that is content neutral.").

In accord with the statute, the government's enforcement of Section 27001 discriminated against Porter was based on the content of her expressive conduct (honks to warn of dangers are permissible, whereas honks in support of political causes are not). Because Porter was targeted by the government based on the content of her honk — Porter would not have been cited for honking to warn of a safety-related emergency — *Reed* applies. 5-ER-1163–64.

Although Section 27001 is content-based on its face, even a purportedly content-neutral statute can evince a content-based approach. In *Boyer v. City of Simi Valley*, this Court determined that a facially content neutral mobile billboard advertising display ordinance was actually content-discriminatory, as the ordinance allowed for some government vehicles to display messages. *Boyer v. City of Simi Valley*, 978 F.3d 618 (9th Cir. 2020). In that case the court noted that because it could not "identify a justification for allowing speech only from authorized emergency and construction, repair, or maintenance vehicles that does not rely on content," *Reed* applied. *Id.* at 623.

This case presents a similar situation: the government allows for speech that warns, but not speech that advocates. The *Boyer* court observed that the government's content-based distinction made sense and was perhaps even prudent — but that *Reed* created a "firm rule [which] mandates strict scrutiny review whenever an ordinance allows some messages, but not others, based on content—

no matter how sensible the distinction may be." *Id.* The district court elided a fundamental part of the analysis by failing to apply *Reed*; strict scrutiny therefore should govern the court's analysis of the government's actions.

Strict scrutiny, the most exacting test in First Amendment law, mandates that the government demonstrate that a "restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). Few government actions survive this standard. *See, e.g., U.S. v. Playboy Entertainment Group*, 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible."). As Porter's brief argues, the government cannot meet that standard in this case. Appellant's Opening Brief at 29–31, 37–38, 43–44. Expressive horn use does not *necessarily* implicate the government's interests in minimizing excessive noise or promoting safety. *See Goedert v. City of Ferndale*, 596 F.Supp.2d 1027, 1033–34 (E.D. Mich. 2008) ("[t]he City has not come forward with any evidence correlating a single honk expressing support for a demonstration with safety problems…. Assuming arguendo that noise regulation may be deemed a 'compelling state interest,' the City of Ferndale has not produced evidence that the honk regulation is 'necessary' to limit the noise."). In the instant case, no evidence was presented at the district court that justifies the government's actions in sanctioning Porter's speech. Appellant's Opening Brief at 29–39. Given that citing Porter for speaking

was unnecessary, ruling in favor of the government would allow for essentially unrestricted discretion for law enforcement to censor expressive speech in similar cases — and given the common practice of honking to express support, implicate numerous speakers without any limiting principle.

Even if restricting speech at a protest was a sufficiently compelling interest, the government's actions were here not narrowly tailored to promote any potential interest in public safety or noise. The government presented to the trial court no evidence of a public-safety or noise-related concern in Porter's case, and the government has ample alternatives — most notably, disruptive noise statutes or ordinances — to pursue its stated goals.

Finally, the backdrop in which this case arose — a political protest — demonstrates why strict scrutiny applies and why the government cannot satisfy it. Courts show particular concern when examining government action limiting such speech, especially when such action is based on content. *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("[A] content-based restriction on political speech in a public forum must be subjected to the most exacting scrutiny."). While strict scrutiny may not always be fatal in fact, courts must meaningfully and seriously interrogate the government's stated interests and justifications in a more fulsome way than the trial court did.

B. The Court's Analysis Ignored Alternative Governmental Enforcement Options and Misconstrues Expressive Conduct Doctrine

In ruling for the government, the trial court made two errors beyond ignoring *Reed*. First, the trial court determined that there were in fact no alternatives to Section 27001 to satisfy the government's interests, despite other laws that prohibit excessive noise. The district court discounted these alternatives, positing that they too might be subject to constitutional challenge. 1-ER-28 ("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."). But such challenges are *purely speculative* and not at issue in this case. Given the presumption of legality, the existence of alternate, tailored methods of satisfying the government's stated interests demonstrate that strict scrutiny cannot be satisfied. Ratifying the district court's reasoning would undercut the rigor of the strict scrutiny standard by essentially shifting the burden from the government to the censored speakers, as the district uncritically assumed that the government lacked viable constitutional alternatives. *See McCullen v. Coakley*, 573 U.S. 464, 496 (2014) ("Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked.") (overturning content-neutral time, place, and manner restriction). Because the

district court incorrectly determined that the government acted in a content-neutral way in enforcing Section 27001, its analysis cannot hold.

Second, the court expressed concern that "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," citing to *Edge v. City of Everett*. 1-ER-27 (citing *Edge v. City of Everett*, 929 F.3d 657, 668-69 (9th Cir. 2019). But *City of Everett* counsels *against* the proposition that context cannot provide sufficient guidance on when conduct qualifies as expressive and when it does not. The Ninth Circuit held in *City of Everett* that because speakers' expressive conduct was not easily cognizable to others, it could not qualify as speech. *Edge v. City of Everett*, 929 F.3d at 668–69. Indeed, to qualify as expressive conduct under *Texas v. Johnson*, speech that takes the form of expressive conduct must have a high likelihood of being understood by those who receive the message. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). The trial court properly held in this case that Porter's speech constituted expressive conduct because the message met the *Texas v. Johnson* standard. 1-ER-20. Thus, *City of Everett* is inapposite, as the conduct in that case did not met the standard for expressive conduct. The court's citation to *City of Everett* to assert that law enforcement will find it "difficult" to apply Section 27001 in context ignores the court's correct finding that Porter's expressive conduct qualified as speech.

The trial court incorrectly held that law enforcement could not feasibly use context to determine whether honking could be sanctioned under Section 27001. If that were true, it would be functionally impossible for honking to *ever* constitute protected expressive conduct. If law enforcement could credibly argue that it would be impracticable to determine whether honking was expressive conduct, any subsequent judicial determination (applying *Texas v. Johnson*) finding that a honk was expressive would be rendered a nullity.

Context provides direct, relevant indicia for law enforcement to determine under Section 27001 whether honking can be properly sanctioned. Indeed, the statute itself requires officers to determine whether drivers honked to convey a message of "audible warning" or some other message, Cal. Veh. Code § 27001(a), which depends on context, as evidenced by testimony of the officer who cited Ms. Porter. 5-ER-983. The record demonstrates law enforcement awareness of the distinction between honking that expresses support for a cause and honking that delivers other messages or lacks any expressive content. 5-ER-1097, 1099, 1114. Given the history of "honk in support" signs and the practice of honking at protests, most observers — including law enforcement — would easily be able to determine whether a honk functioned as protected speech. *See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 504–514 (1969) (describing the wearing of black armbands as communicating a political message);

Spence v. State of Wash, 418 U.S. 405, 410 (1974) ("A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it.").

Law enforcement already must evaluate whether speech warrants protection based on context in other situations — most obviously, when determining whether speech constitutes a "true threat." *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969) ("[T]he constitutional guarantee of free speech ... does not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action that is likely to incite or produce such action."). While incitement to violence requires differing First Amendment analysis, law enforcement may need to contextually analyze the situation to appropriately proceed in such circumstances. Determining whether incendiary speech falls within the protections of the First Amendment or constitutes a true threat can fall to law enforcement, requiring officers to make choices based on the context of the speech. *Bauer v. Sampson*, 261 F.3d. 775, 783 (9th Cir. 2001) ("Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners.",

quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990), *overruled on other grounds*).

C. The Secondary Effects Doctrine Does Not Apply in This Case

In finding Section 27001 to be a content neutral regulation in this instance, the lower court relied upon the limited secondary effects doctrine, articulated in *City of Renton v. Playtime Theaters*, which faces an uncertain future post-*Reed*. 1-ER-21. Invoking *City of Renton* in this case is misguided. *City of Renton* created the "secondary effects" doctrine to allow for government regulation of certain speech. 475 U.S. 41, 46–50. However, for two reasons, *City of Renton* is inapposite here.

First, secondary effects doctrine *only* applies in situations involving regulations of physical businesses selling adult sexually explicit content. *Free Speech Coalition, Inc. v. Attorney General United States*, 825 F.3d 149, 161 (3rd Cir. 2016) ("[i]f the secondary effects doctrine survives, *Reed* counsels against expanding its application beyond the only context to which the Supreme Court has ever applied it: regulations affecting physical purveyors of adult sexually explicit content."). Courts have generally declined to extend *City of Renton* beyond cases involving zoning. *Cinema Pub, LLC v. Petilos* (2017 WL 3836049, *9, D. Utah 2017) ("[T]he secondary effects doctrine has been applied almost exclusively in cases involving zoning ordinances."). This court should similarly decline to extend

City of Renton beyond its limited application, as this case has nothing to do with the physical business of sexually explicit adult entertainment, or zoning.

Second, it is questionable that the secondary effects doctrine has survived subsequent developments in First Amendment doctrine. In *City of Los Angeles v. Alameda Books*, Justice Kennedy noted in a concurring opinion that the designation of *City of Renton*'s zoning ordinance as content neutral was "something of a fiction" as such ordinances were actually content based. 535 U.S. 425, 448 (2002). Post-*Reed*, courts have noted that secondary effects doctrine faces an uncertain future. *See Free Speech Coalition*, 825 F.3d 149 at 161; *Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs, Georgia*, 703 Fed.Appx. 929, 935 (11th Cir. 2017) ("There is no question that *Reed* has called into question the reasoning undergirding the secondary-effects doctrine."). Academic commentators have similarly questioned the viability of secondary effects. *See* Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 Iowa L. Rev. 1427, 1443 ("The secondary effects doctrine is in obvious and direct tension with numerous Supreme Court cases, including most obviously *Reed*."); David L. Hudson, Jr., *The Content-Discrimination Principle and the Impact of* Reed v. Town of Gilbert, 70 Case W. L. Rev. 259, 280 (describing the existence of secondary effects doctrine as "unsteady").

This court need not opine on whether the secondary effects doctrine persists post-*Reed* to find in Porter's favor. But secondary effects also cannot support the lower court's reliance on the doctrine to justify the government's enforcement of Section 27001 against her speech. The secondary effects doctrine lacks any connection to the subject matter of this case; even if it did, the shakiness of the doctrine means that it cannot support a content-based restriction like the one at issue here.

III. The Government Cannot Satisfy Intermediate Scrutiny

Even though this case presents a clear content-based regulation of speech, triggering strict scrutiny, the enforcement action cannot even stand as a content-neutral regulation, despite the lower court's analysis. The lower court categorized Section 27001 as a content-neutral time, place, and manner restriction, applying the intermediate scrutiny framework. 1-ER-21–22. However, by ruling in favor of the government, the court did not properly apply intermediate scrutiny — which the government cannot satisfy in this case.

Valid time, place, and manner restrictions must be "justified without reference to the content of the regulated speech, … narrowly tailored to serve a significant governmental interest, and … leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1984) (quoting *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 293

(1984)). Even if one assumes that Section 27001 is content-neutral and that the government's interest is significant, the government's enforcement did not leave ample alternative channels for communication, given practical limitations and safety concerns.

In analyzing narrow tailoring, the district court asserted that the enforcement of Section 27001 against Porter did not burden more speech than necessary. 1-ER-29–31. This is inconsistent with other, correct aspects of the district court opinion, which determined that Porter's honking was expressive conduct. Furthermore, it is inconsistent with the record, in which the government fails to prove that Porter's honking imperiled safety or created excessive noise. Appellant's Opening Brief at 29–39. While the government need not demonstrate that enforcement was the *least* restrictive means to satisfy narrow tailoring, enforcement in this case was not necessary and restricted expressive speech. Merely taking the government's assertions as factual would undercut the strength of the narrow tailoring analysis. *See Galvin v. Hay*, 374 F.3d 739, 753 (9th Cir. 2004) ("[A]lthough the regulation need not be minimally restrictive, the availability of several obvious less-restrictive alternatives is pertinent in deciding whether the regulation burdens substantially more speech than necessary to achieve its purposes.").

Porter also lacked ample alternative channels to express her support. As discussed *supra* Part I, speakers cannot necessarily speak in other ways while

driving, and speakers may not be able to participate in in-person rallies or protests. While the government may contend that Porter could have joined the protest, parked her car, or flown a sign out the window, such speculative, potentially unsafe options such as these hardly satisfy the alternative channels inquiry.

Intermediate scrutiny, though more relaxed than strict, still requires the government to bear the burden of justifying an action affecting First Amendment rights. Though this case should properly invoke a strict scrutiny analysis, the government cannot meet the intermediate scrutiny standard. The trial court was improperly deferential to the government's specious arguments for intermediate scrutiny, diluting the intermediate scrutiny analysis by incorrectly holding that the government could justifiably sanction Porter's speech.

CONCLUSION

Speech occurs in a variety of ways, and Porter's expressive conduct in this case qualifies as speech, as the district court noted. But by downplaying the implications of allowing the government to cite Porter for speaking, the district court both ignored existing First Amendment doctrine and created uncertainty for swaths of similar speakers who might opt to express their political opinions by honking. To conform to precedent and avoid chilling future drivers' speech, this court should vacate the district court ruling and remand to prevent the government

from enforcing Section 27001 in contexts where speakers are expressing themselves by honking.

Dated: July 13, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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