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

APPELLANT'S OPENING BRIEF

David Loy
ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES
P.O. Box 87131
San Diego, California 92138-7131
Telephone: 619.232.2121

J. Mark Waxman
Mikle S. Jew
Lindsey L. Pierce (admission pending)
FOLEY & LARDNER LLP
11988 El Camino Real, Suite 400
San Diego, California 92130-2594
Telephone: 858.847.6700

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INTRODUCTION

Every day, people beep their horns to support candidates or causes, greet friends or neighbors, summon children or co-workers, or celebrate weddings or victories. This expressive conduct is common, widespread, and protected by the First Amendment. It is an especially important medium of expression when public health restrictions curtail other forms of assembly and protest. Yet California bans all expressive horn use regardless of time, place, or volume, except to convey messages of "audible warning." Cal. Veh. Code § 27001(a).

Susan Porter was cited for sounding her horn in support of a political protest that involved music, loudspeakers, yelling, and chanting. She challenged the enforcement of Section 27001 against expressive horn use. In ruling against her, the district court ignored or misunderstood bedrock First Amendment law.

The court disregarded controlling precedent dictating that Section 27001 is content based and subject to strict scrutiny because its enforcement against expressive horn use depends solely on the message conveyed. *Reed v. Town of Gilbert*, 576 U.S. 155, 163–67 (2015). It allows drivers to give warnings but not support protests. Regardless of motivation, such a law is content based because it creates an unacceptable risk of censoring political speech. The district court's contrary holding would undermine core First Amendment protections.

Even if Section 27001 is content neutral, the district court erred in upholding a near-total ban on expressive horn use. The First Amendment demands evidence, not speculation. The government did not carry its burden to prove that any alleged harms of expressive horn use are "real, not merely conjectural." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994). Although it invoked an interest in traffic safety, the government produced no evidence of a *single* accident or hazard caused by expressive horn use. It also invoked noise control, but that interest is difficult to credit because the statute allows horn use as a "theft alarm system" that can shatter a quiet night. Cal. Veh. Code § 27001(b). The First Amendment condones noise limits on expression only when the noise materially exceeds ambient levels, and expressive horn use does not do so in every time, place, or manner. In ruling otherwise, the district court substituted conjecture for evidence and downgraded First Amendment scrutiny to rational basis review.

Even if the government's interests were implicated, the court ignored obvious alternatives such as enforcing laws against disturbing the peace or making excessive noise, which can prevent potential abuses without stifling a broad range of protected expression. The court disregarded settled precedent in upholding a blanket restriction as simply easier to enforce. *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). Assuming the statute is otherwise justified, the district court wrongly

held that expression at another time or place is an adequate alternative. *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

The government's complete failure to sustain its burden is even more glaring because its case depended on inadmissible testimony from a purported expert who spoke only to alleged common knowledge, did no material fact investigation, and offered mere conclusions founded in speculation and intuition. Accordingly, the district court's judgment should be reversed.

STATEMENT OF JURISDICTION

Ms. Porter pleaded a 42 U.S.C. § 1983 claim under the First Amendment and a supplemental state claim. 6-ER-1412–13. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1367. After the court dismissed her state claim, she elected not to amend. 6-ER-1377–78, 1405; *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1064 (9th Cir. 2004). The court granted summary judgment against Ms. Porter on her First Amendment claim, entering a final decision. 1-ER-33. This Court has jurisdiction under 28 U.S.C. § 1291. The judgment was entered February 5, 2021, and the notice of appeal was timely filed February 23, 2021. 2-ER-35; 6-ER-1414; Fed. R. App. P. 4(a)(1)(A).

ISSUES PRESENTED

1. Is a statute restricting expressive horn use properly deemed content neutral when enforcement of the statute depends solely on the content of the message conveyed?

2. Is a near-total ban on expressive horn use justified under the First Amendment without any proof that such expression causes traffic hazards or excessive noise regardless of time, place, or volume?

3. Is a near-total ban on expressive horn use sufficiently tailored to the government's interests if any alleged harms could be addressed by obvious means such as enforcement of existing laws against disturbing the peace or making excessive noise?

4. Assuming the ban is otherwise justified, do drivers have ample alternatives to expressive horn use for conveying spontaneous messages?

5. Did the district court improperly admit and rely on the testimony of a proffered expert who spoke only to matters of alleged common knowledge, disclaimed knowledge of material facts, and failed to support his opinions with anything but hypothetical speculation?

PERTINENT STATUTE

California Vehicle Code § 27001:

> (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.

STATEMENT OF THE CASE

Around July 2017, Susan Porter began participating in a weekly protest against Representative Darrell Issa ("Issa Protest"). 2-ER-64, 94. The protest ran for an hour each Tuesday until April 2018. 2-ER-64. The protesters gathered at Issa's district office at 1800 Thibodo Road, a main arterial in Vista, California. 2-ER-37. The building had no neighbors and was bordered in back by Route 78, a six-lane freeway. 2-ER-37. Across the road was a wooded slope with homes at the top. 2-ER-37. As the protests grew, Captain Charles Cinnamo of the San Diego Sheriff's Department, which is responsible for law enforcement in Vista, assigned Lieutenant Michael Munsey to be on site. 2-ER-97–98; 5-ER-1070, 1146–49.

On October 17, 2017, from 50 to 200 people gathered for the protest. 2-ER-52–53; 5-ER-1079. From a flatbed truck, protesters used a megaphone to speak, sing hymns, or chant. 2-ER-60. One protester had a drum. 2-ER-104. Drivers honked horns to support the Issa Protest, as occurs at other protests. 2-ER-58, 68, 111; 5-ER-1093. A counter-protester had a "sound system" and "huge speakers"

with which he tried to drown out or "blast the protesters. That's what was noisy. It wasn't so much the horns that were noisy."[1] 2-ER-58–59, 110.

Lieutenant Munsey asked for help enforcing traffic and parking laws. 5-ER-1047–48. Deputy Kyle Klein arrived and issued citations. 2-ER-102–03, 109; 5-ER-1049, 1065–66. Ms. Porter decided to move her vehicle away from a fire hydrant. 2-ER-52, 105. As she drove past the protest, she honked her car horn several times to support it. 2-ER-52, 57–58, 111; 5-ER-1129. The protesters answered with cheers. 2-ER-111.

Deputy Klein stopped and cited her for violating Section 27001. 2-ER-53–54, 61–62. The citation contained no allegations about noise level, disturbing the peace, distracting anyone, or endangering safety. 2-ER-151; 6-ER-1251–52. The ambient noise included "a loudspeaker, people cheering. It just seemed loud," although Klein did not have trouble hearing a conversation. 5-ER-1079–81, 1092. Klein heard "people honking their horns," but as he said, "I don't remember it actually being that frequent until I reviewed the body camera video … I wouldn't say I didn't hear it … But out there I might not have heard it if I focussed on something else." 5-ER-1079. He did not state that Ms. Porter's car horn exceeded or stood out from ambient noise levels. Klein stopped but did not cite another driver for honking to support the Issa Protest. 5-ER-1123–24.

[1] A "large inflatable chicken" was also present. 5-ER-1157.

Deputy Klein can "tell the difference based on context of what a horn is being honked for." 5-ER-983. He knows when a driver honks to greet a neighbor, celebrate a sports victory, give a warning, or tell another driver to move forward at a stoplight. 5-ER-979–85. He could "discern from the context" that Ms. Porter did not honk to signal an emergency, because he did not see facts such as "somebody in the street, a kid in the roadway, [or] a car coming at them." 5-ER-1099, 1114. Before stopping her, he understood she was using the horn to support the protest, not give a warning. 5-ER-1097.

Deputy Klein did not know the relevant code section and used a reference guide and Google search to find it. 5-ER-1087–91. Deputies can look up the section for which they intend to issue a citation. 5-ER-1084. A deputy who does not know it can "ask somebody" or "[e]verybody's got a phone, so you can use Google." 5-ER-1084–85. Like other deputies, he was issued a "city parking cite guide" to ordinances in cities where the Sheriff is responsible for law enforcement, because cities have "different municipal codes." 5-ER-1082–83.

Ms. Porter's citation was dismissed when Deputy Klein failed to appear at a hearing to contest it. 2-ER-101; 5-ER-1105–06. Ms. Porter regularly drives her vehicle where the Sheriff's Department and California Highway Patrol ("CHP") are responsible for traffic enforcement. 2-ER-37. While doing so, she observes protests or other events she would like to support with her horn, but she is

censoring herself from doing so due to fear of further enforcement of Section 27001. 2-ER-74–76, 115–16, 121–22.

Ms. Porter filed suit alleging that Section 27001 violates the First Amendment as applied to protected expression. 6-ER-1406–13. She sought prospective relief against the Commissioner of CHP and the San Diego County Sheriff in their official capacities ("Defendants").[2] 6-ER-1408, 1413.

The district court declined to dismiss her First Amendment claim. 6-ER-1380–1405. The complaint alleged Ms. Porter engaged in expressive conduct in a traditional public forum by sounding her horn in support of the Issa Protest. 6-ER-1386–89. The court ruled the case was ripe and Section 27001 is content neutral and subject to intermediate scrutiny. 6-ER-1389–96. The court held Ms. Porter stated a claim that Section 27001 violated the First Amendment as applied to her expressive conduct. 6-ER-1396–1403. The court confirmed Defendants bore the burden to justify restricting protected expression. 6-ER-1385.

Neither Section 27001 nor its statutory predecessors contained any relevant legislative findings. 6-ER-1317–55. Other than "articles" or "reports" excluded as inadmissible, 1-ER-24, Defendants relied mainly on the purported expert testimony of Sergeant William Beck, an officer and accident investigator employed by CHP

[2] Although Ms. Porter named the Commissioner, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989), this brief refers to CHP for convenience.

for 24 years.[3] 2-ER-39. Except for looking up "vehicle codes or laws and things like that," he did no research or testing. 4-ER-682–83, 687. He relied only on "what's in my head from experience and from my own knowledge." 4-ER-687. He disclaimed any expertise on "noise pollution." 4-ER-798.

He did not "perform any fact investigation with regards to [his] opinions in this case." 4-ER-731. He did not know the "specifics of the case" except that "a horn-honking citation issued" and "it had something to do with a political rally … some kind of political protest, but the details I'm not sure of." 4-ER-708. "I want to say – I think I remember – was it Darrell Issa? Is that – is that his name?" 4-ER-708. He did not know if Ms. Porter "was in support of Mr. Issa or not. I'm not sure what – what the protest actually was for. I just know there was a political protest, I want to say at his residence or something like that, but I don't know [what] it was in regards to." 4-ER-709.

He did not inspect or have anyone inspect the place where Ms. Porter was cited. 4-ER-725–26. He reviewed no body camera footage of Ms. Porter's citation. 4-ER-727. He did not know how fast Ms. Porter was driving, how many people were at the protest, or whether any other citations were issued. 4-ER-727–28. He was unaware of loud music at the scene. 4-ER-748–49. Other than his Rule

[3] Sergeant Beck testified separately as CHP's Rule 30(b)(6) witness. 3-ER-519.

30(b)(6) deposition, he reviewed no deposition transcripts, nor any news articles, photos, or videos. 4-ER-713.

Beck's opinions were not supported by any data, research, publications, reports, studies, surveys, legislative analysis, or any written or recorded facts or evidence. 4-ER-725, 740, 744–45, 754–55, 760, 771, 787, 790–91, 794–95. He discussed in hypothetical terms "the state's interest in being able to enforce Vehicle Code section 27001." 4-ER-739.

> 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.

4-ER-742. He contended that if "a vehicle horn is used improperly, it can create a dangerous situation by startling or distracting drivers or others" and "the vehicle horn's usefulness as a warning device would be diminished if law enforcement officers were unable to enforce" Section 27001. 4-ER-744, 753–54.

However, he knew of "no specific accident or collision that was caused by the use of a vehicle horn, in general," much less one caused by horn use "to express support for a political protest" or "political candidate," to "express a greeting," or to "support a charitable cause." 4-ER-743–44. He was aware of no "incident where a pedestrian was injured through the improper use of a vehicle horn." 4-ER-797.

Sergeant Beck conceded that if "it was lawful to honk at a political protest … if you're off the roadway and you're doing it … as long as you're not disturbing the peace or something like that, there's no issue," but somehow "it changes things" if a driver is on the road." 5-ER-949–50. When asked if it would "diminish the usefulness of the horn as a safety device" if the horn were sounded "in a parking lot," he concluded, "I don't know whether it would diminish it or not. I'm not sure." 5-ER-950–51.

Sergeant Beck asserted "local noise ordinances are not adequate or practical substitutes for Vehicle Code section 27001," because, although CHP officers may enforce "local ordinances," it is not "practical" to do so and a statewide standard is "better for efficiency." 4-ER-761–63. Although he acknowledged that the disturbing the peace statute, Penal Code section 415(2), "could be used in an enforcement action for improper horn use," it "is not an adequate substitute for section 27001" because "the offender [must] act maliciously" and there must be "a specific victim who is disturbed," and therefore a violation of Section 27001 is "easier to prove." 4-ER-786–89.

Ms. Porter's rebuttal expert was Dr. Peter Hancock, Professor of Psychology in the Institute for Simulation and Training at University of Central Florida and head of the Minds in Technology, Machines in Thought Laboratory, with "over forty years of experience in the field of human factors/ergonomics, applied

experimental psychology, and behavioral performance assessment." 2-ER-269.

Dr. Hancock testified that Beck's assertions "can't be supported by science." 2-ER-208. Unlike the use of "handheld devices," which is scientifically linked to "distracted driving," science supports no finding that expressive horn use distracts drivers, because "use of the horn is really relatively short in both time and infrequent in terms of spatial distribution," and any findings would be "contingent upon the frequency with which people sound their horn." 2-ER-209–14. As Dr. Hancock noted, the "context of the environment is absolutely critical, because the conspicuity of the signal" from horn use "is contingent upon the context in which it occurs," and other things "can affect the individual and attract their attention," especially "visual information" rather than horn use. 2-ER-212. Ultimately, "we don't have the data that will allow us" to conclude "whether using a horn improperly could create a dangerous situation." 2-ER-215.

The parties cross moved for summary judgment, and Ms. Porter moved to exclude Beck's expert testimony. 6-ER-1423. Deciding those motions, the court identified no material fact disputes. The court confirmed Ms. Porter has standing to challenge enforcement of Section 27001 against her intended expressive conduct, that challenge is ripe, and CHP is a proper defendant. 1-ER-13–17. The court held that Ms. Porter engaged in expressive conduct in a traditional public forum by sounding her horn in support of the protest. 1-ER-19–20.

The court ruled again that Section 27001 is content neutral and subject only to intermediate scrutiny. 1-ER-21–22. The court held Defendants sustained their burden to prove that Section 27001 is a justified restriction on expression and did not address whether the Sheriff is liable under *Monell* principles. 1-ER-22–32. The court admitted Sergeant Beck's testimony, denied Ms. Porter's summary judgment motion, and granted Defendants' motion. 1-ER-33.

STANDARD OF REVIEW

Summary judgment on undisputed facts is reviewed de novo for correct application of the law. *Providence Health Sys.-Washington v. Thompson*, 353 F.3d 661, 664 (9th Cir. 2003). The Court "review[s] de novo the district court's application of the law to the facts on free speech questions…. When a district court holds a restriction on speech constitutional, we conduct an independent, de novo examination of the facts." *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988) (cleaned up). The Court reviews admission of expert testimony for abuse of discretion. *Primiano v. Cook*, 598 F.3d 558, 563 (9th Cir. 2010).

SUMMARY OF ARGUMENT

The district court incorrectly upheld a near-total ban on expression in a traditional public forum. The decision turned on five errors.

First, Section 27001 is not content neutral. It allows drivers to give warning but not support a protest. It requires officers to determine what message a driver is

expressing before issuing a citation. As a result, the statute is content based and subject to strict scrutiny regardless of its motivation. *Reed*, 576 U.S. at 163–67.

Second, even if the statute is content neutral, the court relieved Defendants of their burden of proof. To justify a restriction on expressive conduct, Defendants must prove that any alleged harms are real, not conjectural. *Turner*, 512 U.S. at 664. Defendants produced no evidence of any traffic hazards or excessive noise caused by expressive horn use regardless of time, place, or volume. The district court erred in substituting conjecture for evidence and effectively applying rational basis review instead of First Amendment scrutiny.

Third, Defendants did not prove that obvious alternatives such as enforcement of disturbing the peace laws or local noise ordinances are insufficient to address any alleged harms. The district court improperly held Section 27001 is a justified restriction on expression simply because it is easier to enforce. *McCullen*, 573 U.S. at 495.

Fourth, even if Section 27001 were otherwise justified, Defendants failed to prove the existence of ample alternative means for drivers to engage in spontaneous expression as they pass by protests or events. The district court erred by holding that another way to engage in expression at another time and place meets this test. *Schneider*, 308 U.S. at 163.

Fifth, the court defaulted on its "gatekeeping obligation" to exclude a proffered expert who made bare assertions about common knowledge, knew little about the material facts, and engaged in speculation and conjecture. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

ARGUMENT

The "Constitution looks beyond written or spoken words as mediums of expression." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). The First Amendment protects both speech and expressive conduct. *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058–59 (9th Cir. 2010). The government bears the burden to justify restricting protected expression. *United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000).

"First Amendment protections are robust, yet at the same time fragile and precious. Often, government restrictions on speech seem perfectly reasonable at first glance, and the encroachment on expression forgivable in pursuit of convenience," but in a traditional public forum, "the values underlying the First Amendment favor communication among citizens over merely reasonable speech restrictions, and require instead that any regulation of speech be targeted at real problems, and carefully calibrated to solve those problems." *Berger v. City of Seattle*, 569 F.3d 1029, 1059 (9th Cir. 2009) (en banc).

In that light, Defendants did not justify their near-total ban on expressive horn use. This Court should reverse the judgment against Ms. Porter, direct entry of summary judgment in her favor on the merits, and remand for decision whether the Sheriff is liable under *Monell* principles. 28 U.S.C. § 2106; *Nazay v. Miller*, 949 F.2d 1323, 1328 (3d Cir. 1991).

I. DEFENDANTS' ENFORCEMENT OF SECTION 27001 AGAINST EXPRESSIVE HORN USE IS CONTENT BASED AND SUBJECT TO STRICT SCRUTINY.

A. The Statute's Enforcement Against Expressive Horn Use Depends Solely on the Content of the Message Conveyed.

Content-based restrictions on expressive conduct are presumptively unconstitutional and subject to strict scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Showtime Entm't, LLC v. Town of Mendon*, 769 F.3d 61, 71 (1st Cir. 2014). Section 27001 is content based because its enforcement against expressive horn use depends solely on the content of the message conveyed, regardless of time, place, or volume.

Drivers use horns to convey different messages. *Goedert v. City of Ferndale*, 596 F. Supp. 2d 1027, 1031–32 (E.D. Mich. 2008) (holding "a honk may convey speech, that of 'warning'" or "support for the message of the demonstrators"). Case law recognizes the ubiquity and diversity of expressive horn use:

> 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. Examples

> might include: a driver of a carpool vehicle who toots a horn to let a coworker know it is time to go, a driver who enthusiastically responds to a sign that says "honk if you support our troops," wedding guests who celebrate nuptials by sounding their horns, and a motorist who honks a horn in support of an individual picketing on a street corner.

State v. Immelt, 267 P.3d 305, 308 (Wash. 2011); 6-ER-1254–77 (examples of expressive horn use known to public).[4] Reasonable officers are aware that horn use conveys various messages such as greeting neighbors or celebrating sports victories, as Deputy Klein testified.

As enforced, Section 27001 allows expressive horn use to give a warning, but not to support a protest or convey any other message. Therefore, the statute is "content based" because "on its face" it "draws distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163.

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[4] *See also* John Eligon, Tim Arango, Shaila Dewan, and Nicholas Bogel-Burroughs, *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, N.Y. TIMES, April 20, 2021, https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html ("The verdict was hailed across the country by … honking motorists."); Marco della Cava, '*These are Tears of Joy': Americans Honk Horns, Dance in the Streets as Joe Biden and Kamala Harris Claim Victory in a Deeply Divided Nation*, USA TODAY, November 7, 2020, https://www.usatoday.com/story/news/nation/2020/11/07/joe-biden-wins-presidency-america-still-divided-celebrations/6176161002/ (noting "car horns and shouts of joy permeated the air as news spread that … former Vice President Joe Biden had won the presidency"); Marsha A. Stoltz, *Ridgewood rally draws crowd showing support for President Trump*, MSN NEWS, October 18, 2020, https://www.msn.com/en-us/news/politics/ridgewood-rally-draws-crowd-showing-support-for-president-trump/ar-BB1a8en5 (demonstrators "encouraging drivers to 'Honk for Trump'" and drivers honking in response). These publications may be judicially noticed for "what information was in the public realm." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010).

In *Reed*, the Court reviewed a sign ordinance. "Temporary Directional Signs" were defined "on the basis of whether a sign "conveys the message of directing the public to church or some other 'qualifying event.'" *Id.* at 164. "Political Signs" were defined "on the basis of whether a sign's message is 'designed to influence the outcome of an election.'" *Id.* "Ideological Signs" were defined "on the basis of whether a sign 'communicat[es] a message or ideas' that do not fit within the Code's other categories." *Id.* The Court held the ordinance was "content based" because its restrictions "depend[ed] entirely on the communicative content of the sign." *Id.*

The same is true for Section 27001. The statute allows expressive horn use to warn of danger, but not to support a protest or convey any other message. Section 27001 thus defines "regulated speech by particular subject matter" or "by its function or purpose." *Id.* at 163. As enforced, the statute's restrictions are content based because they "depend entirely on the communicative content" of expressive horn use. *Id.* at 164.

Any "innocuous justification" for such a rule "cannot transform a facially content-based law into one that is content neutral." *Id.* at 166. Accordingly, Section 27001 "is a content-based regulation," and "the government's justifications or purposes for enacting" it are irrelevant. *Id.* at 164–65.

The record confirms officers must "examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen*, 573 U.S. at 479 (cleaned up). Deputy Klein cited Ms. Porter because she used her horn to express support of the Issa Protest, not warn of an emergency. To issue a citation under Section 27001, an officer must determine if the driver is "trying to notify somebody" of an "emergency," not convey another message. 5-ER-1114–15. That is content-based enforcement.

Another court has held a similar statute is content based. In *Goedert*, protesters held a vigil, and drivers "communicated their agreement with the demonstrators by honking their horns as they passed by the Vigil." 596 F. Supp. 2d at 1029. The City incorporated a state law similar to Section 27001, which provided that "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." *Id*. An officer "stopped and ticketed a motorist who honked in support of the Vigil, Plaintiff Brian Price." *Id.*

On these facts, the court held the "Honk Statute" was a "content based restriction." *Id.* at 1032. Officers stopped drivers based on the "particularized message" they were "trying to convey," as with Price, who "was ticketed … for the message he tried to convey through use of his horn." *Id.* Under the statute, "honking a vehicle's horn is not banned completely," but "only the honking for

reasons other than traffic warning is deemed unlawful. The content of the message contained within the honk must be determined by the police before issuing citations," and "therefore the regulation, as applied to the honking motorists," was "a content-based policy." *Id.* at 1033.

Goedert anticipated *Reed* in holding that a statute is content based if it facially discriminates based on content, regardless of any benign justification. *Goedert* is on point and explains why Section 27001 is content based and subject to strict scrutiny. The district court was mistaken that *Goedert* was "primarily" about signs asking drivers to honk. 1-ER-31. While *Goedert* addressed a prohibition on such signs, it also invalidated a ban on expressive horn use itself. Although *Goedert* mentioned "selective enforcement," 1-ER-31, that discussion addressed why the statute was not narrowly tailored, not why it was content based in the first instance. *See* 596 F. Supp. 2d at 1035.

B. The District Court Ignored Controlling Precedent and Relied on Inapposite Cases that Cannot Salvage this Content-Based Restriction.

In holding "the principal inquiry is 'whether the government has adopted a regulation of speech because of disagreement with the message it conveys,'" 1-ER-21, the district court ignored *Reed*. A law that discriminates between content on its face is not "content neutral" even if the government "did not adopt its regulation of speech based on disagreement with the message conveyed" or "its justifications for

regulating [expression] were unrelated to the content" of expression. *Reed*, 576 U.S. at 165 (cleaned up).

The district court's ruling "skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. 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.* (cleaned up). Censorship is no less dangerous whether benign or malicious. "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Id.* at 167.

The district court also erred in stating, "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." 1-ER-21 (quoting *Colacurcio v. City of Kent*, 163 F.3d 545, 551 (9th Cir. 1998)). The "secondary effects" doctrine derives from a unique context not at issue. To apply it here would conflict with *Reed*.

In the context of physical "businesses that purvey sexually explicit" content, the Supreme Court has held that "ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards

applicable to 'content-neutral' time, place, and manner regulations." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986) (adult movie theater); *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (adult-oriented department store); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (erotic dancing establishment). In that limited context, a rule that is arguably content based is subject to "intermediate rather than strict scrutiny." *Alameda Books*, 535 U.S. at 448–49 (Kennedy, J., concurring in the judgment).

That "secondary effects" rule has no force "beyond the only context to which the Supreme Court has ever applied it: regulations affecting physical purveyors of adult sexually explicit content." *Free Speech Coal., Inc. v. Att'y Gen. United States*, 825 F.3d 149, 161 (3d Cir. 2016). The decision cited by the district court arose in that context. *Colacurcio*, 163 F.3d at 548 (upholding ordinance "requir[ing] nude dancers to perform at least ten feet from patrons").

The Supreme Court "has never actually *applied* the secondary effects doctrine outside the realm of brick-and-mortar purveyors of adult sexually explicit content," and it has "considered and rejected the applicability of the secondary effects doctrine to cases not involving adult physical establishments." *Free Speech Coal.*, 825 F.3d at 162–63 (citing *Playboy Entm't Grp.*, 529 U.S. at 815; *Reno v. ACLU*, 521 U.S. 844, 867 (1997); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993); *Texas v. Johnson*, 491 U.S. 397, 412 (1989); *Boos v.*

Barry, 485 U.S. 312, 320–21 (1988)). If adopted, the district court's "application of the secondary effects doctrine beyond what the Supreme Court has explicitly endorsed would bring this case into direct conflict with *Reed*'s pronouncement that we cannot look behind a facially content-based law to a benign motive in order to shield the law from the rigors of strict scrutiny." *Id.* at 163.

The district court thus erred in expanding secondary effects doctrine beyond its narrow scope. "To allow the secondary effects doctrine to transform a facially content-based law into a content-neutral one any time the Government can point to a laudable purpose behind the regulation that is unrelated to protected speech would render *Reed* a nullity." *Id.*

The district court's "expansion of the secondary effects doctrine beyond brick-and-mortar purveyors of adult sexually explicit conduct to other regulations, even those enacted for benign reasons, could lead to the erosion of First Amendment freedoms," for "political speech" or otherwise. *Id.*; *see also Boos*, 485 U.S. at 335 (Brennan, J., concurring in part and concurring in the judgment) (noting "secondary effects like 'congestion, ... visual clutter, or ... security....'" could "offer countless excuses for content-based suppression of political speech"); *Saia v. New York*, 334 U.S. 558, 562 (1948) ("Annoyance at ideas can be cloaked in annoyance at sound.").

The district court also erred in holding that Section 27001 is content neutral under *Hill v. Colorado*, 530 U.S. 703 (2000). 6-ER-1392–93. In *Hill*, a statute made it unlawful "to 'knowingly approach' within eight feet of another person," without consent, "for the purpose of … engaging in oral protest, education, or counseling with such other person," within 100 feet of a health care facility. *Id.* at 707. Rejecting a challenge by plaintiffs who sought to engage in "sidewalk counseling" about abortion, the Court held the statute was content neutral because it applied equally "to all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision." *Id.* at 708, 725.

On the facts of *Hill*, oral protest, education, or counseling may be viewed as forms of speech that were regulated as to place and manner but not content or topic. *Id.* at 719 (noting statute was "a regulation of the places where some speech may occur"). Regardless of whether the speech concerned abortion, politics, art, music, religion, or sports, the speaker could not approach within eight feet of another person, without consent, at the designated location. The statute placed no "restriction on the content of any message that anyone may wish to communicate to anyone else, either inside or outside the regulated areas." *Id.* at 708.

Unlike the statute in *Hill*, Section 27001 is content based because it restricts expressive horn use based solely on the message communicated, regardless of

time, place, or manner. It allows expression that warns of danger but prohibits that which supports a protest or conveys any other message. Therefore, it accords "preferential treatment to expression concerning one particular subject matter" while prohibiting expression "of all other issues." *Id.* at 722.

The statute does not regulate "features of speech unrelated to its content," such as time, place, or volume. *McCullen*, 573 U.S. at 477. Because it "applies to particular speech because of the topic discussed or the idea or message expressed" it is "content based" and subject to strict scrutiny. *Reed*, 576 U.S. at 171.

II. THE DISTRICT COURT ERRED IN UPHOLDING A NEAR-TOTAL BAN ON EXPRESSIVE HORN USE WITHOUT EVIDENCE THAT IT CAUSES ACTUAL HAZARD OR HARM.

Whether Section 27001 is content based or content neutral, the district court erred because Defendants did not carry their burden to justify a near-total ban on expressive horn use.

Content-based restrictions on expression are subject to strict scrutiny, under which they "may only be upheld if they are the least restrictive means available to further a compelling government interest." *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018). Given that demanding standard, "[i]t is rare that a regulation restricting speech because of its content will ever be

permissible."[5] *Id.* at 1045.

Even as to content-neutral rules, "'the government's ability to permissibly restrict expressive conduct is very limited'" in "traditional public fora." *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1022 (9th Cir. 2009) (quoting *United States v. Grace,* 461 U.S. 171, 177 (1983)). Under intermediate scrutiny, the restriction must "serve a significant governmental interest," be "narrowly tailored" to that interest, and "leave open ample alternative channels for communication." *Id.* at 1023. "The failure to satisfy any single prong of this test invalidates" a restriction on expression. *Grossman v. City of Portland*, 33 F.3d 1200, 1205 (9th Cir. 1994).

Under strict or intermediate scrutiny, the government's burden requires more than argument and conclusion. Whether through legislative findings or record evidence, the government must prove the "factual basis for a legislative judgment presented in court when that judgment is challenged" under the First Amendment. *Aptive Env't, LLC v. Town of Castle Rock*, 959 F.3d 961, 994 (10th Cir. 2020). Absent legislative findings, Defendants must depend on record evidence.

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[5] The Court should apply strict scrutiny to decide this constitutional issue now because the undisputed facts present a purely legal First Amendment question on which the district court receives no deference and Defendants had full opportunity to develop the record with notice they bore the burden of proof. *Planned Parenthood of Greater Washington & N. Idaho v. U.S. Dep't of Health & Hum. Servs.*, 946 F.3d 1100, 1110–11 (9th Cir. 2020); *Marilley v. Bonham*, 844 F.3d 841, 854 (9th Cir. 2016); *Daily Herald Co.*, 838 F.2d at 383.

Because they bear "the burdens of production and persuasion," Defendants must "shoulder the burden of building an evidentiary record that will support a finding" that their asserted "interests will be jeopardized" without a near-total ban on expressive horn use and that the ban is sufficiently tailored "to promote those interests." *Phillips v. Borough of Keyport*, 107 F.3d 164, 173 (3d Cir. 1997); *see also iMatter Utah v. Njord*, 774 F.3d 1258, 1268 n.6 (10th Cir. 2014) (holding government "bears the burden of producing evidence" to justify restricting speech); *J & B Ent., Inc. v. City of Jackson*, 152 F.3d 362, 370 (5th Cir. 1998) ("[U]nder an intermediate scrutiny standard of review, the government bears the burden of justifying (*i.e.,* both the burden of production and persuasion) the challenged statute.").

A. Defendants Did Not Prove that Any Alleged Harms of Expressive Horn Use Are Real Rather than Conjectural.

Defendants asserted two interests in support of enforcing Section 27001: "traffic safety" and "reducing noise pollution." 1-ER-22. Those interests may be attractive in the abstract, but mere abstraction is not enough.

"That the Government's asserted interests are important in the abstract does not mean" that a challenged regulation "will in fact advance those interests." *Turner*, 512 U.S. at 664. "When the Government defends a regulation on speech as a means to … prevent anticipated harms, it must do more than simply posit the

existence of the disease sought to be cured. 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." *Id.* (cleaned up); *see also Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 863 (9th Cir. 2001) ("The First Amendment demands that municipalities provide tangible evidence.").

A court "may not simply assume" that a restriction on speech "will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity." *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 496 (1986) (cleaned up). This Court has rejected "mere conjecture as adequate to carry a First Amendment burden" and refused to "hold that hypotheticals, accompanied by vague allusions to practical experience, demonstrate a sufficiently important state interest." *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 653–54 (9th Cir. 2007) (cleaned up).

Therefore, under strict or intermediate scrutiny, "merely invoking interests" is insufficient. *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 859 (9th Cir. 2004). "The government must also show that the proposed communicative activity" in fact "endangers those interests." *Id.*; *see also Aptive Env't*, 959 F.3d at 995–96 ("The fact that Castle Rock's interest in public safety is substantial in the abstract does not allow Castle Rock to justify any regulation [of speech] simply through talismanic invocation of that interest.").

1. Defendants Produced No Evidence of a Single Traffic Hazard Caused by Expressive Horn Use.

Defendants primarily relied on the unsupported, conclusory, and hypothetical assertions of Sergeant Beck, who performed no significant investigation, knew virtually no material facts about Ms. Porter's case, and disclaimed reliance on data, research, studies, surveys, or analysis.[6]

Most importantly, Beck did not know of a *single* accident caused by horn use in his 24-year career with CHP. 4-ER-743–44, 797. Nor did Defendants produce evidence of such an accident at any protest or event. Those failures alone doom Defendants' case. *Goedert*, 596 F. Supp. 2d at 1033 ("The City must come forward with evidence showing that honking a vehicle horn other than to convey a warning causes a safety hazard …. The burden is on the City of Ferndale, and the City has not come forward with any evidence correlating a single honk expressing support for a demonstration with safety problems.").

Given that expressive horn use is ubiquitous, one would expect that if it threatened safety, Defendants could produce evidence that it has caused a single accident or hazard. However, Defendants proffered "no police records, no reported injuries," and no other evidence of any hazard resulting from expressive horn use. *Kuba*, 387 F.3d at 859. Their failure of proof is consistent with judicial experience.

[6] This discussion assumes Sergeant Beck's expert testimony is admissible under Rule 702. If it is not, as argued below, Defendants' failure of proof is more glaring.

Goedert, 596 F. Supp. 2d at 1033 ("The Vigil began nearly five years ago, and thousands of expressive honks have been made in support. Not a single accident has occurred as a result of the Vigil.").

Beck offered only naked assertions that expressive horn use jeopardizes safety. That is precisely the kind of conjecture insufficient to justify restricting expression. *Pagan v. Fruchey,* 492 F.3d 766, 773 (6th Cir. 2007) (holding city did not carry burden to justify restricting speech with testimony that "amounts to nothing more than a conclusory articulation of governmental interests" and "is most accurately characterized as simple conjecture by the police chief about something that might occur").

Dr. Hancock's well-grounded testimony rebuts Beck's conclusory assertions that expressive horn use is inherently distracting in all circumstances. As Dr. Hancock confirmed, "use of the horn is really relatively short in both time and infrequent in terms of spatial distribution," and any findings would be "contingent upon the frequency with which people sound their horn." 2-ER-209, 214. Therefore, data and science do not support the contention that expressive horn use causes a traffic hazard in all circumstances.

The record thus contains no scientific, empirical, or anecdotal evidence showing that expressive horn use is hazardous or that reasonable people cannot distinguish between different uses of horns. Indeed, the Legislature itself presumed

drivers can distinguish between horn use as an "audible warning" and as a "theft alarm system," Cal. Veh. Code § 27001, undermining the assertion that they cannot do the same with respect to expressive horn use. Deputy Klein confirmed he could "tell the difference between a theft alarm and somebody honking their horn to pick their kids up from school." 5-ER-1116.

Deputy Klein also admitted that "people honking their horns" did not distract him. 5-ER-1079. His testimony shows people can filter out expressive horn use and refutes the district court's assertion that expressive horn use so "commands the attention of motorists and pedestrians" to make it inherently dangerous or distracting. 1-ER-26.

Accordingly, the enforcement of Section 27001 against expressive horn use fails strict scrutiny. *Goedert*, 596 F. Supp. 2d at 1033 (invalidating content-based restriction on expressive horn use because city "has not shown that the honk ordinance is 'necessary' to achieve" interest in safety where city produced no evidence "showing that horn-honking … causes traffic safety problems").

Even under intermediate scrutiny, the district court improperly failed to require Defendants "to present evidence that [their] significant interests would be seriously hampered" by expressive horn use. *Cuviello v. City of Vallejo*, 944 F.3d 816, 828 (9th Cir. 2019). Absent evidence of actual hazard, Defendants cannot sustain their burden with "nothing more than a series of conclusory statements."

Edenfield v. Fane, 507 U.S. 761, 771 (1993) (striking down speech restriction where government "presents no studies that suggest" speech at issue "creates the dangers" it "claims to fear" or even "anecdotal evidence" that "validates [its] suppositions"); *Aptive Env't*, 959 F.3d at 991 (striking down speech restriction where city "was unable to point to a specific instance" of harm allegedly prevented by restriction); *Edwards*, 262 F.3d at 864–65 (striking down "ban on sign supports" where "record reveals little factual support for the City's claim" it was "necessary to advance the goal of preventing violence" and "City does not cite any parade or public assembly prior to the passage of the ordinance in which … citizens used sign handles as instruments of violence").[7]

A recent decision confirms restrictions on expression cannot be justified by conclusory assertions about "traffic safety." In *McCraw v. City of Oklahoma City*, 973 F.3d 1057 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 1738 (2021), the court held that an ordinance prohibiting speech on traffic medians violated the First Amendment. Applying intermediate scrutiny, the court rejected conclusory assertions similar to those made here. *Id.* at 1070–73.

Like Defendants, the City claimed the ordinance was justified by traffic safety. *Id.* at 1063. However, "the City could not identify anyone injured on a

[7] Commercial speech cases such as *Edenfield* and *Aptive Environmental* apply a standard similar to intermediate scrutiny. *United States v. Edge Broad. Co.*, 509 U.S. 418, 430 (1993).

median in Oklahoma City or any accident caused by pedestrian activity on a median." *Id.* at 1064. Moreover, the City's expert "admitted that he did not have any research or data to support his conclusion that pedestrians remaining on medians in Oklahoma City are exposed to more risk." *Id.*

Although the City claimed the ordinance existed "to 'protect pedestrians on medians from encroaching traffic, and drivers from distractions caused by pedestrians on medians,'" the City did not meet "its burden to show that its recited harms are real" or the ordinance "will in fact alleviate these harms in a direct and material way." *Id.* at 1071. As the court held:

> Critically, this record is devoid of evidence that accidents involving vehicles and pedestrians on medians in Oklahoma City is an actual issue, as opposed to a hypothetical concern. There is neither evidence of any accident involving a pedestrian on a median, fatal or not, nor evidence that a pedestrian on a median caused an accident or distracted a driver enough to compromise the safety of the pedestrian or the driver…. If medians present the danger that the City argues they do, we are baffled as to why there is no impersonal hard evidence of harm arising from their presence.

Id. at 1072 (cleaned up).

In some circumstances, perhaps the government may rely on "studies, anecdotes, history, consensus, and common sense to support a … regulation" of speech, and perhaps it "need not wait for accidents or fatalities to address its interest through safety regulations." *Id.* at 1073. However, that "does not extinguish [the government's] burden to show that its recited harms are real," and

the "evidence in this record does not meet that burden." *Id.* (cleaned up). Absent evidence of any "close calls" or actual hazards, the "City's evidence does not stand up to this review." *Id.* (cleaned up). Accordingly, the City did not meet "its burden to demonstrate that its interest is based on a concrete, non-speculative harm." *Id.*

As in *McCraw*, Defendants contend their restriction on expression promotes traffic safety. However, like the city in *McCraw*, Defendants did not identify a single accident caused or threatened by expressive horn use, and their expert admitted he had no data—scientific, anecdotal, or otherwise—to support his conjecture. As in *McCraw*, the "record is devoid of evidence that accidents" caused by expressive horn use are "an actual issue, as opposed to a hypothetical concern," because Defendants produced no evidence that expressive horn use "caused an accident or distracted a driver enough to compromise the safety" of the driver or anyone else. *Id.* at 1072. Nor did Defendants prove any "close calls" caused by expressive horn use. *Id.* at 1073. Accordingly, there is no evidence of "an actual issue, as opposed to a hypothetical concern," and Defendants did not meet their "burden to demonstrate that [their] interest is based on a concrete, non-speculative harm." *Id.* at 1072–73.

2. Defendants Failed to Prove that Expressive Horn Use Inherently Exceeds Ambient Noise in All Circumstances.

The district court also erred in holding that a near-total ban on expressive horn use volume is justified by an interest in reducing excessive noise. It is

difficult to credit the interest in reducing noise when the statute allows horn use as a "theft alarm system." Cal. Veh. Code § 27001(b). Theft alarms may make any "audible signal" as long as they do not "emit[] the sound of a siren." Cal. Veh. Code § 28085. The statute allows loud theft alarms at any time of day or night in quiet residential areas, but it prohibits virtually all expressive horn use regardless of time, place, or volume. The exemption for theft alarms "diminish[es] the credibility of the government's rationale for restricting" expressive horn use on grounds of noise control. *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994).

In any event, context is critical in assessing the impact of noise. *Ward v. Rock Against Racism*, 491 U.S. 781, 786 (1989) (noting "the impact on listeners of a single decibel level is not constant, but varies in response to changes in air temperature, foliage, audience size, and like factors"). The district court erred by assuming that expressive horn use would always result in excessive noise regardless of time, place, or volume.

When "noise limits on expressive conduct in a public forum" are at issue, analysis of the "interest in preventing excessive noise" must "take into account the nature and purposes of the setting, along with its ambient characteristics." *United States v. Doe*, 968 F.2d 86, 91 (D.C. Cir. 1992). "'[E]xcessive' noise by definition means something above and beyond the ordinary noises associated with the appropriate and customary uses" of a given place and time. *Id.* at 89.

A restriction on expression cannot be justified by noise prevention unless it reaches only "noise that exceeds what is usual and customary in a particular setting." *Deegan v. City of Ithaca*, 444 F.3d 135, 143 (2d Cir. 2006); *see also Hassay v. Mayor*, 955 F. Supp. 2d 505, 521 (D. Md. 2013) ("[W]hether the boardwalk noise proscribed by Ocean City is 'excessive' must be evaluated by reference to 'what is usual and customary' on the boardwalk.").

Defendants offered no evidence that expressive horn use necessarily causes noise transcending usual and customary levels from ambient sources such as vehicle engines, trains, airplanes, helicopters, sirens, lawn mowers, leaf blowers, chain saws, jackhammers, power tools, car stereos or alarms, or "automatic backup audible alarm[s]" on "refuse or garbage truck[s]." Cal. Veh. Code § 27000(b).

To say a horn is "capable of emitting sound audible under normal conditions from a distance of not less than 200 feet," 1-ER-3 (quoting Cal. Veh. Code § 27000(a)), proves nothing about whether every instance of expressive horn use exceeds usual and customary noise regardless of time, place, or volume. Indeed, the statute mitigates concerns about excessive noise, because "no horn shall emit an unreasonably loud or harsh sound." Cal. Veh. Code § 27000(a).

The record confirms expressive horn use does not necessarily exceed ambient noise. Ms. Porter used her horn to support a demonstration that involved cheering, loudspeakers, and music. Her horn use was "consistent with the normal

noise level" of the protest. *Goedert*, 596 F. Supp. 2d at 1034. The district court erred in claiming that expressive horn use necessarily "creates noise levels that contribute to noise pollution" beyond ambient levels.[8] 1-ER-27. Unlike "visual blight" deriving from signs attached to poles, any excessive noise from expressive horn use is only "a possible by-product of the activity," depending on time, place, and volume, and thus it is not inherent in "the medium of expression itself." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984).

As applied to expressive horn use, the statute fails strict or intermediate scrutiny because it reaches far more than noise in excess of ambient levels. *Deegan*, 444 F.3d at 144 (holding noise restriction violated First Amendment in context of "public forum bustling with the sounds of recreation, celebration, commerce, demonstration, rallies, music, poetry, speeches, and other expressive undertakings"); *Doe*, 968 F.2d at 91 (holding government failed to prove that decibel limit was "'narrowly tailored' to promote the government's interest in maintaining an appropriate level of sound volume in a traditional public forum park during a permitted demonstration"); *Hassay*, 955 F. Supp. 2d at 524

[8] Any complaints about "noise arising from the protests," 1-ER-27, are hearsay because they derive from what Captain Cinnamo said homeowners reported. 5-ER-1165; Fed. R. Evid. 802. In any event, the complaints did not single out horn use. 5-ER-1165–66. The Issa Protest was not subjected to noise control enforcement. 5-ER-1163–64.

(invalidating restriction that "falls well short of the noise created by the boardwalk's customary usage").

The Court need not be concerned with unleashing unchecked cacophony, from horn use or otherwise. There is no constitutional right to make "excessive noises for expressive purposes." 1-ER-28. If the noise generated by expression is significantly beyond ambient levels and genuinely disturbing, appropriate enforcement of noise controls complies with the First Amendment. *Harmon v. City of Norman*, 981 F.3d 1141, 1149 (10th Cir. 2020) (upholding enforcement of city's "prohibition against 'loud and unusual sounds' that 'disturb the peace of another'" where volume of protests disrupted people inside buildings); *Costello v. City of Burlington*, 632 F.3d 41, 43–46 (2d Cir. 2011) (upholding enforcement of ordinance against "loud or unreasonable noise" that "disturbs, injures or endangers the peace or health of another" where plaintiff "was preaching at the top of his stentorian voice" and his "raised voice was heard more than 350 feet away, dominated the area, and was not subsumed in any competing ambient noise"). Therefore, properly construed, a rule against horn use that "disturb[s] the peace" would not violate the First Amendment, and one need not fear a "wave of constitutional challenges" to such a rule. 1-ER-28–30 (citing *Martinez v. City of Rio Rancho*, 197 F. Supp. 3d 1294, 1299 (D.N.M. 2016)).

Accordingly, Defendants may address genuinely excessive noise by enforcing appropriate noise controls. If drivers violate such controls, they may be cited for it, but Ms. Porter did not and was not. Even if expressive horn use might present "opportunities for isolated abuses," that fact "does not justify a total ban on that mode of protected" expression, because the government "can regulate such abuses … through far less restrictive and more precise means." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988). "Noise can be regulated by regulating decibels," but "to allow the police to bar the use of loud-speakers because their use can be abused is like barring radio receivers because they too make a noise. The police need not be given the power to deny a man the use of his radio in order to protect a neighbor against sleepless nights. The same is true here." *Saia*, 334 U.S. at 562.

B. The District Court's Ruling Improperly Substituted Conjecture for Evidence.

The district court erred in asserting that conjecture about "history, consensus, [or] 'simple common sense'" can justify a near-total ban on expressive horn use. 1-ER-25 (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995), which cited *Burson v. Freeman*, 504 U.S. 191, 211 (1992)).

In *Burson*, the Supreme Court noted that "[a] long history, a substantial consensus, and simple common sense show that some restricted zone around

polling places is necessary" to protect the "fundamental right" to "cast a ballot in an election free from the taint of intimidation and fraud." 504 U.S. at 211. *Burson* addressed different issues on a different record in the unique context of election integrity. It is not an invitation to substitute conjecture for evidence as sufficient grounds to uphold restrictions on expression.

The Court canvassed a thoroughly documented "history of election regulation" that "reveal[ed] a persistent battle against two evils: voter intimidation and election fraud." *Id.* at 206. It held "this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud." *Id.*

In that context, "because a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State to the burden of demonstrating empirically the objective effects on political stability that are produced by the voting regulation in question." *Id.* at 208 (cleaned up). However, this "modified 'burden of proof' … applies only when the First Amendment right threatens to interfere with the act of voting itself." *Id.* at 209 n.11. Otherwise, the government "must come forward with more specific findings to support regulations" of speech. *Id.*

Accordingly, the decision in *Burson* is not license to dispense with robust evidence before upholding restrictions on expression beyond polling places, and

the Supreme Court has not treated it as such. *Compare, e.g., Florida Bar*, 515 U.S. at 626 (upholding "direct-mail solicitation regulation" based on "study of lawyer advertising and solicitation" that contained "data—both statistical and anecdotal—supporting the Bar's contentions"), *with Edenfield*, 507 U.S. at 771 (1993) (striking down speech restriction unsupported even by "anecdotal evidence").

Whatever may be the minimum quantum of "studies and anecdotes" sufficient to justify restricting expression beyond polling places, *Florida Bar*, 515 U.S. at 628, the record here does not meet it. No evidence of any kind shows that expressive horn use jeopardizes safety or necessarily exceeds ambient noise. Indeed, the one court to consider similar assertions squarely rejected them. *Goedert*, 596 F. Supp. 2d at 1033–34.

The district court incorrectly relied on the mere existence of similar statutes. 1-ER-26; *Aptive Env't*, 959 F.3d at 995 ("Castle Rock only points to the fact that other municipalities have similar ordinances. But the fact that other cities have similar ordinances cannot, standing alone, give us any basis to infer that the public-safety harms that Castle Rock recites are real."). Nor is the mere endurance of the rule "since 1913" sufficient. 1-ER-26; *see Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 842 (9th Cir. 2012) (holding "longstanding" nature of agency practice was "not, without more, an adequate reason to sustain that practice").

The district court's "pronouncement" that a rule restricting expression "is consistent with common sense hardly establishes that it is so." *Pagan*, 492 F.3d at 778. To hold otherwise would effectively downgrade First Amendment scrutiny to rational basis review, under which a rule may be upheld "based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Rational basis review cannot apply when the government "infringes fundamental constitutional rights." *Id.* at 313; *see also Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 847 (9th Cir. 2017) (noting "heightened" scrutiny applies to "speech regulations—as opposed to the rational basis review that courts apply to non-speech regulations of commerce and non-expressive conduct"). The First Amendment demands evidence, not speculation, and the district court erred by holding otherwise.

III. BECAUSE DEFENDANTS RETAIN ABUNDANT MEANS TO ADDRESS THEIR ASSERTED INTERESTS, THE DISTRICT COURT ERRED IN HOLDING THAT SECTION 27001 IS SUFFICIENTLY TAILORED.

"If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. W. States Med. Ctr.,* 535 U.S. 357, 373 (2002). Even if Defendants proved that a near-total ban on expressive horn use advanced their interests, the ban is not sufficiently tailored. The district court

ignored obvious alternatives that would protect Defendants' asserted interests without banning nearly all expressive horn use.

Under strict scrutiny, Defendants must prove such a ban is "the least restrictive means available to further its compelling interest." *Askins*, 899 F.3d at 1045. The "government's mantralike incantation" of its interests "does not on its own establish that its restriction" is "the least restrictive means of serving those interests." *United States v. Marcavage*, 609 F.3d 264, 288 (3rd Cir. 2010). A near-total ban on expressive horn use is not the least restrictive means because it is both "seriously overinclusive" and "seriously underinclusive." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 805 (2011).

Section 27001 is "vastly overinclusive" because it punishes nearly all expressive horn use regardless of time, place, or volume. *Id.* at 804. It is "hopelessly underinclusive" because it allows theft alarms that can shatter a quiet night. *Reed*, 576 U.S. at 171. In addition, the enforcement of appropriate rules against excessive noise is a less restrictive alternative. *Goedert*, 596 F. Supp. 2d at 1034-35 ("Ferndale has not adopted the least restrictive means of preventing excessive noise . . . An example for how a narrowly tailored honk ordinance would look like may be found in Ferndale's own noise ordinance."). Another example of such an ordinance is found in Vista Municipal Code, Chapter 8.32, available at https://records.cityofvista.com/WebLink/DocView.aspx?id=1044354&searchid=b2

7d81b9-0f18-487f-9b22-79856e9f2a64&dbid=0. Where otherwise appropriate, such ordinances target genuinely excessive noise without stifling expression.

Assuming it is content neutral, the enforcement of Section 27001 against nearly all expressive horn use fails intermediate scrutiny, under which "the Government still bears the burden of showing that the remedy it has adopted does not burden substantially more speech than is necessary to further the government's legitimate interests." *Turner*, 512 U.S. at 665. A "narrowly tailored" time, place, or manner restriction "must target and eliminate no more than the exact source of the evil it seeks to remedy." *Berger*, 569 F.3d at 1041 (cleaned up).

Although intermediate scrutiny may not require "the least restrictive or least intrusive means … the existence of obvious, less burdensome alternatives is a relevant consideration." *Id.* (cleaned up). Under intermediate scrutiny, a law is not narrowly tailored if the government has "readily available alternatives" or "various other laws at its disposal that would allow it to achieve its stated interests while burdening little or no speech." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949–50 (9th Cir. 2011) (en banc). As the Supreme Court has explained:

> The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience… But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency.

McCullen, 573 U.S. at 486 (cleaned up).

Assuming Defendants showed some "evidence of traffic problems" caused by some instances of expressive horn use, they "offered no evidence to justify" a near-total ban "in such a sweeping manner. Because the burden rests on [Defendants] to submit evidence in support of [their] position, we cannot simply assume" that all expressive horn use results in "traffic problems" in every circumstance. *Comite de Jornaleros*, 657 F.3d at 949 (holding ordinance banning curbside speech was not narrowly tailored to locations where hazards existed).

The district court also disregarded "various other laws" that would address the alleged harms "while burdening little or no speech." *Id.* For example, California prohibits "maliciously and willfully disturb[ing] another person by loud and unreasonable noise." Cal. Penal Code § 415(2). This statute provides a ready alternative that targets genuinely excessive noise "when the communication is not intended as such but is merely a guise to disturb persons."[9] *In re Brown*, 9 Cal. 3d 612, 619 (1973).

[9] Noise controls also apply to sensitive locations. Cal. Penal Code § 415.5(a)(2) (prohibiting "loud and unreasonable noise" that "maliciously and willfully disturbs" another person on school grounds); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (upholding ordinance against "making of any noise or diversion which disturbs or tends to disturb the peace or good order" of schools).

It is immaterial that section 415(2) requires disturbance of an "identifiable victim." 1-ER-28. If no one is disturbed, Defendants' interests are not implicated. The victim may be another driver, a bystander, or the officer who observed the violation. A complaint is not required to enforce section 415(2). An officer may take enforcement action whenever a person "has committed a public offense in the officer's presence." Cal. Penal Code § 836(a)(1).

Nor are "malice and willfulness" significant obstacles. 1-ER-28. Malice means only "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act," and willfulness means "simply a purpose or willingness to commit the act." Cal. Penal Code § 7(1), (4). In case of egregious honking, the facts would likely support both malice and willfulness regardless of the driver's message, especially where "circumstantial evidence" of "state of mind" is sufficient "to support a conviction." *People v. Manibusan*, 314 P.3d 1, 36 (Cal. 2013).

In any event, any difficulty of proving mental state does not justify restricting expression. *McCullen*, 573 U.S. at 495 (rejecting assertion that alternative laws could not protect state's interest because they "require a showing of intentional or deliberate obstruction, intimidation, or harassment"). *McCullen* forecloses the district court's contention that Section 27001 is narrowly tailored merely because an "additional evidentiary burden" might make enforcement of other laws "more difficult." 1-ER-28–29.

Accordingly, the enforcement of Section 27001 against virtually all expressive horn use "covers substantially more speech than necessary to achieve its ends" and is not tailored to "circumstances where public peace and traffic safety are actually at risk." *Cuviello*, 944 F.3d at 830 (striking down blanket permit requirement for "*any* use of a sound-amplifying device at *any* volume by *any* person at *any* location," whether at "child's weekend birthday party in an already noisy park" or "by demonstrators next to a hospital at 2 a.m.").

The district court committed three further errors in holding a near-total ban on expressive horn use is narrowly tailored. First, the court held that "the fact that a law narrower in scope exists is irrelevant." 1-ER-30. Even under intermediate scrutiny, "the existence of obvious, less burdensome alternatives is a relevant consideration." *Berger*, 569 F.3d at 1041 (cleaned up).

Second, the court deferred to Sergeant Beck's assertions that Section 27001 is "better for efficiency" because violations are "easier to prove." 4-ER-763, 789. This testimony resembles that of an officer in *McCullen*, who said bright line rules "would 'make our job so much easier.'" 573 U.S. at 495. The Supreme Court responded, "Of course they would. But that is not enough to satisfy the First Amendment. 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.* A bright line is "easy to enforce, but the prime objective of the First Amendment is not efficiency." *Id.*; *see also McCraw*, 973 F.3d at 1076 (noting "ease of application is not a sufficient reason to burden First Amendment rights"); *cf. Americans for Prosperity Found. v. Bonta*, No. 19-251, 2021 WL 2690268, at *11 (U.S. July 1, 2021) (holding state's interest in "ease of administration … cannot justify the disclosure requirement" that chills First Amendment rights).

Any alleged "limitations" in other "laws do not suffice to show the need for the sweeping ban" on expressive horn use enforced by Defendants. *Cutting v. City of Portland*, 802 F.3d 79, 92 (1st Cir. 2015) (holding ordinance banning speech in medians was not narrowly tailored to serve interest in public safety because other laws were available). A near-complete "ban is obviously more efficient, but efficiency is not always a sufficient justification for the most restrictive option." *Id.*

Third, the district court accepted conclusory assertions that "alternative measures that burden substantially less speech would fail to achieve the government's interests." *McCullen*, 573 U.S. at 495. Intermediate scrutiny requires "the government to present actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary; argument unsupported by the evidence will not suffice to carry the government's burden." *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015). Under *McCullen*, "the

burden of proving narrow tailoring requires the [government] to *prove* that it actually *tried* other methods to address the problem." *Id.* at 231.

Defendants produced "no evidence showing that [they] ever tried to *use* the available alternatives to address [their] safety concerns." *Id.* at 232. Instead, they relied on "unsupported statements that hypothetically these alternatives could not possibly work." *McCraw*, 973 F.3d at 976. This "summary dismissal of alternatives is insufficient" to uphold a restriction on expression. *Id.* When First Amendment freedoms are at stake, "it is not enough for [Defendants] simply to say that other approaches have not worked." *McCullen*, 573 U.S. at 496; *cf. Americans for Prosperity Found.*, 2021 WL 2690268, at *10 (rejecting state's argument that "alternative means" were "inefficient and ineffective" where state "had not even considered alternatives to the current disclosure requirement").

The alleged "logistical nightmare" of enforcing noise ordinances is hyperbole. 1-ER-28. Defendants have no excuse for not knowing or enforcing applicable law. "We must presume that a reasonable officer knows the law he is charged with enforcing." *United States v. Hernandez*, 55 F.3d 443, 446 (9th Cir. 1995). Officers may not "remain ignorant of the language of the laws that they enforce." *People v. Teresinski*, 640 P.2d 753, 758 (Cal. 1982). Any assertion of "administrative convenience is a thoroughly inadequate basis for the deprivation of

core constitutional rights." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 785 (9th Cir. 2014) (cleaned up).

As a practical matter, officers may be instructed on noise ordinances in their assigned territory, as they are instructed on other laws and may look them up or radio for assistance when needed. Agencies may issue local noise ordinance guides, as the Sheriff does for parking rules. 5-ER-1082–83. In any event, section 415(2) provides a uniform statewide alternative to banning nearly all expressive horn use.

The district court therefore erred because Defendants made no showing that they "seriously undertook to address the problem with less intrusive tools readily available" to them. *McCullen*, 573 U.S. at 494; *see also Cutting*, 802 F.3d at 91 (holding ordinance was not narrowly tailored where "City did not try—or adequately explain why it did not try—other, less speech restrictive means of addressing the safety concerns it identified.)[10]

[10] On remand, the district court may craft an injunction that would "work in practice." 1-ER-27. Reasonable persons know when horn use is expressive in context. An injunction need not satisfy the precision required of "criminal statutes." *Portland Feminist Women's Health Ctr. v. Advocs. for Life, Inc.*, 859 F.2d 681, 687 (9th Cir. 1988). Even criminal "laws that call for the application of a qualitative standard … to real-world conduct" are not necessarily vague. *Johnson v. United States*, 576 U.S. 591, 604 (2015).

IV. DRIVERS DO NOT RETAIN AMPLE ALTERNATIVES TO EXPRESSIVE HORN USE FOR CONVEYING SPONTANEOUS MESSAGES.

Assuming Section 27001 is content neutral and otherwise justified, the district court erred in holding that a near-total ban on expressive horn use leaves open ample alternative channels for spontaneous expression by drivers about protests or events.

"A regulation that effectively prevents a speaker from reaching his intended audience fails to leave open ample alternatives. Where there is no other effective and economical way for an individual to communicate his or her message" to that audience, "alternative methods of communication are insufficient." *United Bhd. of Carpenters & Joiners of Am. Loc. 586 v. NLRB*, 540 F.3d 957, 969 (9th Cir. 2008) (cleaned up). Here, the speaker is a driver seeking to deliver a spontaneous message to persons by the roadside. If "the location of the expressive activity is part of the expressive message, alternative locations may not be adequate," and the court must "consider the opportunity for spontaneity in determining whether alternatives are ample, particularly for political speech." *Long Beach Area Peace Network*, 574 F.3d at 1025.

The district court identified no effective alternative means for drivers to reach the intended roadside audience spontaneously while driving by a particular location. An alternative such as waving or gesturing potentially creates greater risk

than beeping the horn because it requires a driver to take a hand off the wheel. Accordingly, a near-total ban on expressive horn use "fails to leave open ample alternatives" because it "forecloses an entire medium of public expression across the landscape of a particular community or setting," especially under restrictions such as those due to COVID-19. *United Bhd.*, 540 F.3d at 969.

In holding that Ms. Porter had ample alternatives because she could protest in other ways, the district court misunderstood First Amendment law. 1-ER-31–32. It is not dispositive that Ms. Porter "attended the weekly protests against Representative Issa" at other times or could express herself other ways. 1-ER-32. She sought prospective relief protecting her right to support future protests while driving by them, not damages to compensate for her citation at the Issa Protest. The issue is thus not whether Ms. Porter participated in the Issa Protest or may express herself in another way at another time or place. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider*, 308 U.S. at 163. If the opportunity to speak at another time and place were a sufficient alternative, the ample alternatives test would be meaningless because anyone can always speak another way somewhere else.

V. SERGEANT BECK'S EXPERT TESTIMONY IS INADMISSIBLE BECAUSE IT COLLAPSED INTO UNSUPPORTED SPECULATION.

The district court defaulted on its "gatekeeping obligation" by admitting Sergeant Beck's expert testimony. *Kumho Tire Co.*, 526 U.S. at 147. His testimony (1) offered no "specialized knowledge"; (2) was not "based on sufficient facts or data"; and (3) was not the "product of reliable principles and methods" that were "reliably applied" to the facts. *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.,* 752 F.3d 807, 813 (9th Cir. 2014). His testimony thus collapsed into "unsupported speculation and subjective beliefs." *Guidroz-Brault v. Missouri Pac. R.R. Co.*, 254 F.3d 825, 829 (9th Cir. 2001).

A. Beck's Opinions Reduced to Assertions of Common Knowledge or Irrelevant Speculation.

An expert must offer "specialized knowledge." Fed. R. Evid. 702(a). Although Sergeant Beck may be qualified in the abstract, "bare qualifications alone cannot establish the admissibility of ... expert testimony." *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 860 (9th Cir. 2014).

Beck offered no specialized knowledge. He merely asserted that horn use might be distracting; without a law regulating horn use, people might feel free to use horns without restriction; and different cities may have different rules that may be less convenient than a statewide standard. None of those assertions about

alleged "practical realities," 1-ER-12, are "beyond the common knowledge of the average layman." *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002).

A party may not dress up alleged common knowledge as expert testimony. *McDowell v. Brown*, 392 F.3d 1283, 1299 (11th Cir. 2004) (upholding exclusion of opinion that early treatment is better because "the notion of early treatment is well within common knowledge"); *Taylor v. Illinois Cent. R.R. Co.*, 8 F.3d 584, 585–86 (7th Cir. 1993) (affirming exclusion of expert's testimony despite "lengthy experience in the railway industry," where issue "boils down to whether a pile of large rocks is harder to stand on than a pile of smaller rocks," which "any lay juror could understand … without the assistance of expert testimony"); *Schwartz v. Fortune Magazine*, 193 F.R.D. 144, 147 (S.D.N.Y. 2000) (excluding as "unhelpful" expert "testimony that was not generated based on any specialized knowledge, but rather involved basic calculations").

This case turns on legal questions under the First Amendment. Defendants may not bootstrap argument on those questions into expert opinion. Sergeant Beck offered no "specialized understanding" that helps the court, which is "qualified to determine intelligently and to the best degree, the particular issue" in dispute. *Finley*, 301 F.3d at 1013.

In addition, Beck's testimony is irrelevant to the extent he speculates on what would happen if there were no restrictions of any kind on horn use, because

that is not Ms. Porter's position. As she acknowledges, Defendants may enforce appropriate rules against genuinely excessive noise generated by vehicle horns or otherwise. Therefore, Beck's testimony is not "relevant to the task at hand." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).

B. Beck Knew Virtually Nothing about the Facts of the Case.

Expert testimony must be "based on sufficient facts or data." Fed. R. Evid. 702(b). A court may not "admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert" when "there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Beck's testimony was not "sufficiently tied to the facts of the case." *Daubert*, 509 U.S. at 591. He performed no fact investigation and disclaimed knowledge of any material facts except that Ms. Porter was cited for beeping her horn at a protest. He did not consider any specific circumstances under which drivers use horns for expression or the manner in which they do so. He knew of no accident caused or threatened by expressive horn use. He simply assumed that any use of a horn is inherently so distracting that it jeopardizes traffic safety. "That assumption finds no support" in the "evidence in the record," and therefore "it was not sufficiently founded on facts." *Guidroz-Brault*, 254 F.3d at 830-31.

Beck did not "back up his opinion with specific facts." *Id* at 831. His "speculative testimony is inherently unreliable," and his "personal opinion testimony is inadmissible." *Ollier*, 768 F.3d at 861 (upholding exclusion of experts who made "superficial inspections" rather than "systematic assessment").

C. Beck's Experience by Itself Does Not Establish that His Opinions Are Reliable.

Expert testimony must be "the product of reliable principles and methods" that are "reliably applied … to the facts of the case." Fed. R. Evid. 702(c)–(d). The testimony must have "a reliable basis in the knowledge and experience of the relevant discipline." *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014). Expert testimony must be "properly grounded, well-reasoned, and not speculative," and the "expert must explain how the conclusion is so grounded." *United States v. Hermanek*, 289 F.3d 1076, 1094 (9th Cir. 2002). The court's "gatekeeping function requires more than simply 'taking the expert's word for it.'" Fed. R. Evid. 702 advisory committee's note to 2000 amendments.

This Court recently acknowledged "a strong argument that 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). Sergeant Beck's "knowledge and experience" offered no

"sufficient foundation of reliability for his testimony." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017–18 (9th Cir. 2004).

Sergeant Beck may have "experience working for the CHP, responding to car accidents, and training cadets," 1-ER-12, but he did not opine on an accident and knew of no accident caused or threatened by horn use. Instead, he offered conclusory intuitions about what might happen if drivers engaged in expressive horn use. Without specifying the frequency, volume, duration, or context of such expression, he simply speculated it could be dangerous or distracting.

"It is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate." *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000). Nothing in Sergeant Beck's testimony "suggests the sort of 'knowledge' on this point that the Rules require—only speculation, which is generally inadmissible." *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 671 (6th Cir. 2010). Intuition cannot be dressed up as expertise. *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 418 (7th Cir. 2005) (upholding exclusion of testimony based on "'my expertise' or some variant," where expert was essentially "relying on intuition, which won't do").

When a proposed expert such as Beck "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. Beck's testimony satisfies none of those elements. Instead, he simply asserted Defendants' conclusions. Even if Beck "had sufficient experience and knowledge to qualify as an expert" in the abstract, "the record contains no evidence as to why that experience, by itself, equals reliability for his testimony." *Valencia-Lopez*, 971 F.3d at 898.

In holding "Sergeant Beck's opinions are reliably founded on his training and experience," 1-ER-11, the district court committed the error for which this Court reversed in *Valencia-Lopez*. In both cases, the trial court conflated an officer's qualifications with reliability. The district court's "gatekeeper role" requires it to assess "whether the reasoning or methodology underlying the testimony is ... valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Valencia-Lopez*, 971 F.3d at 900. To determine that "an expert's methods are reliable," the court must "assure that the methods are adequately explained." *Id.* In doing so, the court may not rely merely on the expert's "general qualifications." *Id.* Instead, the expert's proponent must "establish the reliability of the principles and methods employed to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant*." *Id.* (cleaned up). While "qualifications and experience are

relevant," by themselves "they cannot establish the reliability and thus the admissibility of the expert testimony at issue." *Id.*

Here as in *Valencia-Lopez*, the district court wrongly allowed an officer to opine as an expert based on "general testimony" about his background, which was too "vague and generalized to establish any reliable principles or methods from which to determine the reliability" of his ultimate conclusions, leaving "too great an analytical gap between his experience and his conclusion." *Id.* at 900–01 (cleaned up); *see also Hermanek*, 289 F.3d at 1094 (holding expert testimony was improper where expert relied only on "his knowledge and prior investigation of defendants and the 'evidence seized' in the case," which "were too vague and generalized to satisfy the requirements of Rule 702," because mere "qualifications … conclusions and … assurances of reliability" are "not enough"). A court may not dismiss reliability concerns by saying they go to "weight, not admissibility," *Valencia-Lopez*, 971 F.3d at 899, as the district court did here. 1-ER-12.

In addition, Beck was unsure if expressive horn use off the road, which is not covered by Section 27001, presents safety concerns. His uncertainty calls into question whether his opinions derived from reliable application of objective principles or the imperative to support Defendants' position, given that the alleged risks to safety should be the same regardless of whether a horn is used when a vehicle is moving or parked. While Defendants were free to argue their position,

they may not bootstrap argument into expert testimony. The district court abused its discretion in admitting Sergeant Beck's testimony as expert opinion.

CONCLUSION

For the foregoing reasons, the Court is respectfully requested to reverse the judgment and remand with directions to grant summary judgment in Ms. Porter's favor on the merits and decide whether the Sheriff is liable under *Monell*.

Dated: July 6, 2021

Respectfully submitted,

/s/ David Loy
David Loy
Counsel for Appellant

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FOR THE NINTH CIRCUIT

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