

A Cautionary Note on Honking Your Own Horn

April 12, 2023

On April 7, 2023, the Ninth Circuit Court of Appeals issued its decision in [Porter v. Martinez](#), which addresses California’s law that prohibits honking a car horn except to warn of a safety hazard. Here, Susan Porter drove past a group of protesters and honked in support. She was cited under California Vehicle Code section 27011 for honking her horn in those circumstances. Porter challenged the California law as a violation of the First and Fourteenth Amendments, arguing that it is a content-based regulation and not narrowly tailored to a compelling government interest. Porter sought a broad remedy — “to block enforcement of Section 27001 against what she calls ‘expressive’ honking. In Porter’s view, expressive horn use includes honks not only to ‘support candidates or causes’ but also to ‘greet friends or neighbors, summon children or co-workers, or celebrate weddings or victories.’” On appeal of the district court’s grant of summary judgment to the state, the Ninth Circuit panel evaluated Porter’s broad challenge to the statute as it was argued and determined that it was not unconstitutional on its face or as applied to all expressive honking. This is where an interesting tactical decision was implicated. A dissenting judge was inclined to grant Porter a narrower form of relief. That is, the dissenting judge would have concluded that the statute is unconstitutional as it applies to “honking in response to a political protest.” But the panel majority refused to grant that narrower relief and explained that Porter had not asked for it and, in fact, she had “expressly disavowed” it.

The dissent argues that Section 27001 is unconstitutional as applied to *political* honking — specifically, “honking in response to a political protest.” But Porter herself has not advanced that argument, contending instead that the statute is unconstitutional as applied to *all* expressive honking, which under her definition includes honking to communicate greetings and celebratory sentiments, among other things. Indeed, when pressed at oral argument on whether she sought to enjoin the statute as applied only to political honking, she expressly disavowed any such limitation of her argument, firmly replying that she sought to enjoin enforcement against “all expressive conduct through use of a vehicle horn.” Taking Porter at her word, we decide only whether the statute is unconstitutional on its face or as applied to

all expressive honking. *See Bell v. Wilmott Storage Servs., LLC*, 12 F.4th 1065, 1071 n.8 (9th Cir. 2021) (declining to consider certain arguments where the defendant failed to make the relevant arguments in its briefing and disclaimed such arguments at oral argument); *cf. Greenlaw v. United States*, 554 U.S. 237, 243, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008) (“[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.”).

In the end, the panel majority applied intermediate scrutiny to Porter’s broad challenge, held that section 27001 is narrowly tailored to advancing California’s substantial interest in traffic safety, and affirmed the district court’s summary judgment. **Tips:**

- Think carefully about the remedy you seek and be sure to ask for it specifically. In this case, Porter apparently did consider the remedy she wanted and advertently decided only to swing for the fences. But often counsel do not fully consider the questions of appropriate relief and alternative relief. Failure to do so may lead to preservation problems.
- Be prepared for a “bargaining” panel. In this case, the panel evidently gave the appellant an opportunity to refine and narrow the relief being sought at oral argument. That is not uncommon. Advocates should be prepared to respond to questions at oral argument whether narrower or different relief might be appropriate, as Porter’s counsel appears to have been prepared to do here.

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