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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEVE KLEIN, et al.,
Plaintiffs,
v.
CITY OF SAN CLEMENTE, et al.,
Defendants.

CASE NO. CV 07-3747 AHM (JTLx)

ORDER DENYING PRELIMINARY INJUNCTION

I. INTRODUCTION

A. Procedural Background

On June 11, 2007, Plaintiffs filed a complaint in this Court against Defendant City of San Clemente ("City"), alleging that San Clemente Municipal Code Section 8.40.130 ("the Ordinance"), prohibiting the leafleting of parked vehicles, is, on its face and as applied, an unconstitutional violation of the First Amendment.

Plaintiffs are a group of individuals who, allegedly motivated by their political beliefs, distributed leaflets on the subject of illegal immigration in the City of San Clemente on June 2, 2007. (Second Declaration of Steve Klein ("Klein Decl.")). "When pedestrian traffic slowed," they securely placed leaflets under the windshield wipers of vehicles parked on City streets. (*Id.* ¶ 4.)

Plaintiffs were stopped by Orange County Sheriff's Deputies. (*Id.* ¶ 5). The deputies, who provide law enforcement to San Clemente, ordered them to stop placing leaflets on the parked cars. (*Id.* ¶¶ 6, 8.) A Deputy Sheriff told Plaintiffs that they would be cited for violating the law if they did not cease placing leaflets on the cars. (*Id.* ¶ 9.) Plaintiffs allege that they "did not wish to stop the leafleting of vehicles parked on public streets, but [they] feared arrest and prosecution if [they] did not stop." (*Id.* ¶ 11.) "Fearing arrest and prosecution, [Plaintiffs] also canceled future plans to place leaflets on vehicles parked" on San Clemente streets. (*Id.* ¶ 12.)

On June 26, 2007, Plaintiffs moved for a Temporary Restraining Order ("TRO"), prohibiting defendant City from enforcing Section 8.40.130 until the Court could hear and resolve a motion for a preliminary injunction. On July 6, 2007, the Court denied Plaintiffs' motion because they "failed to meet the requisite standard for obtaining injunctive relief."

On August 20, 2007, the Court denied the City's motion to dismiss Plaintiffs' Complaint and the City's request for a more definite statement. On October 5, 2007, the City filed an Answer to Plaintiffs' Complaint.

On October 1, 2007, Plaintiffs moved for a Preliminary Injunction, prohibiting defendant City from enforcing Section 8.40.130. For the reasons set forth below, the Court DENIES the motion.[1]

B. <u>The Ordinance</u>

The ordinance Plaintiffs seek to enjoin states, in relevant part:

> No person shall throw or deposit any commercial or noncommercial advertisement in or upon any vehicle. Provided, however, that it shall not be unlawful in any public place for a person to hand out or distribute, without charge to the receiver thereof, a noncommercial advertisement to any occupant of a vehicle who is willing to accept it.

San Clemente Municipal Code §8.40.130 (Mot. Ex. 1).

C. <u>New Factual and Legal Allegations Supporting this Motion</u>

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[1] Docket No. 29.

Plaintiffs have now clarified that they "securely placed [their] leaflets under the windshield wipers of vehicles" parked on City streets. (*Id.* ¶ 4.) Plaintiffs have also provided the Court with a copy of such leaflet. (Klein Decl. Ex. 1.) The leaflet is noncommercial and involves an issue of public interest. It expresses opposition to and criticism of "illegal aliens" and those public officials who supposedly fail to enforce immigration laws.

Plaintiffs also contend that when they handed out the leaflets to pedestrians on June 2, 2007, "several recipients expressed appreciation at receiving a leaflet and expressed a desire to receive it." (Klein Decl. ¶ 3.) Plaintiff Steve Klein ("Klein") also asserts, based on his extensive experience in distributing political issue flyers, candidate statements and voting guide leaflets, that if leaflets are securely placed "under windshield wipers of vehicles, usually no litter will occur as a result of the leafleting activity." (*Id.* ¶ 24.) He also contends, albeit without factual support or corroboration, that "very few drivers will throw a leaflet on the ground when they receive one on their vehicle" and that "most people do not mind receiving leaflets on their vehicles." (*Id.* ¶¶ 25-26.)

Klein further asserts that leafleting parked vehicles enables one to communicate his message to many more recipients than by the "exhausting and impractical" alternative of "running up to a driver" or by leafleting people hurrying by as they leave a public facility, such as a stadium. (Klein Decl., *passim*.)

Also new is evidence from two "long-time political activist[s]," Wally Clark and Sylvia Sullivan. Their declarations largely repeat Klein's contentions that "[l]eafleting vehicles is a well-established form of expressive activity," that "no litter will result from the leafleting activity," and that in the past "person-to-person leafleters" have been "angrily confronted by pedestrians who disagreed with their message and committed violence by pushing or shoving them." (Sullivan Decl. ¶¶ 7, 13, 20; Clark Decl. ¶¶ 7, 13, 20.)

In addition to supplementing their case with the foregoing "facts," which go directly to both the purpose of the Ordinance (prevention of litter) and the impact on Plaintiffs' rights of speech, Plaintiffs' motion now stresses that enforcement of the Ordinance violates their rights under Article I, §2 of the California Constitution, which provides greater protection for speech than does the United States Constitution. Plaintiffs so alleged in Count II of the Complaint, but they did not urge this in their papers seeking a TRO.

Next, Plaintiffs have abandoned their prior argument that the vehicles on which they sought (and still seek) to place leaflets are properly classified as public fora. Instead, they now argue that "Further research, however, establishes that [vehicles are] private property [on which an effort to place speech] does not involve forum analysis at all." Consistent with that fundamental revision in their argument, Plaintiffs continue that "The public forum doctrine applies to public property and has never extended beyond property owned by the government. See *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 681 (1992) . . . ." Plaintiffs also cite *Deida v. City of Milwaukee*, 176 F.Supp. 2d 859, 868 (E.D. Wisc. 2001) for the proposition that "[a] vehicle is private property, and thus is neither a public nor a non-public forum."

Because their attempts at "speech" are confined to private property, Plaintiffs argue next, what the Court must focus on is "the law's effect on willing recipients' constitutional right to receive speech."[2]

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[2] According to Professor Erwin Chemerinsky, "[t]here is not a right to use private property owned by others for speech. Because it is private property, the Constitution does not apply. Most of the cases involving a right to use private property for speech have concerned claims of a right to use privately owned shopping centers for expression." Erwin Chemerinsky, Constitutional Law: Principles and Policies § 11.4.3, 1103 (Aspen 2d ed. 2002). Professor Chemerinsky notes that under the First Amendment there is no right to use such centers for speech, citing *Hudgens v. National Labor Relations Board*, 424 U.S. 507 (1976). However, as discussed below, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) the Supreme

Then, turning to yet another "new" contention, Plaintiffs argue that the Ordinance is not narrowly tailored, because the City has three "less onerous options" to deal with any potential litter problem: (1) Punish those who receive the leaflets and then choose to litter. (2) Require "activists to place leaflets securely on a vehicle, *e.g.*, under windshield wipers." (3) Have private citizens who do not want leaflets on their vehicles place a sign to that effect on the dashboard.

Finally, and perhaps most importantly, Plaintiffs cite several cases, especially *Kuba v. 1-A Agr. Ass'n*, 387 F.3d 850, 859-60, 862 (9th Cir. 2004), for the proposition that it is defendant who shoulders the burden of establishing the constitutionality of the ordinance, which requires it to establish a realistic basis for using the ordinance to deal with an actual problem - - *i.e.*, litter. On this point, Plaintiffs are correct. The City has the burden to establish that all of the "time, place and manner" factors are satisfied. *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990).

D. Issues Requiring Additional Analysis

The new or modified issues that now require analysis are:

(1) On the basis of their California Constitution claims, are Plaintiffs entitled to a preliminary injunction?

(2) Does the clarified and narrowed manner of expression that Plaintiffs seek to engage in (i.e., to place leaflets only underneath the windshield wiper) require a different result on their First Amendment claims - - i.e., does it warrant entering an injunction?

(3) Did the City tailor the Ordinance narrowly enough to allow for its enforcement?

Court held "that states could recognize a state constitutional right of access to shopping centers." *Id.* at 1104 (holding that the California Constitution protects speech and petitioning, reasonably exercised, in privately owned shopping centers).

(4) May Plaintiffs assert the First Amendment rights of putative recipients of their leaflets, and if so, have Plaintiffs made a showing sufficient to enjoin (preliminarily) enforcement of the Ordinance?

Defendant's opposition reflects an astounding carelessness, verging on indifference, in failing to address these issues meaningfully. Notwithstanding that failure, the Court nevertheless DENIES the injunction.

II. LEGAL STANDARD FOR A PRELIMINARY INJUNCTION

As stated in *Raich v. Gonzales*, 500 F.3d 850, 857-58 (9th Cir. 2007),

> "'The standard for granting a preliminary injunction balances the plaintiff's likelihood of success against the relative hardship to the parties.' *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). We have two different criteria for determining whether preliminary injunctive relief is warranted. 'Under the traditional criteria, a plaintiff must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to [the] plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).' *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005) (internal quotations omitted). We also use an alternative test whereby a court may grant the injunction if the plaintiff demonstrates either: (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in his favor."
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> The two alternative formulations 'represent two points on a sliding scale in which the required degree of irreparable harm

increases as the probability of success decreases. They are not separate tests but rather outer reaches of a single continuum.' *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998) (internal quotation marks and citations omitted). *Id.* at 858.

III. DOES THE ORDINANCE VIOLATE THE LIBERTY OF SPEECH CLAUSE OF THE CALIFORNIA CONSTITUTION?

A. The Court Must Apply California Law First.

Initially, the Court must determine if the California Constitution provides "independent support" for Plaintiffs' claim. *Kuba v. 1-A Agr. Ass'n*, 387 F.3d 850, 856 (9th Cir. 2004) (citing *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042 (9th Cir. 1985), abrogated on other grounds by *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal.4th 352 (2000)). If the California Constitution does provide "independent support" for Plaintiffs' claim, "then there is no need for decision of the federal issue." *Carreras*, 768 F.2d at 1042 ("The doctrine that federal constitutional issues should be avoided if a case can be decided on state law grounds is a corollary of the general principle that federal courts should avoid the adjudication of federal constitutional issues when alternative grounds are available.") (citations omitted).

B. The California Constitution Provides Broader Protection of Speech than the Federal Constitution.

The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. Amend. I. This is somewhat narrower than Article I, § 2(a) of the California Constitution (the "Liberty of Speech Clause"), which provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being

responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

"The California Constitution provides protections for speakers in some respects broader than provided by the First Amendment of the Federal Constitution." *Kuba*, 387 F.3d at 856 (citing *Los Angeles Alliance for Survival*, 22 Cal.4th at 352, 367 ("This court, and the California Courts of Appeal, likewise have indicated that the California liberty of speech clause is broader and more protective than the free speech clause of the First Amendment."). For example, in *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 910 (1979), *aff'd. sub nom. PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the California Supreme Court held that "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." The California Supreme Court based its conclusion on "the public character of the shopping center" and the fact that the owner "has fully opened his property to the public." *Robins*, 23 Cal.3d at 910 (citation omitted). These factors are not present here. Moreover, in *Golden Gateway Center v. Golden Gateway Tenants Assn.*, 26 Cal.4th 1013, 1016 (2001), the California Supreme Court held that a tenants association had no right under the California Constitution to distribute a newsletter in a privately owned apartment complex. In its opinion, the Court filled a "gap" in *Robins* by holding that "California's free speech clause contains a state action limitation." *Id.* at 1023. In so doing, it cast doubt on whether *Robins* was correctly decided. *Id.* at 1022. And in a concurring opinion, Chief Justice George stated, in dicta, that "[e]ven if the apartment complex at issue had been publicly owned (and thus the state action doctrine clearly satisfied), the state constitutional right of free speech would not extend to the unsolicited distribution of pamphlets in the interior hallways of an apartment building that is not generally open to the public." *Id.* at 1036. The Court of Appeal for the 4th District quoted Chief Justice George's

language in *Costco Companies, Inc. v. Gallant*, 96 Cal.App.4th 740, 748 (2002), where it applied a "time, place and manner" analysis to uphold a retailer's restrictions on signature-gathering outside its stores.

C. <u>Although the Issue Is Not Settled, it Appears That California Courts Use Federal Forum Analysis to Determine the Nature of a Forum</u>.

The first, or threshold, inquiry in analyzing whether an ordinance violates the First Amendment or California's "Liberty of Speech Clause" is to determine whether strict scrutiny or a more relaxed standard of review is applicable. That requires deciding, among other factors, the nature of the forum where the "speech" was to be communicated.[3]

A recent and pithy iteration of the federal test is set forth in *Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir. 2007), as follows:

> Accordingly, we apply a forum analysis to determine when the government has legitimate interests in restricting the use of a forum to certain intended purposes that outweigh a speaker's interest in using the forum for a different purposes. [sic] . . . Forum analysis has traditionally divided government property into three categories: public fora, designated public fora, and nonpublic fora. Once the forum is identified, we determine whether restrictions on speech are justified by the requisite standard . . . .
>
> On one end of the fora spectrum lies the traditional public forum, "places which by long tradition ... have been devoted to assembly and debate.". . . Next on the spectrum is the so-called designated public forum, which exists "[w]hen the government intentionally dedicates its property to expressive conduct.". . . A designated public forum cannot exist in the absence of specific action on the part of the government . . . A content-based restriction on speech in a public or designated public forum is subject to strict scrutiny, requiring the state to show a compelling interest in the restriction that is drawn narrowly to meet

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[3] Among the other factors is whether the challenged ordinance is content-based (if so, it is presumptively unconstitutional and strict scrutiny is necessary, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)). The Ordinance in question here is not content-based.

> that interest . . . A content-neutral time, place, and manner restriction is permissible so long as it is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication. . . ."
>
> At the opposite end of the fora spectrum is the non-public forum. The non-public forum is "[a]ny public property that is not by tradition or designation a forum for public communication." . . . We subject speech restrictions in a non-public forum to less-exacting judicial scrutiny: "[A]s long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view," the government may preserve the forum for its intended purposes. *Perry*, 460 U.S. at 46, 103 S.Ct. 948. (Most citations deleted.)

Plaintiffs contend that the California Constitution "allows a more lenient test for determining whether a particular area is suitable for speech." They cite *Kuba* for the proposition that "[t]he standard under the California Constitution for whether a particular area is a 'public forum' is one aspect of constitutional law in which the California Constitution varies from its federal cousin." *Kuba,* 387 F.3d at 856.

Kuba states that under California's Liberty of Speech Clause, "the 'public forum' doctrine is not limited to traditional public forums such as streets, sidewalks, and parks or to sites dedicated to communicative activity. Rather, the test under California law is whether the communicative activity is basically incompatible with the normal activity of a particular place at a particular time." *Id.* at 856. However, the California Court of Appeal recently concluded that it uncovered no post-1984 "California cases adopting this 'basic incompatibility' test when analyzing the nature of a forum." *San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist.*, 154 Cal.App.4th 866, 885 n.15 (2007) (noting instead that the "basically incompatible" language "is utilized in federal cases in the context of deciding whether a given regulation constitutes a reasonable

time, place, and manner restriction"). Thus, although "[m]indful that [California's] constitutional guarantee of freedom of speech is broader than the federal provision," in *San Leandro* the California Court of Appeal analyzed the nature of the forum at issue in that case "under federal precedent." *Id.* at 887.

D. Regardless of What Test Is Used, The Forum at Issue Here Is Not A Public Forum.

This Court need not choose whether to follow the Ninth Circuit's adoption in *Kuba* of the old "basic incompatibility" test or instead to follow *San Leandro Teachers Association* and apply federal precedent. It is unnecessary to choose between the two approaches because now Plaintiffs agree with Defendant that the "forum" in question here - - parked unoccupied vehicles on public streets - - is not public to begin with.

E. The Merits of Plaintiffs' California-Based Claims

1. Burden of Proof

Although Plaintiffs have the burden of establishing the elements necessary to obtain injunctive relief, "[t]raditionally and logically . . . the party seeking to restrict protected speech has the burden of justifying that restriction." *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000). California courts agree. *See e.g., Kaufman v. ACS Systems, Inc.*, 110 Cal.App.4th 886, 906 (2003) (holding that the "party seeking to uphold a restriction on commercial speech carries the burden of justifying it."). On this motion, then it was up to the City to justify the Ordinance, not just in terms of its stated purpose, but also in terms of its application to these facts.

As recently reiterated in *Desert Outdoor Advertising, Inc. v. City of Oakland*, ___ F.3d ___, 2007 WL 3225883 at *3 (9th Cir. October 30, 2007), a court is "obligated to interpret a statute, if it is fairly possible, in a manner that renders it constitutionally valid." (citations deleted)

2. "Time, Place and Manner" Standards Govern

According to *Jobe v. City of Cattlesburg*, 409 F.3d 261, 267 (6th Cir. 2005), "Once *Taxpayers for Vincent* [*Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984)] had concluded that the ordinance at issue did not regulate a public forum, it proceeded to apply the traditional time-place-manner test to the regulation." *Cf. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) ("The 'time, place, or manner' test was developed for evaluating restrictions on expression taking place on public property which had been dedicated as a 'public forum,' although we have on at least one occasion applied it to conduct occurring on private property.") (citations omitted).

Although the windshield of a vehicle differs greatly as a forum from a shopping center and here a city enacted the restriction rather than the owner of a shopping center, the clearest articulations of California law with respect to rights of expression on private property arise in cases where shopping centers are involved. In such circumstances, California courts also apply the federal "time, place and manner" standards. *See Costco Companies, Inc. v. Gallant*, *supra*, 96 Cal.App.4th at 745 ("In recognizing the right of free expression extends in some instances to privately owned property, the [California Supreme Court in *Robins*] nonetheless expressly acknowledged private property owners, like governmental agencies, may regulate speech as to 'time, place and manner.'"); *Savage v. Trammell Crow Co.*, 223 Cal.App.3d 1562, 1572 (1990) (After reviewing a series of California decisions addressing the free speech rights of California citizens in privately owned shopping centers, the court concluded that although a citizen's "right to engage in expressive activity at shopping centers is found solely in the broader protection provided by California's Constitution, a shopping center's power to impose time, place and manner restrictions on such activity is nonetheless measured by federal constitutional standards."); *Kuba*, 387 F.3d at 857 ("California's 'formulation of the time, place, and manner test was fashioned

from a long line of United States Supreme Court cases.'") (citation omitted). Accordingly, the Court will rely on mostly federal authorities in analyzing the constitutional issues.[4]

To qualify as a reasonable time-place-and manner regulation of speech, an ordinance must (1) be content neutral and (2) serve a significant government interest and (3) be narrowly tailored to serve that government interest and (4) permit sufficient alternative channels of communication. *Taxpayers for Vincent, supra*, at 808, 815. Here, there is no dispute that the Ordinance is content neutral. So the Court will address the remaining components.

3. The Ordinance Serves a Significant Government Interest

The City argues that "the Ordinance advances two significant interests: (1) the government's interest in prohibiting litter and visual blight thereby preserving the aesthetics of the community, and (2) the individual's interest in having their [sic] private property left alone by those who do not have permission to use it." While Plaintiffs concede that litter prevention is a legitimate state interest, they argue that it is not a significant state interest. This Court disagrees. If littering is allowed to occur and does occur, the litter undermines the City's significant interests in promoting esthetic values. *See Taxpayers for Vincent*, 466 U.S. at 806 (Curbing littering and the visual blight that comes with it advances the city's "weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression."); *Metromedia Inc. v. City of San Diego*, 453 U.S. 490,

[4] In *People v. Uffindell*, 90 Cal.App.2d Supp. 881, 882-83 (1949), a California appellate court affirmed the defendant's criminal conviction for violating a penal ordinance that provided, in relevant part, that "it shall be unlawful to deposit in or on any motor vehicle parked on any street in the City of San Diego any advertising matter." With minimal analysis, the court held that the ordinance did not violate the defendant's "freedom of speech or press guaranteed by the Federal and State Constitutions." *Id.* at 883. The decision has not been cited by any other court, lacks any reference to later-established (and still applicable) First Amendment jurisprudence and is entitled to no weight whatsoever.

507-08 (1981) (four-justice plurality) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further-traffic safety and the appearance of the city-are substantial governmental goals. It is far too late to contend otherwise."). The most applicable precedent is *Jobe v. City of Catlettsburg*, *supra,* 409 F.3d at 273-74. The careful opinion in that case begins with this pithy formulation of the issue present here: "May a city, consistent with the First and Fourteenth Amendments, prohibit individuals from placing leaflets on car windshields and other parts of a vehicle without the consent of the owner?" *Id.* at 262. The court concluded that a city may do so, summarizing its reasons as follows:

> Because the law represents a content-neutral restriction on the time, place and manner of speech, because the law narrowly regulates the problems at hand (littering, visual blight and unauthorized use of private property), because the law leaves open ample alternative avenues for distributing leaflets in an inexpensive manner (face-to-face on a public street and door-to-door in a neighborhood) and because the law has much in common with a ban on placing signs on utility poles, *see Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) . . .

Jobe, 409 F.3d at 262.

Plaintiffs attempt to undermine *Jobe's* reliance on *Taxpayers for Vincent* by contending that *Taxpayers for Vincent* was based on the right of the defendant City of Los Angeles to promote and protect esthetic interests, in contrast to the San Clemente Ordinance dealing with littering. This, too, is a distinction without much of a difference. If littering is allowed to occur and does occur, the litter obviously undermines the City's interests in promoting esthetic values. As stated in *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998), cities "have a substantial interest in protecting the aesthetic appearance of their communities by avoiding visual clutter . . . ." In any event, fundamentally *Taxpayers for Vincent*

is not really dependent on the fact that the purpose of the ordinance was primarily to curb visual blight.

Plaintiffs next cite *Desert Outdoor Advertising, Inc. v. The City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996) for the proposition that the Ordinance here does not pass constitutional muster because prior to the filing of this lawsuit, San Clemente provided no reason or purpose for its enactment. *Desert Outdoor Advertising* is of little help to Plaintiffs, because a city has a recognizable and legitimate interest in preventing littering, and Section 8.40.130 reflects San Clemente's objective to do so. That Ordinance is part of Chapter 8.40 of the Municipal Code of San Clemente, which is entitled "LITTER." Recently, in *Get Outdoors II, LLC v. City of San Diego*, ___ F.3d ___, 2007 WL 3197108 at *5 (9th Cir. Nov. 1, 2007), the Ninth Circuit upheld a city's restrictions on billboards. It stated,

> The City has stated that the purpose of its sign code is "to optimize communication and quality of signs while protecting the public and the aesthetic character of the City." SDMC § 142.1201. That is all our review requires to prove a significant interest. *See Ackerley v. Krochalis*, 108 F.3d 1095, 1099-1100 (9th Cir. 1997).

The Ninth Circuit also recently stated that "[i]n the context of regulating commercial speech our case law does not require" that a city "conduct studies showing that offsite signs have an adverse effect upon the city's aesthetics or safety." *Outdoor Media Group, Inc. v. City of Beaumont*. ___ F.3d ___, 2007 WL 3197112 at *6, n.8 (9th Cir. Nov. 1, 2007).

Plaintiffs nevertheless cite Judge Collins's decision in *Khademi v. South Orange County Community College District*, 194 F.Supp. 2d 1011, 1035-36 (C.D. Cal. 2002). Apart from the fact that this Court is not bound by a decision of another colleague on this Bench, *Khademi* would not be dispositive in any event. In the applicable portion of that wide-ranging opinion, Judge Collins relied heavily on the Eighth Circuit's decision in *Krantz v. City of Fort Smith*, 160 F.3d

1214, 1221-22 (8th Cir. 1998). The court in *Jobe*, which was decided seven years after *Krantz* and five years after *Khademi,* declined to adopt the *Krantz* court's reasoning. Indeed, *Jobe* expressed flat disagreement with three facets of the *Krantz* analysis. It rejected the Eighth Circuit's decision to assume that the placing of fliers on cars is not littering. It faulted *Krantz* for not addressing *Taxpayers for Vincent*. And it criticized *Krantz* for failing to account for the fundamental difference between traditional leafleting on the one hand and the activities of both Jobe and Krantz on the other. In that regard, *Jobe* sensibly noted that the windshield of a vehicle does not occupy the same place "in the long-accepted traditions of leafleting . . . that governments may regulate only with the utmost care." *Id.* at 274.

4. The Ordinance is Narrowly Tailored

The Ordinance advances these interests in a narrow and constitutionally permissible way. In *Jobe*, the Sixth Circuit stated that "[a]s in *Taxpayers for Vincent*, where Los Angeles banned the posting of signs on public property, 'the substantive evil' at issue-visual blight there, littering on private property here- is not merely a possible by-product of the activity, but is created by the medium of expression itself." 409 F.3d at 269 (citation omitted). Thus, the Sixth Circuit concluded that the ordinance "responds precisely to the substantive problem which legitimately concerns the City [and] curtails no more speech than is necessary to accomplish its purpose." The same is true here. The Ordinance targets the precise problem- littering that results from leafleting on private vehicles- that the City seeks to correct. The Ordinance also curtails no more speech than is necessary to prevent littering because it leaves open ample alternative channels of communication in the same location at the same time. As the United States Supreme Court has "emphasized on more than one occasion, when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the

least restrictive or least intrusive means of serving the statutory goal." *Hill v. Colorado*, 530 U.S. 703, 726 (2000). "Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (citation omitted).

Plaintiffs nevertheless contend that the City could and should control littering by punishing those who receive the leaflets and then choose to litter. In *Jobe*, the Sixth Circuit addressed this argument:

> Placing unrequested leaflets on privately owned cars, moreover, amounts to a form of littering no less than placing leaflets on privately owned lawns or directly on the public streets. There is nothing special about a car-or, for that matter, about a bicycle, a baby stroller, an individual's back or a lawn-that invites others to place leaflets or advertisements on it without the owner's consent . . . [Thus], parking a car on a public street is not an invitation to place literature on the car or, worse, to become a vehicular sandwich board for another citizen's message of the day . . . Unlike traditional leafletting, the recipient of an advertisement or other pamphlet on a car windshield has no choice in receiving the literature, no choice in accepting the burden of disposing of it and no choice in peeling it off the windshield after a rain shower.

409 F.3d at 270-71.

Plaintiffs also argue that the Ordinance is not narrowly tailored because it fails to account for drivers who want to receive leaflets. They suggest that private citizens who do not wish to have leaflets placed on their vehicle may place a sign on their dashboard indicating their unwillingness to accept leaflets. In *Jobe*, the court noted that a "windshield wiper is not a communications device and has never taken on the trappings of one." 409 F.3d at 272. Because vehicle windshields are not an established forum for communication, it makes "little sense" to place the burden on vehicle owners to express their unwillingness to receive leaflets on their vehicles. *Id.*

Finally, Plaintiffs contend that the Ordinance is not narrowly tailored because the City has the "less onerous" option of requiring "activists to place

leaflets securely on a vehicle, *e.g.*, under windshield wipers." An ordinance generally prohibiting leafletting but permitting it if the papers are placed under the wiper might burden speech less than this Ordinance and could help curb litter. But that alternative would require law enforcement officers to make the additional determination of whether the leaflet was placed "securely" on a vehicle or sufficiently "under" a windshield. Moreover, such a narrowed ordinance probably would not really reduce litter because it fails to account for the likelihood that rain or wind could dislodge the leaflet from the windshield wiper and that drivers would throw leaflets onto the street after removing them from beneath the windshield wipers. In any event, such a precisely-framed regulation is not constitutionally mandated. A regulation may be narrowly tailored even without being "the least restrictive or least intrusive means of serving the statutory goal." *Hill v. Colorado*, 530 U.S. 703, 726 (2000). The "narrow tailoring" requirement is satisfied here because the substantial government interest of litter prevention "would be achieved less effectively absent the regulation." *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).[5]

5. <u>The Ordinance Leaves Open Ample Alternative Channels for the Communication of Plaintiffs' Message.</u>

Plaintiffs contend that placing leaflets on vehicles is the safest and most cost-effective means to communicate their message. Although courts are sensitive to the need to permit inexpensive methods of spreading information, "this

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[5] It is true that in *Deida v. City of Milwaukee,* 176 F.Supp. 2d 859 (E.D. Wisc. 2001), the court held that an ordinance that prohibited anyone from "plac[ing] any . . . pamphlet in or on any vehicle, whether or not the vehicle is occupied" violated the First Amendment. The ordinance in question was content-based, so the court applied a "strict scrutiny" test, and found that the city's justification for the ordinance did not meet the "compelling" standard. Because the City is not required to demonstrate that its interest in preventing litter is "compelling," the holding in *Deida* is not dispositive here.

1 solicitude has practical boundaries." *Taxpayers for Vincent*, 466 U.S. at 812 n.30.
2 "In the end, the fact that a means of communication is efficient and inexpensive
3 does not automatically trump other government interests." *Jobe*, 409 F.3d at 273.
4 "At some point, the very cheapness of a mode of communication may lead to its
5 abuse." *Id.*

6 Like the ordinance in *Taxpayers*, the Ordinance here "does not affect any
7 individual's freedom to exercise the right to speak and to distribute literature in
8 the same place where the posting of" leaflets is prohibited. *Taxpayers for Vincent*,
9 466 U.S. at 812. The Ordinance explicitly permits Plaintiffs to engage in other
10 speech on the same issue and in the same general area, by distributing leaflets
11 directly to pedestrians or to the occupants of vehicles. Plaintiffs are also free to
12 distribute leaflets to residents of private residences or to mail such information to
13 them. Thus, the Ordinance leaves open ample alternative channels for Plaintiffs to
14 communicate their message in an inexpensive and efficient manner.

15 **F. <u>First Amendment Rights of Putative Recipients</u>**

16 Plaintiffs argue that "when the government restricts speech on private
17 property, a court must analyze the law's effect on willing recipients' constitutional
18 right to receive speech . . . As such, in addition to applying the time, place, and
19 manner test, a court must also examine the impact of a law on willing recipients."

20 To support this contention, Plaintiffs merely cite cases stating the general
21 proposition that there is "a constitutional right to receive information." *See e.g.,*
22 *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (The First Amendment
23 "embraces the right to distribute literature . . . and necessarily protects the right to
24 receive it.") (citation omitted). As the Supreme Court stated a half-century later,
25 "[f]or over 50 years, the [Supreme] Court has invalidated restrictions on
26 door-to-door canvassing and pamphleteering." *Watchtower Bible and Tract*
27 *Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 161-62 (2002)
28 (noting "the historical importance of door-to-door canvassing and pamphleteering

as vehicles for the dissemination of ideas"). However, other than cases in which courts ruled unconstitutional laws prohibiting such leafleting or solicitation, Plaintiffs cite no cases where a court struck down an otherwise constitutional restriction on speech because it violated the First Amendment rights of putative recipients to receive the information. On this record, the Court declines to do so.[6]

G. Irreparable Injury

In its July 6, 2007 Order, the Court held that Plaintiffs did not establish irreparable injury, "given that their rights of expression have hardly been curtailed, much less fully curtailed." Order at 5. Plaintiffs contend that "[a] lower threshold for granting a preliminary injunction applies to free speech cases." Plaintiffs cite *Elrod v. Burns*, 427 U.S. 347, 373 (1976) for the proposition that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."

Elrod is not applicable. First, as this Court now has found, Plaintiffs have not established a California Constitution or First Amendment right to leaflet unoccupied parked vehicles– or, at the very least (and more precisely)– they have not established a likelihood of doing so. Second, the plaintiffs in *Elrod* had not even engaged in speech, as such; it was the right of association that the employees asserted. Which leads to the third distinction: the *Elrod* plaintiffs challenged patronage dismissals, as to which the Supreme Court found no justification sufficient to override that right of association. Less drastic means were available to achieve the stated objective. Here, the Ordinance has a justification, it is

[6] Plaintiffs also rely on *Clement v. Cal. Dept. of Corrections*, 364 F.3d 1148, 1151 (9th Cir. 2004), in which the Ninth Circuit held that a regulation prohibiting prison inmates from receiving mail containing material downloaded from the Internet violated the inmates' First Amendment rights. In *Clement*, contrary to what Plaintiffs contend, the Ninth Circuit did not apply a test that analyzed a law's effect on willing recipients' constitutional right to receive speech; the Ninth Circuit instead applied the Supreme Court's "four factor test to determine whether a prison policy serves legitimate penological objectives." *Id.* at 1151-52.

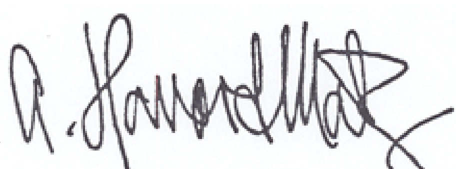
narrowly-phrased and applied, and Plaintiffs have an alternative means of expression available to them, unlike the *Elrod* employees whose very livelihoods were threatened.

IV. CONCLUSION

The foregoing analysis applied both California and federal standards in concluding that the Ordinance violates neither the Liberty of Speech Clause nor, *a fortiori*, the First Amendment. Hence, the Court DENIES Plaintiffs' motion for a preliminary injunction.

IT IS SO ORDERED.

DATED: November 27, 2007



A. HOWARD MATZ
United States District Judge