No. 09-777

In The Supreme Court of the United States

CITY OF SAN CLEMENTE,

Petitioner,

v.

STEVE KLEIN; SUSEN FAY; M. LORRAINE KLEIN; MICHAEL LEWIS; SAUL LISAUSKAS; KRISTIN SCHUITEMAN; JEFFERSON SMITH; MARY THOMPSON; ELIZABETH WELLER; and ROBERT WELLER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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REASONS WHY THE COURT SHOULD DENY THIS PETITION

I. Any decision rendered by this Court regarding the federal question would merely be an advisory opinion, because the lower court also based its decision on independent state grounds not subject to this Court's jurisdiction

In addition to *First Amendment* violations, Klein also alleged violations of Article I, section 2(a) of the California Constitution. *Klein v. City of San Clemente*, 584 F.3d 1196, 1200 n.1 (9th Cir. 2009). The clause 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." CAL. CONST. art. 1, § 2(a). This clause is a protective provision more definitive and inclusive than the First Amendment. *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 908 (1979). *See also Kuba v. 1-A Agricultural Ass'n*, 387 F.3d 850, 856-57 (9th Cir. 2004).

In this case, the court expressly analyzed the California Constitution. *Klein*, 584 F.3d at 1205-07. While the court devoted three pages of its substantive analysis to the *First Amendment*, it also devoted two pages to the state law issue. *Id.*

This Court does not review decisions that rest on independent state grounds. *See Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983); *Herb v. Pitcairn*, 324 U.S.

117, 125-26 (1945). In this case, any decision rendered by the Court regarding a federal question would merely be an advisory opinion, because the vehicle leafleting ban would remain invalid under state law. *Cf. Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, 136 (1946) (refusing to decide constitutional validity of a federal statute because of the presence of a dispositive non-constitutional issue).

II. Because the City seeks review of an interlocutory order, granting certiorari is unwarranted because no compelling need exists for resolution before trial

This case involves the interlocutory appeal of the district court's denial of a motion for a preliminary injunction. *Klein v. City of San Clemente*, 584 F.3d 1196, 1199 (9th Cir. 2009). The City seeks review of this interlocutory order, despite the fact that the parties have nearly completed discovery (with an impending discovery cut-off date of March 22, 2010) and despite the fact that a district court will hear the parties' cross-motions for summary judgment by May 3, 2010. (District Court Docket, Doc. 74, Scheduling and Case Management Order, Exhibit A) Under these circumstances, granting review of an interlocutory order makes no sense.

This Court has held that "except in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Thus, the lack of

finality in the judgment below may "of itself alone furnish[ ] sufficient ground for the denial of the application." *Id.*

Ordinarily, "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent *extraordinary* inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893) (emphasis added).

In this case, granting review would do the opposite – and halt a trial process that is scheduled for quick completion. Substantial progress toward a final decision greatly lessens the odds that a Supreme Court ruling will save the parties, and the courts, from wasted effort. Indeed, this Court has warned that review of a non-final order may induce inconvenience, litigation costs, and delay in determining ultimate justice. *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152-53 (1964). That is exactly the case here.

In fact, the court indicated that the City might be able to enact a valid ban on vehicle leafleting *provided* it could produce *evidence*, at trial, demonstrating that such activity really creates a litter problem in the City. *Klein v. City of San Clemente*, 584 F.3d 1196, 1203 (9th Cir. 2009). Hence, it is still possible that the City could prevail after further fact-finding, without this Court's intervention. This Court seldom grants review in cases that would benefit from

further factual development of the issues. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998).

III. The allegedly conflicting decisions are distinguishable on their facts

While the City claims that a circuit court conflict exists regarding this issue, the single case cited by it is easily distinguished. In that case, the court addressed a situation where a city ordinance prohibited persons from using vehicles as billboards by placing leaflets, signs, or posters on them, thereby creating visual blight. *Jobe v. City of Catlettsburg*, 409 F.3d 261, 263, 268, 270 (6th Cir. 2005).

In this case, however, the law involves *only* leaflets – and the court expressly held that visual blight from using vehicles as billboards was not at issue. *Klein*, 584 F.3d at 1201. Thus, the allegedly conflicting cases are easily reconcilable. Stated another way, *Jobe* is distinguishable from the three other vehicle leafleting cases, because it is more aptly classified as a billboard case, rather than a traditional leafleting case. *See id.* at 1201-02 (criticizing City's citation of billboard cases). In short, there is no conflict between the circuit courts. It is highly unlikely that another court will reach a different result in a vehicle leafleting case on the same set of facts.

The City argues that *Jobe* conflicts with other circuit court decisions regarding whether a city may use common sense as a substitute for evidence to

justify a speech restriction. (Petition, pages 6-9) In subsequent cases, however, the Sixth Circuit *itself* has backed away from this novel idea. The Sixth Circuit has clarified that *Jobe* was based *not* on common sense or mere speculation, but on the existence of some evidence. *Pagan v. Fruchey*, 492 F.3d 766, 777 n.9 (6th Cir. 2007) (citing the evidence relied upon by the court in *Jobe*).

In *Pagan*, the Sixth Circuit struck down a speech restriction because the City produced no evidence justifying the need for a ban on "for sale" signs on vehicles. *Id.* at 777-78. The court held that "principles of common sense or obviousness" are insufficient to uphold a speech restriction. *Id.* at 778. The Sixth Circuit followed this reasoning in subsequent cases. *E.g., Bellsouth Telecommunications, Inc. v. Farris*, 542 F.3d 499, 509 (6th Cir. 2008). Thus, to the degree that *Jobe* may be read to not require *any* evidence (contrary to the holdings of other circuit courts), subsequent Sixth Circuit decisions have thoroughly discredited this interpretation of the case.

IV. The constitutional issue is not fully developed enough for review

Even if a conflict did exist, this newly emerging legal issue is in a state of flux and would therefore benefit from further development through the lower courts. This is especially true in the context of constitutional adjudication, because this Court's rulings cannot be overturned by statutory amendment. An

ill-conceived constitutional ruling by a lower court may be tolerable, but a premature Supreme Court ruling that fails to appreciate, or properly weigh, all the relevant aspects of a constitutional issue could have a severe – and lasting – adverse impact on the nation.

The more important an issue, the more this Court will benefit from further consideration of the issue by the lower courts. By allowing an issue to fully develop, the Court can avail itself of the wisdom of many other jurists before reviewing an important constitutional matter. *See, e.g., McCray v. New York*, 461 U.S. 961, 963 (1983) (denying certiorari where legal issue required "further study" in the lower courts). Moreover, allowing further litigation often enables the circuit courts to build a consensus that resolves an issue without this Court's intervention.

Indeed, in two-of-three previous vehicle leafleting cases, parties petitioned for writ of certiorari (after summary judgment and an appeal), but this Court denied certiorari in both cases. *Jobe v. City of Catlettsburg*, 546 U.S. 876 (2005); *City of Fort Smith v. Krantz*, 527 U.S. 1037 (1999); *Cities of Alma, Dyer, and Van Buren v. Krantz*, 527 U.S. 1037 (1999). This is a strong indication that this issue is not yet ripe for review in this Court.

V. Only questions of evidence and factual findings are involved in this case

In this case, the City merely quibbles over factual determinations made by the court below. It attacks the lower court's finding that the City presented no evidence that vehicle leafleting caused a litter problem. (Petition, pages 6-9)

The court found that "the record in this case is plainly inadequate to support the government's asserted interest in restricting Klein's speech." *Klein v. City of San Clemente*, 584 F.3d 1196, 1202-03 (9th Cir. 2009). "In sum, the City has not provided any evidence that placing leaflets on parked cars results in any litter, much less a more-than-minimal amount of additional litter." *Klein*, 584 F.3d at 1204.

As noted earlier, the court indicated that the City might be able to enact a valid ban on vehicle leafleting *provided* it could produce *evidence*, at trial, demonstrating that such activity really creates a litter problem in the City. *Klein*, 584 F.3d at 1203. This Court does not grant review of "fact bound" cases. "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . ." Supreme Court Rule 10.

VI. The court below fully considered, and correctly decided, the issues

Ignoring well-established precedent of this Court, the City seeks to eliminate the rule that, before enacting a law that restricts speech, it must produce

evidence establishing that the targeted problem really exists. (Petition, pages 6-9) The City fails to realize that curbing speech without producing any evidence that a problem exists is anathema to our constitutional Republic.

When a law restricts speech, the government's burden to produce evidence is not satisfied by mere speculation or conjecture; it must offer evidence establishing that the problem it identifies is real and that the speech restriction will alleviate that problem to a material degree. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). For example, in a case where campaign-contribution-limits restricted speech, this Court held that "Congress must show *concrete evidence* that a particular type of financial transaction is corrupting or gives rise to the appearance of corruption. . . ." *McConnell v. FEC*, 540 U.S. 93, 185-86 n.72 (2003) (emphasis added).

In this case, the Ninth Circuit also relied on the reasoning of two other vehicle leafleting cases from the Seventh and Eighth Circuits. *Klein v. City of San Clemente*, 584 F.3d 1196, 1203-04 (9th Cir. 2009). A Seventh Circuit decision held that a City cannot rely on mere speculation when restricting speech: "common sense . . . can all-too-easily be used to mask unsupported conjecture, which is, of course, *verboten* in the *First Amendment* context." *Horina v. Granite City*, 538 F.3d 624, 633 (7th Cir. 2008) (emphasis in original). An Eighth Circuit decision held that the City failed to establish "a factual basis for concluding that a cause-and-effect relationship actually exists

between the placement of handbills on parked cars and litter that impacts the health, safety, or aesthetic well-being of the defendant cities." *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1221-22 (8th Cir. 1998). As a result, the court below fully considered, and correctly decided, this issue.

VII. There are several alternative bases for affirming the decision

There are other alternative bases for affirming the decision, including issues raised by Klein but not addressed by the Ninth Circuit. Klein raises those issues here to preserve them on appeal. Klein argued that speech on private property (i.e., vehicles) deserves *more* constitutional protection than the level provided on public streets and sidewalks. (General Docket, Doc. 9, Opening Brief, pages 9-10)

Klein argued that the law violates the constitutional right-to-receive-speech, especially when it occurs on one's own private property. (General Docket, Doc. 9, Opening Brief, pages 11-18) The right-to-receive-speech is well-established. *E.g., Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (holding that the First Amendment "embraces the right to distribute literature (citation omitted) and necessarily protects the right to receive it."). "This right to receive information and ideas, regardless of their social worth (citation omitted), is fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). While the City failed to discuss this issue in its

petition, it was central to the court's decision. *Klein v. City of San Clemente*, 584 F.3d 1196, 1204 (9th Cir. 2009).

Klein also argued that while litter prevention is a reasonable state interest, this Court has never held that litter prevention, *by itself*, is a significant state interest. (General Docket, Doc. 9, Opening Brief, pages 19-23) *E.g., Martin*, 319 U. S. at 143 ("The privilege [to distribute literature] may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets."); *Schneider v. New Jersey*, 308 U.S. 147, 162-63 (1939) (same). While the court noted that litter prevention is probably not a "sufficiently significant interest" to preclude vehicle leafleting, it sidestepped this dispositive issue because it concluded that "the record is insufficient to establish such an interest here." *Klein*, 584 F.3d at 1202 n.5.

Klein also argued that the law is not narrowly tailored because the City has numerous and obvious, less restrictive, alternatives available: (1) it could simply punish persons who receive leaflets and then choose to litter, (2) it could require activists to place leaflets securely on vehicles (e.g., under windshield wipers) so that vehicle leafleting could not create litter, or (3) it could allow drivers who do not want leaflets on their vehicle to place a sign on their dashboard. (General Docket, Doc. 9, Opening Brief, pages 23-27) Each option is far less restrictive on speech than a total ban on vehicle leafleting, thereby demonstrating that the law is not narrowly tailored.

Klein also argued that the law is facially overbroad, because it includes vehicle leafleting activities that do not cause litter. (General Docket, Doc. 9, Opening Brief, pages 34-35) First, it bans leafleting on vehicles owned by willing recipients (who will not litter). Second, it bans leafleting even when leaflets are securely placed on vehicles (e.g., under windshield wipers), where they cannot blow away and cause litter. This is another independently dispositive reason for affirming the decision.

CONCLUSION

For the reasons set forth above, the Court should deny the City's petition for writ of certiorari.

Respectfully submitted,

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