No. 09-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a City's interest in preventing litter and blight sufficient to justify a content-neutral "time, place and manner" restriction prohibiting throwing or depositing litter in or upon vehicles unless an occupant consents to receive it where ample alternative methods of communication admittedly remain open?

PARTIES

Plaintiff-appellants were Steve Klein, Susen Fay, M. Lorraine Klein, Michael Lewis, Saul Lisauskas, Kristin Schuiteman, Jefferson Smith, Mary Thompson, Elizabeth Weller and Robert Weller. Defendant-respondent-petitioner was the City of San Clemente.

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CITATIONS OF OPINIONS AND ORDERS

Klein v. City of San Clemente, Case No. CV-07-03747-AHM (C.D.Ca 2007)

Klein v. City of San Clemente, Case No. 08-55015, 584 F.3d 1196 (9th Cir. 2009).

JURISDICTION

The Court of Appeals for the Ninth Circuit issued its decision on October 2, 2009. No motion for rehearing was filed. The Court has jurisdiction under 28 U.S.C. § 1254(1) in that petitioner seeks review of this civil case from the Ninth Circuit Court of Appeals after its decision.

CONSTITUTIONAL PROVISIONS AND ORDINANCES

> "Congress shall make no law . . . abridging the freedom of speech."

U.S. Const. amend. I.

> "No person shall throw or deposit any commercial or non-commercial 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 non-commercial advertisement to any occupant of a vehicle who is willing to accept it."

San Clemente Municipal Code § 8.40.130.

San Clemente Municipal Code Chapter 8.40 Litter (set forth in its entirety in appendix).

STATEMENT OF THE CASE

The City of San Clemente passed a comprehensive Anti-Litter Ordinance. The Ordinance addressed matters such as trash in the streets, litter thrown from vehicles, litter dropped from aircraft, litter in parks, *etc.* One subsection of the ordinance prohibited persons from placing commercial or non-commercial advertisements in or upon vehicles. That subsection included an exception that allowed a person to hand matter to any occupant of a vehicle willing to accept it.

In June or 2007, Steve Klein and other plaintiffs (collectively, "Klein") distributed leaflets in the City. Klein initially handed leaflets to pedestrians but then began placing leaflets under the wipers of unoccupied vehicles parked on City streets. When instructed to cease by law enforcement officials, Klein stopped.

Klein sued, claiming that the Anti-Litter Ordinance violated his rights under the First Amendment. Klein sought a preliminary injunction, which the district court denied, finding that the City would likely prevail in showing that the ordinance was narrowly tailored to serve the City's significant interest in litter prevention and promoting aesthetic values. On appeal, the Ninth Circuit reversed, holding that on the record before it, the City's interests were not "sufficiently weighty" to justify the restrictions. Jurisdiction arose under 28 U.S.C. § 1331, with appellate jurisdiction below arising under 28 U.S.C. § 1292(a)(1).

The parties and both courts below agreed that the Ordinance was a content-neutral time, place and manner

restriction. Thus the issues were whether the restriction was "narrowly tailored to serve a significant government interest," and whether the restriction left open "ample alternative avenues for communication of the information" under *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

At the district court, counsel for Klein conceded "there are lots of alternatives available to get the message out that are linked to people's usage of cars." Those methods included offering leaflets to drivers of vehicles at the exits or entrances of parking lots. Leafleters could approach cars at stoplights (from driver's or passenger's side), and of course, person-to-person leafleting was an option as well.

Therefore, the only real issue was whether or not the Anti-litter Ordinance met the "narrowly tailored" aspect of the test. The Ninth Circuit, contrary to a prior holding from the Sixth Circuit on similar facts, found that it did not and reversed the district court's denial of a preliminary injunction.

REASONS FOR GRANTING THE PETITION

This case presents a constitutional question of "the most serious magnitude" in that it addresses the balancing required between free-speech rights under the first amendment and the interest a governmental entity may have in regulating certain types of conduct. *See, e.g., Watchtower Bible & Tract Society v. Village, Stratton*, 536 U.S. 150, 161 (2002). This Court must determine that balance, particularly in cases involving the rights of unwilling listeners. *See Hill v. Colorado,*

530 U.S. 703, 714-15 (2000). The activity in question is not that of traditional leafleting whereby a "speaker" distributes material to a passer-by who is willing to receive it, and the restriction against placing litter on unoccupied vehicles has not been addressed by this Court even though many governmental entities have similar prohibitions. *See Jobe v. City of Catlettsburg,* 409 F.3d 261, 274-79 (6th Cir. 2005) (appendix listing state, territorial and municipal prohibitions on placing litter on vehicles).

The Anti-Litter Ordinance is a traditional "time, place and manner" restriction on speech. Cities may impose reasonable time, place and manner restrictions on leafleting. *See Frisby v. Shultz,* 487 U.S. 474, 488 (1988) (upholding ban on leafleting in front of targeted residence); *Heffron v. Int'l Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 654-55 (1981) (upholding regulation restricting leafleting at state fair to assigned booths); *Hill v Colorado,* 530 U.S. 703, 723 (2000) (upholding regulation prohibiting leafleters within certain distance of health-care facility from approaching too closely a person without first receiving that person's consent).

A reasonable time, place and manner restriction must be (1) content neutral; (2) serve a significant government interest; (3) be narrowly tailored to serve that interest; and (4) permit sufficient alternative channels of communication. *See Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 808 (1984). All parties agreed that the Anti-Litter Ordinance was content-neutral, thus meeting the first prong.

The City advanced two significant interests: its governmental interest in prohibiting litter and visual blight and thus preserving the aesthetics of the community, and individuals' interests in having their private property left alone by those who do not have permission to use it.[1] Curbing litter and visual blight, thereby preserving the aesthetics of the community, are substantial governmental goals. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (four-justice plurality). In *Metromedia*, the plurality found that the appearance of the city and preserving scenic beauty were both "substantial" governmental goals. *Id.* at 552 and 570. *See also Horina v. City of Granite City*, 538 F.3d 624, 633 (7th Cir. 2008) ("we have no quarrel with [city's] claim that prevention of litter, intrusion, trespass and harassment is a substantial government interest").

The City's interest in curbing litter is evidenced by the very title of the ordinance. The City defined "litter" to mean garbage, refuse, rubbish . . . and all other waste materials which, if thrown or deposited as herein proscribed, tends to create a danger to public health, safety and welfare." Other sections of the Anti-Litter Ordinance deal with such matters as placing trash into public streets, throwing litter into public places, throwing litter from vehicles, *etc.* The Ninth Circuit, however, declined to accept the nexus between leaflets placed on vehicles and litter on the streets. *See Klein*, 584 F.3d at 1202

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[1] The Ninth Circuit determined this second ground under the California Constitution, so that issue is not presented for review.

The Sixth Circuit addressed a factually similar situation but reached the opposite result in *Jobe v. City of Catlettsburg,* 409 F.3d 261, 262 (2005). The *Jobe* Court noted that at least one state and many cities have ordinances prohibiting exactly the same conduct – depositing leaflets onto or into unoccupied vehicles without consent – as is at issue here. The *Jobe* Court specifically recognized that it would be a "daunting task" for a defendant to show the original purpose for an anti-litter ordinance, or to demonstrate the "empirical necessity for a law" on the facts before it. *See id.* at 269. Instead, the Sixth Circuit saw no reason to question the defendant's theory that a ban on placing leaflets on automobiles would further the City's interest in preventing littering.

The *Jobe* Court found that the ordinance advanced the governmental interest in preventing litter in a "narrow and constitutionally permissible way." *Id.* at 269. The court noted that the "substantive evil" of litter was "created by the medium of expression itself" so that the ordinance curtailed no more speech than necessary to accomplish its purpose." *Id.* at 269, quoting *Taxpayers for Vincent,* 466 U.S. at 810. Where the city had targeted the "precise problems" of littering and use of private property, the ordinance was constitutional. *Id.*

Two other circuits have addressed somewhat similar fact patterns: *Horina v City of Granite City,* 538 F.3d 624 (7th Cir. 2008), and *Krantz v City of Fort Smith,* 160 F.3d 1214 (8th Cir. 1998). In *Krantz*, the plaintiffs challenged city ordinances making it a misdemeanor to place handbills or advertisements on another person's

vehicle parked on public property unless an occupant were willing to accept it. The Eighth Circuit addressed the ordinances as time, place and manner restrictions but held as a matter of law that they were not narrowly tailored to serve a significant governmental interest where individuals not wanting to receive handbills "can quite easily and effectively provide notice . . . by placing a sign on the dashboard." *Id.* at 1220. The *Krantz* Court further found that the defendants had not established a factual basis to show a causal relationship between placement of leaflets on parked cars and litter. *See id.* at 1222. This holding directly contradicts with the Sixth Circuit's holding in *Jobe*:

> In view of the common-sense explanations for these type of laws, they do not invariably require proof that the problem has occurred in the past . . . or an elaborate study of their present-day necessity . . . . [I]t hardly amounts to speculation to conclude that the First Amendment costs of this law are quite modest (given the inexpensive alternatives available for distributing literature or advertisements) and the police-power benefits of the law are quite legitimate (given the private-property and aesthetic interests advanced by the law.

Jobe, 409 F.3d at 269.

The Seventh Circuit's decision in *Horina* involved slightly different facts that directly undercut the reasoning in *Krantz* that vehicle owners can protect themselves from unsolicited litter by advising leafleters not to place materials in or on their vehicles.

See Horina, 538 F.3d at 627. In that case, the plaintiff was leafleting cars parked on city streets adjacent to a medical clinic. One of the security guards directly instructed the plaintiff not to place tracts on his car to no avail. After watching Horina deposit yet another tract through an open window of his car, the guard contacted the local police department, which arrested the plaintiff. *See id.* at 627-28. Granite City enacted a revised regulation restricting leafleting that prohibited depositing or throwing handbills onto or into any vehicle. During the ensuing litigation over the revised regulation, the city did not offer any empirical studies, testimony, police records or reported injuries to support its claimed interests. The Seventh Circuit, however refused to accept Granite City's "assertion that it can rely on mere common sense to show that [the ordinance] is needed to combat those ills," including specifically preventing litter. *See id.* at 633.

This holding directly contradicts the *Jobe* Court's conclusion that the "common-sense explanations" for anti-littering ordinances meant that they "do not invariably require proof" of past or present problems. *Jobe*, 409 F.3d at 269. In fact, the dissent in *Horina* acknowledged that *Jobe* was directly on point and "found common sense enough" in its holding. *Horina*, 538 F.3d at 640 (Manion, J., dissenting). Noting that "common sense must not be and should not be suspended" in evaluating constitutionality, the dissent stated:

> Common sense dictates that the Ordinance serves the interests noted. It would be the rare driver indeed who has not experienced the intrusion of a flyer placed under a car

> windshield and the annoyance of removing the flyer, especially in inclement weather or when the driver doesn't notice it tucked under the passenger side windshield wiper until after fastening his seatbelt and starting his car. While the more thoughtful drivers dispose of such flyers properly, common sense tells us that at least some of the unwanted flyers become litter, even without evidence.

Horina, 538 F.3d at 640. Since the ordinance "regulate[d] precisely the conduct that causes the litter . . . namely the placing of flyers on automobiles," the dissent would have upheld the ordinance as narrowly tailored and constitutionally permissible. *See id.*

Of course, a time, place and manner restriction must leave open ample alternative methods of communication. The Ninth Circuit held that the existence of "numerous and obvious less-burdensome alternatives" was relevant to assessing whether a restriction reasonably fits the interest asserted. *See Klein,* 584 F.3d at 1201. However, the court did not address the admission by Klein that there were "lots of alternatives available" to get his message out, even "linked to people's usage of cars." The court below also did not address the options of handing out leaflets to vehicle occupants at stop lights or entrances/exits to parking lots, or simply resorting to traditional leafleting by handing material to passers-by on the street, which Klein had engaged in that same day.

Of course, the Court upheld a restriction that "unquestionably lessened" the ability to distribute leaflets in *Hill v. Colorado,* 530 U.S. 703, 715 (2000).

The restriction at issue there prohibited demonstrators from approaching too closely persons within a certain radius of the entrance to a health clinic. While acknowledging that the regulation made it more difficult to give leaflets to persons entering or leaving the clinic, the Court specifically noted the distinction between restrictions on willing audiences wishing to receive communications and the protection from unwanted communications being given to listeners. Since the distributors could stand near the path to the entrance and proffer their materials to any pedestrian willing to take them, the regulation left open an adequate means of speech. The Court noted that, "as in all leafleting situations, pedestrians continue to be free to decline the tender." *Id.* at 727. The regulation at issue protected the interests of those who did not wish to receive the materials while still allowing the distributors an ample alternative of communicating with those willing to listen.

The *Jobe* Court directly addressed this issue of alternative means, noting that this Court has been "quite sensitive to the need to permit inexpensive methods of spreading ideas and information." *Jobe,* 409 F.3d at 272. However, "the fact that a means of communication is efficient and inexpensive does not automatically trump other government interests." *Id.* The *Jobe* Court relied on this Court's explanation in *Taxpayers for Vincent* that:

> A distributor of leaflets has no right simply to scatter his pamphlets in the air – or to toss large quantities of paper from the window of a tall building or a low flying airplane. Characterizing such an activity as a separate

> means of communication does not diminish the State's power to condemn it as a public nuisance.

Taxpayers for Vincent, 466 US at 809, *quoted in Jobe,* 409 F.3d at 273.

The Seventh Circuit also addressed this requirement in *Horina.* While noting that adequate alternatives do not have to be the speaker's first or best choice, or provide for the same audience or impact, it noted that the alternative must be realistic. *See Horina,* 538 F.3d at 635. The court then concluded that neither person-to-person distribution nor mailing were adequate alternatives. However, there was no mention of any admission that "lots of alternatives," including those centered on vehicles, were available to Klein.

Thus there is a direct conflict between the Sixth Circuit's decision in *Jobe v. City of Catlettsburg*, 409 F.3d 261 (6th Cir. 2005), and the Seventh, Eighth and Ninth Circuits' decisions in, respectively, *Horina v. City of Granite City,* 538 F.3d 624 (7th Cir. 2008), *Krantz v. City of Fort Smith,* 160 F.3d 1214 (8th Cir. 1998), and *Klein v. City of San Clemente,* 584 F.3d 1196 (9th Cir. 2009). This conflict arises on the critically important matter of the proper balance between free-speech rights under the first amendment and the government's ability to regulate conduct – such as littering – in which it has a significant interest. Given the many, many ordinances and regulations in effect across the country on exactly this issue, the Court's guidance is needed.

CONCLUSION

The Court should issue its writ of certiorari and review the decision of the United States Court of Appeals for the Ninth Circuit in *Klein v. City of San Clemente*, 584 F.3d 1196 (9th Cir. 2009).

Respectfully submitted,

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