

9th Circuit Strikes Down City's Attempt to Prohibit Leaflet Distribution.

Klein v. City of San Clemente, ___ F.3d ___ (2009)

The City of San Clemente prohibited the distribution of leaflets on vehicles in an effort to prevent litter. Klein and others (the plaintiffs) distributed leaflets on parked vehicles and were warned to cease or be subject to penalties under the ordinance. They stopped and promptly filed suit in federal court, arguing that the ordinance violated their free speech rights under the First Amendment.

The district court ruled in the city's favor, finding that the ordinance served its significant interest in preventing litter in the city and denied plaintiffs' motion for a preliminary injunction. Plaintiffs appealed and the 9th Circuit Court of Appeals noted that in order to withstand a First Amendment challenge the prohibition must be "content-neutral, be narrowly tailored to serve an important government interest, and leave open ample alternative channels for the communication of the message." This is the standard test applied to speech restrictions in "traditional public forums" such as parks, sidewalks, streets and other public rights-of-way.

The parties agreed that the ordinance was content neutral, so the court focused on whether the ordinance was narrowly tailored to serve an important government interest. The city asserted that the ordinance was narrowly tailored to advance two significant public interests: 1) curbing litter; and 2) preventing the unauthorized use of private property. The 9th Circuit rejected both arguments.

With respect to curbing litter, the city argued that the prohibition was narrowly tailored because the ordinance "only prohibit[ed] the placing of materials on unoccupied vehicles where it result[ed] in litter" and thus "target[ed] the precise problem that [the prohibition] wished to correct." Unfortunately, the city couldn't cite to any evidence in the record establishing a "nexus between leaflets placed on vehicles and a resulting substantial increase in litter on the streets." Moreover, the court noted that persons were free to continue to carry beverages, food, gum and candy on San Clemente's streets and that these items would certainly add to litter.

With respect to preventing the unauthorized use of private property, the court essentially analogized San Clemente's prohibition with other municipalities' attempts to prohibit door-to-door solicitations. The judicial concern regarding such bans is the "chilling effect" on protected speech, whereby those who may wish to hear the speech never have the opportunity to do so. Based on Supreme Court precedent, the 9th Circuit concluded that a more narrowly tailored approach to prevent the unauthorized use of private property would be to encourage drivers to display "no soliciting" signs on their dash boards, much like home owners do in their windows, and prohibit the distribution of leaflets on vehicles with such signs.

For Oregon cities who may have such prohibitions in place, or who may be contemplating similar prohibitions, it is critical to review whether evidence exists establishing a clear connection between the harm sought to be avoided (litter or private property intrusions) and the means of preventing the harm (prohibiting handbills, leaflets or door-to-door solicitations). In

the absence of such a clear connection, and an explanation as to how the prohibition is narrowly tailored, similar prohibitions are likely to be found to violate the First Amendment.