No. _____

In The
Supreme Court of the United States

MICHAEL KLEINMAN, SCOTT WADE
and JOHN TRAVIS,

Petitioners,

v.

CITY OF SAN MARCOS, TEXAS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners transformed a wrecked Oldsmobile 88 into an expressive work of art and displayed it on private property. The City of San Marcos, Texas, cited and later seized the artwork, claiming it violated the City's "junked vehicle" ordinance because it was visible from the street.

The Fifth Circuit has reasoned that the First Amendment protects only "great works of art." It held that the City may completely ban any public display of artwork made using junked vehicles.

The Fifth Circuit's First Amendment analysis conflicts with *Hurley v. Irish-American GLB Group of Boston*, 512 U.S. 557 (1995), and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and with decisions of the Second and Ninth Circuits applying *Hurley* and *Ward*. The questions presented for review are:

1. Does the First Amendment protect only "great works of art"?

2. May a city wholly ban the public display of an entire category of art, leaving enclosed, private display as the only available option?

PARTIES TO THE PROCEEDING

The Petitioners are Michael Kleinman, Scott Wade and John Travis, the plaintiffs and appellants below. The Respondent is the City of San Marcos, Texas, the defendant and appellee below.

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[1] Although entitled "proposed," these stipulated facts were agreed to by all parties, signed, and timely filed with the District Court before trial. *See* App. 64.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 597 F.3d 323 (5th Cir. 2010). App. 1. The final judgment and findings of fact and conclusions of law of the United States District Court for the Western District of Texas are not reported. App. 19.

JURISDICTION

The Fifth Circuit entered its judgment February 10, 2010. Petitioners' Petition for Rehearing was denied March 8, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The First Amendment is applicable to the states and political subdivisions through the Fourteenth Amendment.

The City of San Marcos Code provides, in relevant part:

Sec. 34.191. Definitions.

> *Junked vehicle* means a vehicle that is self-propelled, inoperable and:
>
> (1) Does not have lawfully affixed to it both an unexpired license plate and a valid motor vehicle safety inspection certificate;
>
> (2) Is wrecked, dismantled, partially dismantled or discarded; or
>
> (3) Has remained inoperable for more than 45 consecutive days.
>
> *Nuisance vehicle* is a vehicle that is a public nuisance under 34.194.

Sec. 34.194. Junked vehicles declared a public nuisance.

> A junked vehicle that is located in a place where it is visible from a public place or public right-of-way is detrimental to the safety and welfare of the general public, tends to reduce the value of private property, invites vandalism, creates fire hazards and constitutes an attractive nuisance creating a hazard to the health and safety of minors and is detrimental to the economic welfare of the city by producing urban blight adverse to the maintenance and continuing

development of the City and is a public nuisance.

Sec. 34.196. Nuisance vehicles prohibited on private property.

(a) It is unlawful for a person that owns or controls any real property to maintain, allow, cause or permit a nuisance vehicle to be placed or to remain on the property.

Sec. 34.197. Defenses to prosecution.

(1) The vehicle or vehicle part is completely enclosed within a building and is not visible from the street or other private or public property;

. . .

(4) The vehicle is completely covered by a heavy duty, contour-fitting cover so that no part of the vehicle except the tires is exposed to public view and it is the only one on the property;

STATEMENT OF THE CASE

1. *The Facts*. Petitioner Michael Kleinman held a "car bash" charity event where participants paid to smash a donated Oldsmobile 88. App. 1, 59. He then had the doors welded shut, the glass, hood and trunk lid removed, the top cut off and the resulting object filled with dirt and planted with native Texas cacti. *Id*. App. 60.

Kleinman then commissioned two local visual artists, Petitioners Scott Wade and John "Furly" Travis, to transform the smashed vehicle into a work of art. App. 60. Each artist painted one side. App. 61. Wade painted stylized local San Marcos scenes. App. 65-67. Travis painted abstract, colorful objects and animals. *Id*.

The City stipulated that (1) from the beginning, Kleinman had intended to turn the smashed vehicle into artwork; (2) Wade intended to convey the idea of transforming "a large gas-guzzling vehicle" into "something that's more respectful of the planet and something that nurtures life as opposed to destroys it;" (3) Travis intended to convey the idea that "you could take a junked vehicle, junk canvas, and create something beautiful out of it;" (4) using a smashed vehicle was integral to both artists' expression; and (5) the resulting creation "is an object which contains and projects some level of artistic expression after it was painted by Plaintiffs Wade and Travis and altered to allow it to grow plant-life." App. 60-62.

Petitioners displayed the artwork on Kleinman's private property, in a location visible from Interstate Highway 35, the main highway running from San Antonio to Austin and Dallas-Fort Worth, and from other roads and easements. App. 60. While the artwork was located on the same property as Kleinman's Planet K store, it contains no advertisement, only the artists' painting and the words "Make Love Not War." App. 65-66.

2. *Proceedings below*. The City of San Marcos issued a notice that the artwork was a "junked vehicle" that violated the San Marcos City Code. App. 63. A San Marcos municipal judge agreed and ordered it removed or brought into compliance with the code. App. 63.

The city code defines any inoperable vehicle that is "wrecked, dismantled or discarded" to be a "junked vehicle." San Marcos Code § 34.191. The code declares a "junked vehicle that is located in a place where it is visible from a public place or public right-of-way" to be a public nuisance, and prohibits landowners from permitting "nuisance vehicles" to remain on their property. San Marcos Code §§ 34.194, 34.196.

The code permits only two exceptions, each requiring that the vehicle not be publicly visible.[2] The ordinance contains no exception for junked vehicles used in art. There is no dispute that the ordinance effectively prohibits the public display of Petitioners' artwork anywhere in the City.

Petitioner Kleinman, later joined by Petitioners Wade and Travis, sued to enjoin the City from applying the code to their artwork. The City removed

[2] The "vehicle or vehicle part is completely enclosed within a building and is not visible from the street or other private or public property," or "is completely covered by a heavy duty, contour-fitting cover so that no part of the vehicle except the tires is exposed to public view. . . ." San Marcos Code § 34.197(1), (4).

the case to the United States District Court for the Western District of Texas (Austin Division).

The Hon. Sam Sparks initially granted the City's motion to dismiss, then reversed that ruling on motion for rehearing, holding that "if Kleinman can establish the car planter itself is his message . . . [he] will have established that the junked car ordinance cannot be constitutionally applied in this case because it requires him to screen the junked car from all public view, thus providing no 'alternative channel of communication' for his unique message." App. 47.

After a bench trial, the District Court reversed itself again. This time it held that the sole option of a fully-enclosed private display, not visible anywhere from the street, road, right of way or adjacent property, provided "adequate alternative avenues of communication through the medium of the junked car." App. 33.

The Fifth Circuit affirmed in an opinion by Chief Judge Edith H. Jones, joined by Circuit Judge Prado, with Circuit Judge Haynes concurring in the judgment only. App. 1.

The Fifth Circuit first questioned whether, despite the uncontested testimony and stipulations by the City, the Petitioners' artwork "could be considered a constitutionally-protected expression" at all. App. 6. Quoting this Court's opinion in *Hurley v. Irish-American GLB Group of Boston*, 515 U.S. 557, 569 (1995), the Fifth Circuit held that *Hurley* "refers solely to great works of art," and that "[n]either in

Hurley nor in any later case has the Court elaborated on the extent of First Amendment protection for visual non-speech objects or artworks." App. 7.

"In an abundance of caution," the Fifth Circuit engaged in an alternative First Amendment analysis, coming to the same conclusion – that the City could ban any public display of Petitioners' artwork. App. 10-14. In a single paragraph, the Fifth Circuit concluded that the city-wide ban still left ample alternative channels of communication because the artwork could be displayed "behind a fence, indoors, or in a garage enclosure," and because Kleinman could "erect a sign" or "display a poster" of the artwork or "invite the public to view" it privately. App. 13.

Following the Fifth Circuit's denial of rehearing, the City seized and removed (but did not destroy) the artwork. Petitioners still want to publicly display their creation within the San Marcos city limits.

REASONS FOR GRANTING THE WRIT

The First Amendment applies to art. The First Amendment's protection of artistic expression is not limited to "great works of art" by famous artists. A city may not simply ban the publicly visible display, especially on private property, of an entire category of art.

The Fifth Circuit's analysis contradicts *Hurley v. Irish-American GLB Group of Boston*, 515 U.S. 557, 569 (1995), and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

The Fifth Circuit's opinion is also in clear conflict with decisions of the Second Circuit and the Ninth Circuit, *Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996), and *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc).

The Fifth Circuit's opinion invites the very evil it condemns, making judges decide subjectively what art is "great" enough to protect.

The Fifth Circuit's opinion allows cities to enact bans on public display of artwork.

The Fifth Circuit's opinion should be reviewed to determine whether its reading of the First Amendment as applied to artistic expression, or the Second and Ninth Circuit's reading, is more consistent with this Court's precedent and the fundamental goal of protecting free expression from excessive government regulation.

I. THE FIFTH CIRCUIT'S ANALYSIS CONTRADICTS THIS COURT'S FIRST AMENDMENT HOLDINGS.

The Fifth Circuit's decision and analysis contradict two of this Court's key First Amendment decisions, *Hurley* and *Ward*. First, the decision below misreads *Hurley v. Irish-American GLB Group of*

Boston, 515 U.S. 557, 569 (1995), as holding that only "great works of art" merit constitutional protection, while lesser known works do not necessarily merit what the Fifth Circuit calls the "heavy machinery of the First Amendment." Second, the decision below misapplies *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), in holding that a city-wide ban on any public display of the Petitioners' artwork – even from private property – still leaves open the constitutionally-required "ample alternative channels of communication" because a private, enclosed display is not also banned.

A. The First Amendment Protects Art, Not Just "Great" Art.

Despite the City's stipulations that Kleinman "had always intended to turn the donated vehicle into an artwork," that the artists' paintings are "unique, one-of-a-kind images," that the work "contains and projects some level of artistic expression," and that use of a smashed car was "integral to [each artist's] expression," App. 60-61, the Fifth Circuit concluded that the First Amendment did not apply, "irrespective of the intentions of its creators," because it declared that Petitioners' artwork to be "a utilitarian device, an advertisement, and ultimately a 'junked vehicle.'" App. 9.

This logic defied the facts and binding stipulations of the parties, and put the cart before the horse, as if the reach of a city's junked vehicle ordinance

could determine the constitutional protection available to artistic expression. The iconic "Cadillac Ranch" in Amarillo and John Chamberlain's famous automobile part sculptures fall within the "junked vehicle" ordinance's terms, but that does not answer whether they may be banned from public view consistent with the First Amendment.

In reaching its flawed conclusion, the Fifth Circuit cited a single case from this Court, *Hurley v. Irish-American GLB Group of Boston*, 515 U.S. 557 (1995). *Hurley* held that the organizers of the Boston St. Patrick's Day parade had a First Amendment right to select parade participants, free from government interference. *Hurley* is but one of many cases from this Court recognizing that "the Constitution looks beyond written or spoken words as mediums of expression." 515 U.S. at 569. This Court in *Hurley* rejected the concept that the First Amendment is "confined to expressions conveying a 'particularized message,'" because if so limited, it

> would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.

Hurley, 515 U.S. at 569.

Surely, this Court cited Pollock's abstract paintings, Schönberg's expressionist music, and Carroll's "nonsense" poetry to show the breadth of First Amendment protection, not its limits. But the Fifth Circuit drew the opposite conclusion – that because

Hurley "refers solely to great works of art," the Constitution must stop with great works. App. 7. *But no speech – artistic or otherwise – requires public acclaim before finding constitutional protection*.

Despite years of precedent, the Fifth Circuit somehow still found uncertainty:

> Neither in *Hurley* nor in any later case has the Court elaborated on the extent of First Amendment protection for visual non-speech objects or artworks.

App. 7.

This is simply wrong or, at a bare minimum, overlooks several decades of First Amendment precedent from the Supreme Court. This Court has held that all sorts of non-verbal expression find full Constitutional protection.[3] In fact, this Court's holding in *Hurley* itself reveals the Fifth Circuit's error: *Hurley* unanimously found First Amendment protection in

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[3] *E.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) (theater); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (motion pictures); *Miller v. California*, 413 U.S. 15, 34-35 (1973) (expression of serious literary, artistic, political, or scientific ideas, unless legally obscene); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-34 (1975) (topless dancing); *Gregory v. Chicago*, 394 U.S. 111, 112 (1969) (peaceful marches); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505 (1969) (black arm bands); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (sit-ins); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943) (refusal to salute flag).

the act of choosing who may join a parade – expressive, yes, but hardly a "great work of art."

The Fifth Circuit's final comment on *Hurley* gives further reason for review. Hesitating to employ "the heavy machinery of the First Amendment . . . in every case involving visual non-speech expression," the court distinguished *Hurley* because its "reference to works of fine art did not sweep so broadly as to require a judicially crafted hierarchy of artistic expression." App. 9. Petitioners do not ask for a "hierarchy" of art; indeed, courts judging what art is sufficiently "fine" or "great" to warrant constitutional protection would be anathema to our Bill of Rights. But the Fifth Circuit did exactly what it disdained – by distinguishing "great works of art" from Petitioners' work, and by dismissing the artists' intentions, the court applied its own "hierarchy," elevating "great" art over Petitioners'.

Art criticism aside, under the law, because Petitioners' work was artistic and expressive – *and was stipulated to be such by the City of San Marcos* – it merits the same legal protection as the works of Pollock, Schönberg and Carroll. This Court should grant review, because the Fifth Circuit wrongly concluded that *Hurley* held otherwise.

B. Banning Any Publicly Visible Display of Artwork on Private Property is Not Narrowly Tailored and Does Not Provide "Ample Alternative Channels of Communication."

"In an abundance of caution," the Fifth Circuit briefly addressed this Court's "intermediate scrutiny" First Amendment review applicable to content-neutral regulations of expression. App. 10-14. That standard permits enforcement of "reasonable restrictions on the time, place, or manner of protected speech," provided that

> the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information."

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

San Marcos' ban on public display of Petitioners' artwork is absolute: it cannot be displayed anywhere it can be seen from the sidewalk, street, right-of-way or adjacent property.

The ban applies despite the fact that Petitioners' artwork was rendered safe. The ban applies no matter how or where the artwork is displayed, even if that display addresses every "safety" concern imagined by the City. The ordinance bans display of

the artwork on a rooftop, behind a chain link fence, inside a Lucite box, or even inside a building if it is visible from a sidewalk through a window. The ordinance is unconcerned with the artwork's location – any public display is banned *anywhere* in San Marcos, even miles from Planet K, making the Fifth Circuit and District Court's reliance on a perceived connection between the artwork and the store legally irrelevant.

Because the City's ban on public display of artwork made using junked vehicles brooks no exception whatsoever, even when every "content-neutral" government rationale is satisfied, it effectively regulates Petitioners' expression based on their artistic choice of medium – an aesthetic decision.

This is a troubling and illegitimate basis for regulating artistic expression. As this Court noted in *Ward*, "[a]ny governmental attempt to serve purely aesthetic goals by imposing subjective standards . . . would raise serious First Amendment concerns." 491 U.S. at 793. The Fifth Circuit opinion denies this, claiming to "pretermit 'recourse to principles of aesthetics'" in its analysis. App. 10. But the Court's unilateral conclusion that "the 'expressive' component of [the artwork], considered objectively in light of its function and utility, is at best secondary," in fact reflects a wholly subjective and standardless rejection of the Petitioners' expressed artistic intent. The only "utility" in this work is its ability to support plant life, which is itself integral to the artists' message and choice of medium. App. 61.

But even if the cacti were removed, the same constitutional question would remain: Is San Marcos' city-wide ban on any public display of artwork made using junked vehicles narrowly tailored, and does it leave ample alternative channels of communication?

The Fifth Circuit, citing only *Ward*, answered "yes" – something neither this Court nor any Court of Appeals has ever done – because the artwork could be located "behind a fence, indoors, or in a garage enclosure," and because Petitioners could "erect a sign," "display a poster" or "invite the public to view" the artwork privately. App. 13.

Ward provides no support for this holding. *Ward* addressed New York City's regulation of the *volume* of sound amplification in a single public park bandshell, not a city-wide ban extending to private property as well as public parks which must accommodate various uses. *Ward*, 491 U.S. at 784. The restrictions in *Ward* were sufficiently narrow and left open "ample alternative channels of communication" because the amplification guideline did not "attempt to ban any particular manner or at a given place or time." *Id.* at 802. "Rather, the guideline continues to permit expressive activity in the bandshell, and has no effect on the quantity or content of that expression beyond regulating the extent of amplification." *Id*. The music still could be played at the bandshell, just not quite so loudly.

Ward's acceptance of a city's power to regulate the volume of speech in a public park provides no

support for the proposition that a city may totally ban any display of a category of artwork visible to the public. A total ban, by definition, leaves no alternative channels of communication – contrary to this Court's teaching in *Ward*.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SECOND AND NINTH CIRCUITS.

A. The Second Circuit Held in *Bery v. City of New York* that the First Amendment Does Not Permit a City-Wide Ban on Public Displays of Art.

In *Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996), the Second Circuit reviewed the city's street vendor regulations which, due to excessive demand, had effectively banned any new artists from obtaining permits to display and sell their works on city sidewalks or parks. The court found the city's regulations unconstitutional – even though they regulated only display and sale *on* public property, not displays visible *from* public property, as here.

First, the court clearly does not adhere to the Fifth Circuit's suggestion that only "great works of art" merit First Amendment protection:

> Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is

> similarly entitled to full First Amendment protection.

Bery, 97 F.3d at 695.

Next, the Second Circuit held that the effective city-wide ban was too broad:

> The City may enforce narrowly designed restrictions as to where appellants may exhibit their works in order to keep the sidewalks free of congestion and to ensure free and safe public passage on the streets, *but it cannot bar an entire category of expression to accomplish this accepted objective when more narrowly drawn regulations will suffice*.

Id. at 697 (emphasis added).

Finally, the Second Circuit rejected the argument, accepted by the Fifth Circuit here, that non-public, enclosed, museum-gallery displays provide "ample alternative channels of communication," holding that artists "are entitled to a *public* forum for their expressive activities." *Id*. at 698 (emphasis in original). Museum or gallery shows are simply not available to all artists, and

> [d]isplaying art on the street has a different expressive purpose than gallery or museum shows; it reaches people who might not choose to go into a gallery or museum or who might feel excluded or alienated from these forums. *The public display and sale of artwork is a form of communication between artist and the public not possible in the*

> *enclosed, separated spaces of galleries and museum*."

Id. (emphasis added).

Such was the case here – both the content (use of a wrecked vehicle) and the context (next to a highway filled with cars) were integral to Petitioners' expression. *See* App. 54. Forcing the artwork indoors (if space can be found, and afforded) divorces it from both its intended audience and its intended setting.

The Fifth Circuit overstated the Second Circuit's refinement of *Bery* in *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2nd Cir. 2006), which upheld New York City's vendor regulations as applied to a person wanting to sell painted t-shirts on city streets. Without denying that the t-shirts were expressive, and thus entitled to First Amendment protection, the Second Circuit found the denial of a permit to conduct the commercial activity of selling shirts permissible, both because indirect sale through licensed vendors was possible, and because ample public display alternatives to display the t-shirts remained:

> Notwithstanding New York's licensing permit, plaintiffs may personally distribute their art to the public free of charge, or should they wish to turn a profit, they may enlist licensed vendors to sell their clothing. At most, therefore, § 20-435 prohibits plaintiffs, as unlicensed vendors, from *personally* selling their wares *for a profit* and *at a venue of their choosing*.

Id. at 101 (emphasis in original). Essential to *Mastrovincenzo*'s holding, therefore, was the continued ability to publicly display (if not sell) the expressive works – an option wholly unavailable to Petitioners.

B. The Ninth Circuit Held in *Berger v. City of Seattle* that "Ample Alternative Channels of Communication" Means Leaving Some Public Venues Available.

In *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) (en banc), the Ninth Circuit addressed in detail the intermediate scrutiny "ample alternative channels for communication" element. The Fifth Circuit's opinion here did not address *Berger*, but it conflicts with *all* the *Berger* opinions that addressed that issue – the majority as well as two dissents.

Berger reviewed Seattle's permitting regulations for street performers in the Seattle Center, a large city park. The district court held that the city's regulations limiting street performers to sixteen designated locations in the park violated the First Amendment. The Ninth Circuit reversed and remanded for further factual development, exploring in depth whether those sixteen locations provided constitutionally-adequate alternatives.

Judge Berzon's majority opinion, joined by six judges, cited *Ward* and held, like *Bery*, that "an alternative is not ample if the speaker *is not permitted to reach the intended audience*." *Id*. at 1049 (quoting *Long Beach Area Peace Network v. City of Long*

Beach, 552 F.3d 1010, 1024 (9th Cir. 2008)) (emphasis added). Even though there were *sixteen* locations available in the park, the court remanded for trial because there was evidence that those locations were not ample – too far from sidewalks and because trucks, equipment, and construction sometimes blocked some locations. *Id*. at 1049-50.

Judge Gould, in dissent, concluded that the "alternative means of communication are ample and secure," because, rather than banning speech outright, the regulation "funnels performance speech into sixteen locations near the most popular Seattle Center attractions, where the performers will be readily visible. . . ." *Id*. at 1076 (Gould, J., dissenting). Unlike here, there was no evidence that the regulation precluded "the entire medium of street performance or den[ied] street performers a reasonable opportunity for communication." *Id*. at 1078. He noted that "[t]he Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication *unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting*." *Id*. (emphasis added).

Judge N.R. Smith found the available locations ample because only an average of five to eight performers were present even at peak times, the locations were all within the park, adjacent to pedestrian walkways, near the most popular attractions, and because the speakers could "reasonably expect that

their performances will be visible and audible to their expected audiences, even if not as close as they might be." *Id*. at 1088 (N.R. Smith, J., dissenting in part).

Notably, each opinion in *Berger*, majority and dissents, looked only to alternative locations *within the public park* to determine adequacy. Not a single judge, even those ready to uphold the regulation, thought public venues other than the Seattle Center would suffice, let alone the zero public locations available to Petitioners.

Neither the parties here nor the Fifth Circuit cited a single case permitting a ban on the public display of an entire category of artistic expression.[4]

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[4] Easily distinguished from *Bery* and *Berger* is a thirty-one year old case, *Davis v. Norman*, 555 F.2d 189 (8th Cir. 1979), which interestingly rejected a superficially similar claim: that the display of a vehicle wreck was a protected "symbolic protest against police abuse of authority." Unlike the Petitioners here, however, the owner in *Davis* simply declared that the unmodified, unadorned car wreck conveyed a message about his son's car accident. The owner in *Davis* did nothing to transform the wreck into a genuine expressive work of art; he simply assigned a subjective "message" to a piece of junk. While the Fifth Circuit described *Davis* as applying "intermediate scrutiny," App. at 10, in fact *Davis* preceded *Ward v. Rock Against Racism* by ten years and failed to address the narrow tailoring and "ample alternative channels of communication" elements of the intermediate scrutiny standard. 555 F.2d at 190. The Fifth Circuit's misplaced reliance on *Davis* underscores the need for this Court to grant review and clarify what does – or what does not – satisfy this element.

Like *Bery* and *Berger,* numerous district courts have struck down overbroad regulations of the public display of art. None has upheld a ban on public display of non-obscene art on private property. *See, e.g., Ecko.Complex LLC v. Bloomberg*, 382 F. Supp.2d 627, 628 (S.D.N.Y. 2005) (mayor of New York may not choose which medium graffiti artists could use for a public art exhibition, despite fear that use of mock subway cars "presented too great a risk of inciting criminal behavior" and "encouraged vandalism"); *Celli v. City of St. Augustine*, 214 F. Supp.2d 1255, 1261-62 (M.D. Fla. 2000) (City of St. Augustine ordinance that completely prohibited sale of artwork "on any and all public property," failed intermediate scrutiny because its total ban was "not narrowly tailored to serve a significant government purpose, leaving open ample alternative channels of communication" – despite the City's argument that speakers remained free to communicate on private property); *Trebert v. City of New Orleans*, 2005 WL 273253 (E.D. La. Feb. 2, 2005) (City of New Orleans could not refuse to allow an artist to sell his artwork in Jackson Square by claiming that other public venues such as the Superdome were available). The Fifth Circuit neither addressed nor distinguished these cases.

CONCLUSION

The Fifth Circuit has done something unique in First Amendment jurisprudence – permitted a city-wide ban of the public display of art based on the medium chosen by the artists. This Court should grant review to clarify whether the First Amendment permits what the City of San Marcos, Texas, has done.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-50960

MICHAEL KLEINMAN; SCOTT WADE; JOHN FURLY TRAVIS,

Plaintiffs-Appellants

v.

CITY OF SAN MARCOS

Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas

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(Filed Feb. 10, 2010)

Before JONES, Chief Judge, and PRADO and HAYNES, Circuit Judges.

EDITH H. JONES, Chief Judge:

This appeal concerns whether a junked-vehicle ordinance designed to eliminate eyesores and promote public order, SAN MARCOS, TEX., CODE OF ORDINANCES § 34.196(a), can be applied to a wrecked Oldsmobile 88 that has been put to use as a cactus planter, colorfully painted, and adorned with the words "make love not war." Appellants contend that

the car is an expressive artwork and that interference with this display violates their rights under the First Amendment and the Visual Artists Right Act (VARA). 17 U.S.C. § 166A(a)(3). The district court rejected both claims, then went further and ordered the owner to comply with a removal order of the San Marcos municipal court. We also reject Appellants' constitutional and statutory claims but vacate the district court's attempt to enforce the municipal court order.*

I. BACKGROUND

Appellant Michael Kleinman operates Planet K stores throughout the San Antonio and Austin areas. Planet K stores are funky establishments that sell novelty items and gifts. Kleinman has a tradition of celebrating new store openings with a "car bash," a charity event at which the public pays for the privilege of sledgehammering a car to "a smashed wreck." The wrecks are then filled with dirt, planted with vegetation, and painted. Placed outside each store, the "planters" serve as unique advertising devices.

An Oldsmobile 88 car-planter was created upon the opening of a new Planet K store in San Marcos, Texas. Kleinman arranged to have the smashed car planted with a variety of native cacti and painted with scenes of life in San Marcos. Positioned in front of the store, the distinctive planter is visible to

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* Judge Haynes concurs in the judgment only.

motorists traveling north on Interstate 35. Kleinman did not dictate the content of the illustrations, but he requested that the phrase "make love not war" be incorporated into the design. Two local artists, Scott Wade and John Furly Travis, were commissioned to paint the wreck. At trial, Travis testified that he had no particular message in mind when he painted the car, "just happiness." He intended his images to convey the idea that "you could take a junked vehicle, junk canvas, and create something beautiful out of it." Wade sought to transform "a large gas-guzzling vehicle" into "something that's more respectful of the planet and something that nurtures life as opposed to destroys it." Wade explained that his intent was to describe American car culture and the link between gasoline and the war in Iraq.

On several occasions during and after the conversion of the smashed wreck into a car-planter, the City of San Marcos ticketed Planet K and various Planet K employees under an ordinance banning junked vehicles. The ordinance declares junked vehicles to be a public nuisance and prohibits citizens from placing or keeping junked vehicles on their property. SAN MARCOS, TEX., CODE OF ORDINANCES §§ 34.194, 34.196(a). The ordinance defines a "junked vehicle" as follows:

> *Junked vehicle* means a vehicle that is self propelled, inoperable, and:
>
> (1) Does not have lawfully affixed to it both an unexpired license plate and a valid motor vehicle safety inspection certificate;

> (2) Is wrecked, dismantled, partially dismantled, or discarded; or
>
> (3) Has remained inoperable for more than 45 consecutive days.

Id. § 34.191.

Kleinman contested the tickets and requested a hearing to determine whether the car-planter falls within that definition. The San Marcos municipal court found that it did and ordered the car-planter removed or brought into compliance by concealment behind a fence or in an enclosure.[1] Kleinman then brought suit for injunctive relief in state court. The City removed the case to federal district court. Wade and Travis joined the suit to assert their claims under VARA.

Following a bench trial, the district court determined that the application of the junked-car ordinance to the car-planter would not violate the First Amendment and that Wade and Travis failed to state a statutory claim for relief. The district court also ordered all three plaintiffs *sua sponte* to comply with the municipal court order and bring the car-planter

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[1] A junked vehicle can be brought into compliance if the "vehicle or vehicle part is completely enclosed within a building and is not visible from the street or other private or public property" or if the "vehicle is completely covered by a heavy duty, contour-fitting cover so that no part of the vehicle except the tires is exposed to public view and it is the only one on the property," SAN MARCOS, TEX., CODE OF ORDINANCES § 34.197(a)(1), (a)(4).

into compliance with the City Code within thirty days. This appeal ensued.

II. STANDARD OF REVIEW

This court reviews a district court's factual findings after a bench trial for clear error and its legal conclusions *de novo. Water Craft Mgmt. LLC v. Mercury Marine,* 457 F.3d 484, 488 (5th Cir. 2006). Clear error exists:

> if (1) the findings are without substantial evidence to support them, (2) the court misapprehended the effect of the evidence, and (3) although there is evidence, which if credible would be substantial, the force and effect of the testimony, considered as a whole, convinces the court that the findings are so against the preponderance of credible testimony that they do not reflect or represent the truth and right of the case.

Id. Reversal for clear error is warranted only if the court has a definite and firm conviction that a mistake has been committed. *Id.*

III. DISCUSSION

A. First Amendment

Appellants' principal contention is simple: "visual art" is fully protected by the First Amendment. Consequently, neither the city ordinance nor the state

statute standing behind the ordinance[2] may impose a "content-based regulation" prohibiting the car-planter's public display. In the alternative, Appellants, while acknowledging that the car-planter is a "junked vehicle," assert that the ordinance fails to satisfy intermediate scrutiny as applied to their creation.

That this cactus planter, a three-dimensional advertisement for a novelty shop, could be considered a constitutionally-protected expression speaks more to the law's vagueness than to the capability or intention of the artists. In fact, the City stipulated that "the vehicle/planter is an object which contains and projects some level of artistic expression after it was painted by Plaintiffs Wade and Travis and altered to allow it to grow plant-life."[3] But this category is not so unbounded. The Supreme Court, in the course of

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[2] Texas Transportation Code declares a junked vehicle visible from a public place to be a public nuisance and its maintenance to be a misdemeanor punishable by a fine not to exceed $200. TEX. TRANSP. CODE § 683.071, 072-073 (2007). In addition, municipalities may adopt procedures to remove junked vehicles. *Id.* § 683.074. Any municipal procedures cannot apply to a junked vehicle (1) that is completely enclosed in a building in a lawful manner and is not visible from the street or other public or private property; or (2) that is lawfully stored in connection with the business of a vehicle dealer or junkyard, or is an antique or special interest vehicle, provided that the vehicle is orderly maintained, not a health hazard, and screened from the public view. *Id.* § 683.077.

[3] The City, of course, rejects a characterization of the planter as protected by the First Amendment.

applying the First Amendment to an expressive act (a Saint Patrick's Day parade), stated unanimously:

> As some of these examples [of non-speech protected expression] show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569, 115 S. Ct. 2338, 2345 (1995) (citation omitted). *Hurley* refers solely to great works of art. Neither in *Hurley* nor in any later case has the Court elaborated on the extent of First Amendment protection for visual non-speech objects or artworks.

Seizing on *Hurley*'s statement, the Second Circuit declared, in a case concerning New York City's street vendor regulations, that artworks including paintings, photographs, prints, and sculptures are "always" communicative and therefore entitled to "full First Amendment protection." *Bery v. City of New York,* 97 F.3d 689, 696 (2d Cir. 1996). Despite this broad language, the *Bery* court held only that the ordinance's application to vendors of those works did not stand up to intermediate scrutiny. *Id.* Further, the court reasoned that, because the crafts of the jeweler, the potter, and the silversmith are only sometimes "expressive," the constitutional protection

afforded those categories of works must be determined on a case-by-case basis. *Id.*

Subsequently, the Second Circuit grappled with *Bery*'s implication when vendors of T-shirts and ballcaps decorated with "graffiti art" sought an exemption from the same New York City ordinance. *Mastrovincenzo v. City of New York,* 435 F.3d 78 (2d Cir. 2006). The court narrowed *Bery*'s broad dictum: "To say that the First Amendment protects the sale or dissemination of all objects ranging from 'totem poles' to television sets does not take us far in trying to articulate or understand a jurisprudence of ordered liberty; indeed, it would entirely drain the First Amendment of meaning."[4] *Id.* at 92 (citation omitted).

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[4] *Bery* has been criticized or limited by other lower court opinions as well. *See, e.g. White v. City of Sparks,* 341 F. Supp. 2d 1129, 1139 (D. Nev. 2004) (declining to follow the *Bery* holding because it would be out of step with

> the First Amendment's fundamental purpose – to protect *expression.*"); *Mastrovincenzo v. City of New York,* 313 F. Supp. 2d 280, 294 n.11 (noting that the difficulty with *Bery* is that it is "at once too broad and too narrow in their scope of protection. Conceivably, not every item of painting, photograph, print or sculpture that may be offered for sale on City sidewalks by any vendor is necessarily so expressive as to categorically merit First Amendment protection, but at the same time some objects outside those four categories may also be sufficiently expressive.

State v. Chepilko, 965 A.2d 190, 202 (N.J. Super. Ct. App. Div. 2009) (agreeing with criticism of *Bery*'s holding that any business activity that involves the taking and sale of photographs automatically qualifies for First Amendment protection and

(Continued on following page)

The court recast *Bery*'s distinction between fine art and decorative arts in terms that enforcement officers and vendors in the "real world" can understand and apply "without recourse to principles of aesthetics." *Id.* at 95. *Mastrovincenzo* ultimately decided that the "expressive" elements of the clothing merited some First Amendment protection, but that the city ordinance was narrowly tailored and left ample alternative avenues of communication, thereby satisfying intermediate scrutiny.

We share the *Mastrovincenzo* court's skepticism that the heavy machinery of the First Amendment is to be deployed in every case involving visual non-speech expression. Protected expression takes many forms, but *Hurley*'s reference to works of fine art did not sweep so broadly as to require a judicially crafted hierarchy of artistic expression. By analyzing the artist-vendors' rights under intermediate scrutiny, the *Bery* court effectively conceded as much.

Fortunately, we need go no further than that in the instant case. Irrespective of the intentions of its creators or Planet K's owner, the car-planter is a utilitarian device, an advertisement, and ultimately a "junked vehicle." These qualities objectively dominate any expressive component of its exterior painting.[5]

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concluding that such business activity is entitled to First Amendment protection only if it serves predominantly expressive purposes).

[5] We need not reach the City's contention that, if viewed as some form of protected speech, the car-planter represents

(Continued on following page)

Appellants concede that the car falls within the definition of the San Marcos ordinance. Moreover, the Eighth Circuit, confronted before *Hurley* with a wrecked auto that was displayed streetside to remind the public how the owner's son had been killed, had no difficulty finding that the auto's removal under a junked-vehicle ordinance survived intermediate scrutiny. *Davis v. Norman,* 555 F.2d 189 (8th Cir. 1977). When the "expressive" component of an object, considered objectively in light of its function and utility, is at best secondary, the public display of the object is conduct subject to reasonable state regulation. We therefore pretermit "recourse to principles of aesthetics."

In an abundance of caution, however, because the City concedes that the car-planter has some protected expressive content, we apply the intermediate scrutiny test articulated by the Supreme Court in *United States v. O'Brien,* 391 U.S. 367, 88 S. Ct. 1673 (1968), which balances the individual's right to speak with the government's power to regulate. *O'Brien* rests on the principle that when "speech" and "non-speech" elements are united in a course of conduct, a valid governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. *Id.* at 376, 88 S. Ct. at 1678-79. Under *O'Brien,* a regulation is constitutional if it

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commercial speech entitled to a lesser level of constitutional protection.

is within the constitutional power of the government; it furthers an important or substantial governmental interest; the government interest is unrelated to the suppression of free expression; and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* at 376, 88 S. Ct. at 1679. The junked-vehicle ordinance passes muster under the *O'Brien* test.

First, regulation of junked vehicles is within the City's traditional municipal police powers. Second, important governmental interests justify the ordinance, the purpose of which is to protect the community's health and safety from the problems created by abandoned vehicles left in public view. A junked vehicle is a public nuisance:

> A junked vehicle that is located in a place where it is visible from a public place or public right-of-way is detrimental to the safety and welfare of the general public, tends to reduce the value of private property, invites vandalism, creates fire hazards and constitutes an attractive nuisance creating a hazard to the health and safety of minors and is detrimental to the economic welfare of the city by producing urban blight adverse to the maintenance and continuing development of the City and is a public nuisance.

SAN MARCOS, TEX., CODE OF ORDINANCES § 34.196(a). Junked vehicles are an attractive nuisance to children. Rodents, pests, and weeds thrive in and around

them. Testimony showed that the City pursued more than 1,300 junked vehicle cases in the two years prior to trial. These facts, found by the district court, fully support the City's interests in regulating junked vehicles. The ordinance also tends to reduce urban blight, vandalism, and the depressing effect of junked vehicles on property values. Appellants' insistence that the car-planter has been rendered safe is immaterial to the constitutionality of the ordinance. The City's right to regulate junked vehicles, not the individual status of each vehicle, is the concern of First Amendment inquiry. *See FTC v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 430, 110 S. Ct. 768, 779 (1990).

Third, the junked-vehicle ordinance is not intended to regulate "speech" at all but is a content-neutral health and safety ordinance. Appellants argue that the City's enforcement of the ordinance is motivated by disagreement with the content of the car-planter's "message" and thus should be subject to the strict scrutiny reserved for content-based speech regulations. The district court made no finding of an impermissible motivation, nor is such a finding compelled by the record.

Fourth, the ordinance is reasonably tailored to achieve the City's legitimate interests with only incidental restriction on protected expression. The ordinance authorizes junked vehicles to remain on private property if enclosed from public view. SAN MARCOS, TEX., CODE OF ORDINANCES § 34.197(a)(1). Appellants contend that the ordinance is not

narrowly tailored because it permits an exception for dealerships and junkyards. The underlying state statute, however, prohibits the City from adopting any procedures as to vehicles "stored or parked in a lawful manner on private property in connection with the business of a licensed vehicle dealer or junkyard." TEX. TRANSP. CODE § 683.077. Thus, the City has an overarching legal basis for exempting dealerships and junkyards from its junked vehicle statute. Indeed, the exemption for businesses that deal with junked vehicles reinforces rather than discredits the content-neutrality of the junked vehicle ordinance. Both the City and the State sensibly distinguish individual conduct from commercial conduct, which creates different hazards and requires different regulations. In addition, the ordinance is limited to regulating the medium and location of the car-planter, and in so doing it reduces the blight and attractive nuisance problems caused by vehicular wrecks.

Appellants also argue that the enclosure requirement leaves them without any adequate alternative means of expression. *See Ward v. Rock Against Racism,* 491 U.S. 781, 798-99, 109 S. Ct. 2746, 2753 (1989). But as the district court noted, enclosing the car-planter does not cut off public access because it leaves Planet K free to display the car-planter behind a fence, indoors, or in a garage enclosure. Kleinman could still advertise and invite the public to view the car-planter. He could, pursuant to local law, erect a sign or display a poster of the car-planter visible to the public. Because the ordinance affords ample

alternative means for Appellants to express their messages, this court will not second-guess the scope of the ordinance nor impose Appellants' preferred display mode on the City. *Id.* at 800, 109 S. Ct. at 2758.

B. VARA

Appellants Travis and Wade also raise claims under the VARA. The VARA provides the author of a work of visual art with the right:

> (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
>
> (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

17 U.S.C. § 106A(a)(3). The district court denied relief under VARA, finding that the junked-vehicle ordinance does not require the destruction of a junked vehicle, merely its screening from general public view.

The preliminary statutory issue, however, is whether the car-planter qualifies as a "work of visual art" under the VARA. The statute excludes "any merchandising item or advertising, promotional, descriptive, covering, packaging material or container" from protection. 17 U.S.C. § 101. The district court found

that the car-planters are closely associated with Planet K, are part of the store's corporate image and culture, and are a distinctive symbol of the Planet K business. These findings, which are not clearly erroneous, indicate that the car-planters are "promotional" material and thus outside of the VARA's protection. See *Pollara v. Seymour,* 344 F.3d 265, 270 (2d Cir. 2003). For this reason as well as that of the district court, we affirm the conclusion that Appellants Travis and Wade failed to state a claim for relief under VARA.

C. Order for Compliance

The district court ordered that "Plaintiffs shall comply with the Order of the San Marcos Municipal Court" and "bring the car planter into compliance with City Code." Appellants assert this order was in error since the City never requested any affirmative relief. Further, Wade and Travis were not parties to the municipal court's order and cannot be ordered to "comply." We agree. Although the City contends that the order is actually in Kleinman's favor – by giving him thirty days to comply before any City enforcement action – the district court lacked jurisdiction to grant this relief. This portion of the district court's order must be vacated.

IV. CONCLUSION

For the reasons articulated above, we affirm the judgment on the merits but vacate the portion of the

district court's judgment that orders Appellants to comply with the municipal court order.

AFFIRMED IN PART AND VACATED IN PART.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 08-50960

D.C. Docket No. 1:08-CV-58

MICHAEL KLEINMAN; SCOTT WADE;
JOHN FURLY TRAVIS

Plaintiffs-Appellants

v.

CITY OF SAN MARCOS

Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas, Austin

Before JONES, Chief Judge, and PRADO and HAYNES, Circuit Judges.

JUDGMENT

(Filed Feb. 10, 2010)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and vacated in part in accordance with the opinion of this Court,

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: 19 MAR 2010

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

MICHAEL KLEINMAN,

Plaintiff,

-vs-

CITY OF SAN MARCOS,

Defendant. /

Case No. A-08-CA-058-SS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Aug. 25, 2008)

BE IT REMEMBERED on the 4th day of August 2008 the Court held a bench trial in the above-styled cause, and the parties appeared through counsel. The trial of this matter lasted one day and the Court heard testimony from the following witnesses: Michael Kleinman, Scott Wade, John Travis, Dr. Robert Bednar, and Kenneth Bell. The Court now enters the following findings of fact and conclusions of law.

Background

Plaintiff Michael Kleinman, in order to "make a philosophical statement about the need to find ways to combat the pollution caused by automobiles," held a charity event in which he allowed the general public to reduce a car to "a smashed wreck" with a

sledgehammer for $1 per swing. Amended Mot. File Am. Compl. Ex 2, Aff. Michael Kleinman. Kleinman then arranged to have the wrecked car modified into a planter holding a variety of native cacti and depicting scenes of life in San Marcos painted by local artists Scott Wade and John "Furly" Travis. *Id.* The car-planter was positioned in front of Planet K. At the bench trial, Kleinman testified Planet K is an establishment controlled by Kleinman but owned by a separate corporate entity.

On several occasions both during and after the conversion of the car into a planter, the City of San Marcos ticketed Planet K and various Planet K employees under the City's ordinances banning junked vehicles in public places. City of San Marcos Code of Ordinances §§ 34.191, 34.194, 34.196. The "junked vehicle" ordinances state, in relevant part:

> *Junked vehicle* means a vehicle that is self propelled, inoperable, and:
>
> (1) Does not have lawfully affixed to it both an unexpired license plate and a valid motor vehicle safety inspection certificate;
>
> (2) Is wrecked; dismantled, partially dismantled, or discarded; or
>
> (3) Has remained inoperable for more than 45 consecutive days.

Id. at § 34.191.

> A junked vehicle that is located in a place where it is visible from a public place or

> public right-of-way is detrimental to the safety and welfare of the public, tends to reduce the value of private property, invites vandalism, creates fire hazards and constitutes an attractive nuisance constituting a hazard to the health and safety of minors and is detrimental to the economic welfare of the city by producing urban blight adverse to the maintenance and continuing development of the City and is a public nuisance.

Id. at § 34.194.

> It is unlawful for a person that owns or controls any real property to maintain, allow, cause, or permit a public nuisance vehicle to be placed or to remain on the property.

Id. at § 34.196(a).

It is a defense to prosecution under section 34.196 that:

> (1) The vehicle . . . is completely enclosed within a building and is not visible from the street or other private or public property. . . .

Id. at § 34.197.

Kleinman contested the tickets in a hearing before the San Marcos Municipal Court on January 10, 2008. The municipal court found the car-planter constituted a junked vehicle under the ordinances and ordered it removed or otherwise brought into compliance with the City Code.

Kleinman did not appeal the municipal court's order, but brought a separate civil suit in state court, asserting the City's ordinances, as applied to his car-planter, violated his right to free speech. The City removed, and this Court entered an order on March 7, 2008 finding the junked vehicle ordinances are a permissible "time, place, and manner" restriction on Kleinman's First Amendment rights, because the ordinances do not restrict Kleinman's right to publicly express his views – they limit only the manner in which he may do so by restricting the medium of the junked car. The Court dismissed his claims for relief.

On April 30, 2008, the Court granted Kleinman's Motion to Reconsider the Order of March 7, 2008. Kleinman argued the City ordinances restrict not just the manner in which he expresses himself, but the substance of his message, because the "medium of the junked car" is a substantive part of the message he wishes to convey. The Court stated "if Kleinman can establish the car planter itself is his message and is therefore entitled to whatever First Amendment protections attach to Kleinman's free expression of his ideas on automobile pollution, Kleinman will have established the junked car ordinance cannot be constitutionally applied in this case because it requires him to screen the junked car from all public view, thus providing no 'alternative channel of communication' for his unique message." Order of April 30, 2008 at 8.

Finding "[t]he extent to which 'the medium is the message' in this case cannot be evaluated on the

pleadings alone," the Court withdrew its prior order and denied Defendants' motion to dismiss the case. The Court also granted Plaintiffs Wade and Travis, who painted the car planter, leave to join their claims for relief under the First Amendment and the Visual Artists' Rights Act (VARA) in an Amended Complaint, and granted a preliminary injunction against the removal or destruction of the car planter for the duration of the suit.

At the bench trial, the parties stipulated "the vehicle/planter is an object which contains and projects some level of artistic expression after it was painted by Plaintiffs Wade and Travis and altered to allow it to grow plant life." Joint Stipulations ¶ 16. The parties further stipulated Kleinman had "always intended to turn the donated vehicle into an artwork" and did not do so for the purpose of evading the tickets issued by the City before the car was fully painted and modified. *Id.* at ¶ 18.

On hearing Kleinman's testimony that he does not personally own Planet K or the land on which the car is located, the Court became concerned about his standing to sue. However, the parties have stipulated Kleinman owns the car planter itself. *Id.* at ¶ 15. Accordingly, the Court finds Kleinman has standing to assert that he has a right to display the planter as a work of art protected by the First Amendment. Wade and Travis have standing to bring First Amendment claims because they are the artists responsible for whatever level of protected expression the car planter conveys.

The Plaintiffs, Kleinman, Wade, and Travis, each testified about the public expression they intended the car planter to convey. Plaintiff Travis testified he had no particular or discrete message in mind when he painted the car – "just happiness." Plaintiffs Kleinman and Wade, however, both testified they intended the car planter to convey thoughts about the problems of American car culture, particularly the links between "gas guzzlers" and the current war in Iraq. Kleinman testified he requested that the car planter have the phrase "make love not war" incorporated into its design in protest of the "war where we're killing people over oil and gas rights."

At the bench trial, Kleinman testified the location of the car planter, which is visible to motorists passing on Interstate Highway 35, is an important part of the message.[1] He wishes to reach an audience that might not stop and come inside his shop or an art gallery to view the planter. Plaintiffs called Dr. Robert Bednar, the Chair of American Studies at Southwestern University, to testify that the car planter is "site specific" art and its location adjacent to the highway is an important part of its message about "car culture."

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[1] The Court notes the car planter is one of several unusual roadside embellishments in the neighborhood. For example, Kleinman's neighbor, a restaurant specializing in Mexican food, has an oversized sculpture of a handgun, pointing at the highway, that contains a functioning barbeque grill in its barrel.

The City, for its part, called City Marshall Kenneth Bell to testify about the history and purpose of the junked vehicle ordinances. Marshall Bell testified the City has had over 1300 open junked vehicle cases in the last two and a half years, including some cases where children were using the vehicles as forts, and at least one case where a child became locked inside an abandoned vehicle. Marshall Bell testified that in addition to being a nuisance attractive to children, junked vehicles in San Marcos may contribute to problems controlling rodents, pests, and weeds that tend to thrive in and around inoperable vehicles.

Analysis

I. First Amendment claims

As stated in this Court's Order granting Kleinman's Motion to Reconsider, the City's junked vehicle ordinances are "a content-neutral ban on nuisance vehicles visible from public places." Order of April 30, 2008 at 7. It is well established that a content-neutral regulation may restrict some constitutionally protected speech if the regulation "is narrowly tailored to serve a significant government interest and leaves open alternative channels of communication." *World Wide St. Preachers Fellowship v. Town of Columbia*, 245 Fed. Appx. 336, 344 (5th Cir. La. 2007 (citing *Horton v. City of Houston*, 179 F.3d 188, 194 (5th Cir. 1999)).

This Court further found "[i]t is undisputed that the junked-car ordinances bar all public display of any junked vehicle – in other words, the ordinance does not leave open any 'alternative channel' of public communication through the medium of the junked car." Order of April 30, 2008 at 7. Plaintiffs argue the ordinance's ban therefore leaves them without an adequate alternative channel to communicate their message, because it is uniquely linked to the medium of the car.

Plaintiffs rely heavily on *Bery v. City of New York*, 97 F.3d 689, 696-97 (2d Cir. N.Y. 1996), to support this argument. The *Bery* Court granted a preliminary injunction prohibiting the enforcement of a New York City ordinance regulating street vendors, because "[t]he ordinance's effective bar on the sale of artwork in public places raises concerns that an entire medium of expression is being lost." *Id.* Therefore, the *Bery* court reasoned, the ordinance failed to leave open adequate alternative channels of communication and was overbroad. *Id.*

Bery remains "at the forefront" of the case law delimiting the First Amendment's protection of visual art. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 93 and n.10 (2d Cir.N.Y.2006). Nevertheless, the courts interpreting *Bery* have found its broad interpretation of First Amendment protection for visual art in the context of content-neutral ordinances questionable. *See, e.g. White v. City of Sparks*, 341 F. Supp. 2d 1129, 1139-42 (D. Nev. 2004) (declining to hold that "all visual art is per se constitutionally

protected," and finding *Bery*'s "blanket presumption of protected status . . . out of step with . . . the First Amendment's fundamental purpose – to protect expression."); *Celli v. City of St. Augustine*, 214 F.Supp.2d 1255, 1258-59 (trial court expressly declined to reach as far as the *Bery* case's broad holding regarding visual arts as protected under the First Amendment).

Moreover, *Bery* has been expressly limited and qualified by the Second Circuit's 2006 opinion in *Mastrovincenzo v. City of New York*, 435 F.3d 78. The *Mastrovincenzo* court found the same licensing ordinance in *Bery* passed constitutional muster as applied to a vendor of "graffiti painted" clothing. *Id*. at 102. Though the *Mastrovincenzo* court found the graffiti art "contained sufficient expressive content to qualify for First Amendment protection," *id.*, the court further held the decorated clothing, "whose dominant purpose is not clearly expressive, present[s] line-drawing questions markedly distinct from the more-easily-classified 'paintings, photographs, prints and/or sculpture' at issue in *Bery*." *Id.* The court reasoned "the 'least restrictive means' [test] . . . in this context is likely to be more burdensome [for Plaintiffs] than it would be with respect to the traditional art forms at issue in *Bery*." *Id.*

In this case, Plaintiffs allege the car planter's "dominant purpose" is expressive. In support of this position, Plaintiffs offered the expert testimony of Dr. Bednar, who compared the car planter to "Cadillac Ranch," "Carhenge," and other "acts of car art"

throughout the country. The Court notes, however, that the car planter at issue in this case is markedly different from the car sculptures identified by Dr. Bednar. Specifically, the item in this case is not a sculpture, whose sole purpose is expressive and not functional. The item at issue here has both expressive and functional elements; it is not a "pure statement" of Plaintiffs' beliefs about car culture, but is also both a planter and a distinctive symbol of the Planet K business. Kleinman has been installing similar car planters at Planet K locations since 1990. The "art cars" are a part of Planet K's corporate culture and public image, as shown by the petition Kleinman introduced into evidence at the bench trial. Pl's Ex. 13. The petition to save the "Cactus Art Car" was signed by hundreds of individuals at the Planet K store and expressly links the car planter to Planet K's corporate history. "We, the undersigned, believe that the Cactus Art Car located in front of the Planet K at 910 N. IH35 is a welcome addition to our neighborhood! . . . Planet K Gifts started in Austin & San Antonio in 1990 and has proven over the years to be a good neighbor and corporate citizen at all of it's [sic] locations." Pl's Ex. 13.

Plaintiffs dispute that Planet K's multiple car planters are commercial speech, arguing they do not display a Planet K logo or otherwise advertise the Planet K stores. Indeed, the Court finds the car planters are not "commercial speech" in the same manner as a billboard or other advertisement. However, the record establishes the car planters are

closely associated with Planet K and are part of the store's corporate image and culture. Given this quasi-commercial application, along with the functional aspects of the "car art" as a planter, the "Cactus Car Art" at issue in this case certainly falls into the realm of applied art identified by *Mastrovincenzo* as "markedly distinct from the more-easily-classified 'paintings, photographs, prints and/or sculpture' at issue in *Bery*." 435 F.3d at 102.

This is not to say that the car planter is outside the scope of First Amendment protection, or that it is subject to less than intermediate scrutiny. Rather, as the *Mastrovincenzo* court noted, "whether a regulation is narrowly-tailored can only be determined by considering the scope of its application relative to the government objectives being pursued, taking context into account." *Id.* at 102 (citing *Menotti v. City of Seattle*, 409 F.3d 1113, 1140 & n. 52 (9th Cir. 2005) (endorsing a "pragmatic application of the ample alternatives test" that focuses on the particular context in which speech restrictions will apply . . . ")). In the instant case, a particularly important bit of context is the fact that the Plaintiffs' chosen artistic medium, the junked car, is *in itself* a problem a whole chapter of the San Marcos City Code is designed to regulate.

The City of San Marcos has articulated several legitimate government interests in prohibiting junked vehicles visible from public thoroughfares. In particular, the City asserts junked vehicles can be an attractive nuisance, inviting injury to children and others who may climb on them and hurt themselves.

Plaintiffs assert the car in this case has been "made safe" by draining its fluids, welding its doors, hood, and trunk shut, and filling it with dirt and cacti. Nevertheless, the City has a legitimate concern that this car planter, like other junked cars, remains an attractive nuisance – Kleinman himself testified he began planting cacti in all his car planters to discourage people from climbing into them and picking the plants he initially grew there.

The City ordinances do not require that the car planter be destroyed, merely enclosed from public view. City Code § 34.197(1). Plaintiffs assert this requirement is overbroad. However, it has long been established that a content-neutral ordinance "need not be the least restrictive or least intrusive means" of satisfying a legitimate government interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989) "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.'" *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Screening an attractive nuisance from public view effectively reduces the "attractive" qualities of the nuisance, and the City's interest in reducing the dangers of attractive nuisances would not be effectively served absent the screening requirement.

Plaintiffs argue the requirement that the car planter be enclosed leaves them without an adequate alternative means of expression. This Court, in its order on the Motion to Reconsider, agreed. *See* Order

of April 30, 2008 at 8. However, on further review of the evidentiary record, the Court finds an enclosed space, open to the public, on the Planet K lot is an adequate alternative channel of expression.

Enclosing the car planter does not cut off public access to the car planter. The *Mastrovincenzo* court found an ordinance preventing all public sale of plaintiffs' applied art was constitutionally permissible based on plaintiffs' access to alternative, enclosed venues such as galleries and stores. 435 F.3d at 102. Similarly, the City's ban on all public display of the car planter in this case leaves open ample opportunity to display the car planter to patrons of Planet K and any other individual who cares to come inside the screening structure to look at it.

The Court is mindful that "[t]he First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)). In this case, the requirement that the car be enclosed does not prevent Plaintiffs from advertising the existence of the car planter to passers-by and inviting the general public to come in and view the piece.

Of course, enclosing the car planter means the only people who will receive its message are those who accept this invitation. Plaintiffs will not be able to display the car planter to the drivers passing on

Interstate 35, whom Plaintiffs contend are a crucial part of their audience. The Court finds, however, that although these drivers may be part of the audience Plaintiffs wish to reach, the medium of the junked car cannot plausibly be considered an essential part of the expressive content Plaintiffs wish to convey to this group. Dr. Bedmar conceded on cross examination that a driver passing on Interstate 35 would likely be unaware of the car planter's nature as a "junked car," and would see only a brightly painted car with some plants growing in it. To the extent "the medium is the message" in this case, the only audience who receives the unique message of the junked car consists of those who are close enough to see the fact that the car planter is a destroyed automobile. These are people who have already elected to come onto the Planet K lot.

Plaintiffs argue their message is not only medium-specific, but site specific. Dr. Bedmar testified the car planter's proximity to both the highway and the Planet K store are important elements of its message. However, enclosure of the car planter will not necessarily alter either element. Moreover, "alternative channels of expression . . . need not 'be perfect substitutes for those channels denied to plaintiffs.'" *SEIU v. City of Houston*, 542 F. Supp. 2d 617, 627 (S.D. Tex. 2008) (quoting *Vincenty v. Bloomberg*, 476 F.3d 74, 88 (2d Cir. 2007)). "In the 'ample alternatives' context, the Supreme Court has made clear that the First Amendment requires only that the government refrain from denying a 'reasonable opportunity'

for communication." *Menotti v. City of Seattle*, 409 F.3d 1113, 1141-42 (9th Cir. Wash. 2005) (citing *Renton v. Playtime Theatres*, 475 U.S. 41, 54 (1986)). The First Amendment simply "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *SEIU*, 542 F. Supp. 2d at 634 (S.D. Tex. 2008) (quoting *Heffron*, 452 U.S. at 647).

The Court finds the City's ordinance requiring that junked vehicles be enclosed from public view, as applied to Plaintiffs in this case, is sufficiently narrowly tailored and leaves open adequate alternative avenues of communication through the medium of the junked car. Plaintiffs have stated no violation of their rights under the First Amendment.

II. Visual Artists' Rights Act

Plaintiffs Wade and Travis, the painters of the car planter, assert an additional statutory cause of action under the Visual Artists' Rights Act of 1990 ("VARA"), 17 U.S.C. §§ 106A *et seq*. VARA gives the creator of certain works of visual art the right to prevent "intentional distortion, mutilation, or other modification of that work. . . ." 17 U.S.C. § l06A(a)(3)(a). However, the statute contains an exception stating "The modification of a work of visual art which is the result of . . . the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused

by gross negligence." *Id.* at (c)(2). Courts considering this exception have uniformly found "an artist has no right to the placement or public presentation of his sculpture under the exception in § 106A(c)(2)." *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89, 100 (D. Mass. 2003) (collecting cases); *see also Board of Managers of SOHO Int'l Arts Condo v. City of New York*, 2003 U.S. Dist. LEXIS 10221, 2003 WL 21403333, *10 (S.D.N.Y. 2003) (the point of VARA "is not . . . to preserve a work of visual art where it is, but rather to preserve the work as it is"); *aff'd on recons., Board of Managers of SOHO Int'l Arts Condo v. City of New York*, 2003 U.S. Dist. LEXIS 13201, 2003 WL 21767653, *3 (S.D.N.Y. 2003) ("Nowhere in VARA does the statute make any legal distinction between site-specific or free-standing works. . . .").

The ordinances at issue in this case do not require the destruction of a junked vehicle, merely its screening from general public view. San Marcos City Code § 34.197(1). Because the artists have no right under VARA to the "placement or public presentation" of the car planter, they have failed to state a claim for which relief can be granted under this statute. *Phillips*, 288 F. Supp. 2d at 100.

Conclusion

In accordance with the foregoing,

IT IS ORDERED that Plaintiffs' constitutional challenges to San Marcos City Code §§ 34.191 *et seq*. are DISMISSED with PREJUDICE.

IT IS FURTHER ORDERED that Plaintiff's' claims under the Visual Artists' Rights Act, 17 U.S.C. §§ 106A *et seq.*, are DISMISSED with PREJUDICE.

IT IS FINALLY ORDERED that, within thirty (30) days of the entry of this Order, Plaintiffs shall comply with the Order of the San Marcos Municipal Court issued on January 11, 2008 and bring the car planter into compliance with the City Code.

SIGNED this the 22nd day of April 2008.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MICHAEL KLEINMAN,

Plaintiff,

-vs-

CITY OF SAN MARCOS,

Defendant. /

Case No.
A-08-CA-058-SS

JUDGMENT

(Filed Aug. 25, 2008)

BE IT REMEMBERED on the 22nd day of August 2008, the Court entered its findings of fact and conclusions of law following a bench trial. Thereafter, the Court enters the following:

> IT IS ORDERED, ADJUDGED, and DECREED that the plaintiffs Michael Kleinman, Scott Wade, and John "Furly" Travis TAKE NOTHING in this cause against the defendant the City of San Marcos, and that all costs of suit are taxed against the plaintiff, for which let execution issue.
>
> IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the Plaintiffs shall bring their car planter into compliance with the San Marcos City Code within **thirty (30) days** of the entry of this judgment.

SIGNED this the 22nd day of August 2008.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

MICHAEL KLEINMAN,

Plaintiff,

-vs-

CITY OF SAN MARCOS,

Defendant. /

Case No. A-08-CA-058-SS

ORDER

(Filed Apr. 30, 2008)

BE IT REMEMBERED on the 14th day of April 2008 the Court held a hearing in the above-styled cause, and the parties appeared through counsel. Before the Court were Plaintiff's Motion and Corrected Motion for Reconsideration [#14, 15], Defendant's Motion for Leave to File Late Response thereto [#19], Plaintiff's Motion and Amended Motion for Leave to File First Amended Complaint [#16, 17], and Plaintiff's Motion for Preliminary Injunction [#21]. Having considered these documents, the responses and replies thereto, the arguments of counsel at the hearing, the applicable law, and the case file as a whole, the Court now enters the following opinion and orders.

Background

Plaintiff Michael Kleinman, in order to "make a philosophical statement about the need to find ways to combat the pollution caused by automobiles," held a charity event in which he allowed the general public to reduce a car to "a smashed wreck" with a sledgehammer for $1 per swing. Amended Mot. File Am. Compl. Ex 2, Aff. Michael Kleinman. Kleinman then arranged to have the wrecked car modified into a planter holding a variety of native cacti and depicting scenes of life in San Marcos painted by local artists. *Id.* The car-planter was positioned in front of Planet K, an establishment owned by Kleinman.

The City of San Marcos ticketed Planet K and various Planet K employees under the City's ordinances banning junked vehicles in public places. City of San Marcos Code of Ordinances §§ 34.191, 34.194. Kleinman contested the tickets in a hearing before the San Marcos Municipal Court on January 10, 2008. The municipal court found the car-planter constituted a junked vehicle under the ordinances and ordered it removed.

Kleinman, did not appeal the municipal court's order, but brought a separate civil suit in state court, asserting the City's ordinances, as applied to his car-planter, violated his right to free speech. The City removed, and this Court entered an order on March 7, 2008 finding the junked vehicle ordinances are a permissible "time, place, and manner" restriction on

Kleinman's First Amendment rights. The Court dismissed his claims for relief.

Analysis

I. Motion to Reconsider and Related Motions

Kleinman moves the Court to reconsider its March 7, 2008 Order granting the City's original Motion to Dismiss his complaint [#3]. Kleinman explains that he inadvertently failed to answer the City's Motion to Dismiss because he was acting pro se and was unaware of the time limit for filing a response. Now represented by counsel, he asks the Court to reconsider his First Amendment claims.

The City points out that Kleinman was represented by counsel in state court and had advance notice from the City that the case would be removed to federal court. The City asserts Kleinman's state attorney, though he never made an appearance in federal court and is not admitted to the federal bar, was responsible for apprising Kleinman of the deadline to file a response under this Court's local rules. Therefore, the City argues, Kleinman's ignorance of the deadline for a response is no excuse.

In a stunning display of deadpan effrontery, the City seeks leave to file this argument late. The City actually asserts its own attorney's failure to read the local rules regarding the deadline to file a response in this District should be excused! The City stops short

of trying to distinguish its attorney's ignorance regarding this deadline from the pro se plaintiff's.

In the interest of even-handed fairness, both motions are GRANTED.

The Court now turns again to the merits of the City's initial motion to dismiss Kleinman's constitutional claims. In the March 7, 2008 Order, the Court ruled (1) the municipal court's finding that the planter is a junked vehicle within the meaning of the City Code is a final judgment, which Kleinman chose not to appeal, and this finding is entitled to res judicata effect in the instant proceeding; (2) Kleinman may nevertheless challenge the constitutionality of the City's junked vehicle ordinances as applied to his planter; and (3) the City's ordinances are a content-neutral "time, place, and manner" restriction that does not impermissibly infringe Kleinman's First Amendment rights.

At the hearing on April 14, 2008, the Court asked the parties to address the issue of whether Kleinman could have appealed the municipal Court's finding that the planter is a junked vehicle within the meaning of the City ordinances. Kleinman has always maintained that a new lawsuit seeking injunctive relief was his only recourse, while the City argued at the hearing that Kleinman could and should have followed the procedures described by this Court's Order of March 7, 2008, citing Texas Government

Code § 30.00014, for appealing a municipal court decision.[1]

At the Court's invitation, both parties have submitted post-hearing briefing on the subject, and Kleinman has further submitted a transcript of the January 10, 2008 municipal court hearing. This transcript establishes Kleinman's attorney gave notice in open court of Kleinman's intent to appeal the decision, exactly as required by Texas Government Code § 30.00014(d), but the City's attorney, Andrew Quittner, interjected on the record, "Actually, Judge, I don't think this is an appealable decision." Pl.'s Brief, Ex. 2, p. 78, l. 9-12, 21-22. Quittner went on to suggest the court give Kleinman a certain number of days to "file a TRO in district court," *id*., the judge responded "That's what I'm going to do," *id.*, and that is, of course, exactly what happened in the case.

In light of these facts, the City is estopped from asserting res judicata on any issue determined by the municipal court, because both Kleinman and the municipal court judge reasonably relied on the City attorney's representation that an appeal was not available and the proper course of action would be to file a new suit for injunctive relief in the state's district court. *See Joleewu, Ltd. v. Austin*, 916 F.2d 250,

[1] In its post-hearing briefing the City also referenced the appeal procedures outlined in the San Marcos Municipal Code Chapter 55, which tracks Texas Government Code Chapters 29 and 30.

254 (5th Cir. Tex. 1990) (City estopped from asserting res judicata because of prior inconsistent representation in quasi-judicial proceeding).[2]

Accordingly, the Court WITHDRAWS that portion of the March 7, 2008 Order according the municipal court's judgment res judicata effect. The practical effect of this decision is not great, however, as the municipal court decision was explicitly limited to whether Kleinman's planter is a junked vehicle within the meaning of the City's ordinances, and Kleinman now concedes that it is. Kleinman argues the planter is both a "junked vehicle" *and* a piece of art, and its dual nature raises First Amendment concerns that prohibit the application of the junked vehicle ordinance in this particular case.

The Court considered and rejected Kleinman's "as-applied" challenge to the junked vehicle ordinances in its Order of March 7, 2008, finding that to the extent Kleinman's planter qualifies as a protected expression, the City's ordinances are a reasonable "time, place, and manner" restriction on the means of expressing Kleinman's idea. Kleinman now argues this Order failed to give due consideration to the fact

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[2] The Court notes, however, that nothing in the language of the San Marcos Municipal Code or Texas Government Code appears to restrict the right to appeal a municipal court decision to criminal cases. Accordingly, but for the issue of estoppel in this Case, the Court stands by its March 7, 2008 ruling that the proper course of action would have been to appeal the municipal court ruling as provided in TEX. GOV.T CODE § 30.00014(d).

that his artistic expression took place on private, not public property. He asserts the junked car ordinance cannot be constitutionally applied to this work of art because time, place, and manner restrictions do not apply to artistic expression on private property.

Plaintiff cites no direct authority for this claim, but does point to *Spence v. Washington*, 418 U.S. 405 (1974) as support. The *Spence* case concerned a college student who hung an American flag decorated with peace signs from the window of his apartment as an anti-war statement. The *Spence* court found it important that the flag and the apartment window were private property, and stated the case was not one "that might be analyzed in terms of reasonable time, place, and manner restrictions on a public area." *Id.* at 409.

Spence notwithstanding, reasonable time place and manner restrictions are applied to speech on private property, such as roadside billboards or adult bookstores, all the time. *See, e.g. City of L.A. v. Alameda Books*, 535 U.S. 425, 434 (U.S. 2002). The key inquiry is not whether the challenged speech occurs on public or private property, but whether the challenged restriction attempts to ban the speech altogether or "merely require[s] that it be distanced from certain sensitive locations." *Id.* at 434 (citing *Renton v. Playtime Theatres, Inc.*, 415 U.S. 41, 46 (1986)). The City points out that the junked vehicle and public nuisance ordinances apply only to vehicles visible from a public place or public right-of-way; these rules are not a total ban on junked cars but

merely a requirement that such vehicles be kept out of public view.

Kleinman argues that the Court's March 7, 2008 ruling failed to take into account the unique artistic nature of the car planter. Specifically, Kleinman argues the restrictions on his junked-car planter are not content-neutral because the "junked vehicle" is not just the canvas for the message but a substantive element of the message he wishes to convey. He asserts the medium of the junked car is "inextricably tied to [his] message" about automobile pollution. Mot. Reconsider at 8. Plaintiff points to other examples of "car art" in Texas, including "Cadillac Ranch" in Amarillo and the sculptures of John Chamberlain in Marfa, Texas. *Id.* at 7. According to Kleinman, the City's interest in public safety does not outweigh his interest in expressing environmental sentiment through the medium of the junked car, because the car planter has been "rendered safe" by removing all fluids and welding shut the doors.

The City disputes the sincerity of Kleinman's argument, pointing out that the car was cited as a junked vehicle *before* it was turned into a planter. The City argues Kleinman is simply trying to avoid the citation by turning the car into "art" after the fact. Kleinman asserts the car was destroyed in a charity "car bash" for the express purpose of creating his environmental artistic statement, and the City cited it as a junked vehicle while the process of transforming the car into a planter was in progress. The merits of this factual dispute cannot be evaluated

without a full evidentiary record. At the motion to dismiss stage, the facts alleged in the complaint must be taken as true and read in the light most favorable to Kleinman. *See Fernandez-Montes v. Allied Photo Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993).

The Court nevertheless rejects Kleinman's argument that the ordinances are not content neutral as applied to him. "'A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" *World Wide St. Preachers Fellowship v. Town of Columbia*, 245 Fed. Appx. 336, 344 (5th Cir. La. 2007 (quoting *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989)). The ordinances together constitute nothing more than a content-neutral ban on nuisance vehicles visible from public places.

Even a content-neutral regulation, however, cannot impermissibly burden a citizen's rights under the First Amendment. A content-neutral regulation that restricts some constitutionally protected speech is permissible only if the regulation "is narrowly tailored to serve a significant government interest and leaves open alternative channels of communication." *Id.* (citing *Horton v. City of Houston*, 179 F.3d 188, 194 (5th Cir. 1999)). It is undisputed that the junked-car ordinances bar all public display of any junked vehicle – in other words, the ordinance does not leave open any "alternative channel" of public communication through the medium of the junked car. The Court previously found this was a permissible restriction

because it simply limited the manner in which Kleinman could convey his message, not the message itself. Kleinman had an "alternative channel of communication" because the challenged ordinances would have allowed him to express his message to the public in any way that did not involve a junked car. However, if Kleinman can establish the car planter itself is his message and is therefore entitled to whatever First Amendment protections attach to Kleinman's free expression of his ideas an automobile pollution, Kleinman will have established the junked car ordinance cannot be constitutionally applied in this case because it requires him to screen the junked car from all public view, thus providing no "alternative channel of communication" for his unique message.

The City argues that even if the junked vehicle is also a piece of art, creating a "car art" exception to the junked vehicle ordinance will transform what is now a content-neutral public nuisance regulation into an unworkable state evaluation of the artistic merits of every junked car described as "yard art" by its owner. The question, however, "is not whether plaintiff's work is art, but whether it is 'speech' within the protection of the First Amendment." *Trebert v. City of New Orleans*, No. 04-1349 Sect. "I" (2), 2005 U.S. Dist. LEXIS 1560, * 13 (E.D. La. Feb. 1, 2005). Courts have long "rejected the principle that protected speech may be banned because it is difficult to distinguish from unprotected speech." *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2681 (2007) (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255

(2002)). The City's argument that every owner of a junked car will respond to this case by breaking out the spray paint and creating a lawn ornament is likewise unpersuasive. The Courts "have never accepted mere conjecture as adequate to carry a First Amendment burden." *Trebert*, 2005 U.S. Dist. LEXIS 1560 at * 19 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000)).[3]

The extent to which "the medium is the message" in this case cannot be evaluated on the pleadings alone. Accordingly, on revisiting the City's Motion to Dismiss in light of Kleinman's Motion to Reconsider, the Court WITHDRAWS its Order of March 7, 2008, and DENIES the Motion to Dismiss [#3] without prejudice to reurging after development of the evidentiary record in the case.

III. Motion to Amend

Kleinman seeks leave to file an Amended Complaint, adding the painters of the car planter, Scott Wade and John "Furly" Travis, as Plaintiffs. In the Amended Complaint, Kleinman, Wade, and Travis assert First Amendment claims similar to those discussed above, and Wade and Travis assert an

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[3] The Court notes, once again, that the proper forum for initially determining the merits of future "car art" First Amendment claims is the municipal court, followed (if necessary) by the appellate review procedures described in Tex. Gov. Code § 30.00014.

additional statutory cause of action under the Visual Artists' Rights Act of 1990 ("VARA"), 17 U.S.C. §§ 106A *et seq*. The City opposes the Motion to Amend on grounds of futility, arguing the addition of Wade and Travis does not change the First Amendment analysis of the case and further arguing Wade and Travis have failed to state a claim for which relief can be granted under VARA.

As described above, the Court has reconsidered its dismissal of the First Amendment claim, and Wade and Travis have standing to assert similar First Amendment claims because they are the individuals who actually created the car planter for Kleinman. Amendment of the Complaint to add Wade and Travis' First Amendment claims is therefore appropriate.

The City argues amendment of the complaint to include VARA claims would be futile. VARA gives the creator of certain works of visual art the right to prevent "intentional distortion, mutilation, or other modification of that work. . . ." 17 U.S.C. § 106A(a)(3)(a). However, the statute contains an exception stating "The modification of a work of visual art which is the result of . . . the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence." *Id.* at (c)(2). Courts considering this exception have uniformly found "an artist has no right to the placement or public presentation of his sculpture under the exception in § 106A(c)(2)."

Phillips v. Pembroke Real Estate, Inc., 288 F. Supp. 2d 89, 100 (D. Mass. 2003) (collecting cases); *see also Board of Managers of SOHO Int'l Arts Condo v. City of New York*, 2003 U.S. Dist. LEXIS 10221, 2003 WL 21403333, *10 (S.D.N.Y. 2003) (the point of VARA "is not . . . to preserve a work of visual art where it is, but rather to preserve the work as it is"); *aff'd on recons., Board of Managers of SOHO Int'l Arts Condo v. City of New York*, 2003 U.S. Dist. LEXIS 13201, 2003 WL 21767653, *3 (S.D.N.Y. 2003) ("Nowhere in VARA does the statute make any legal distinction between site-specific or free-standing works. . . .").

The City points out that the ordinances at issue in this case do not require the destruction of a junked vehicle, merely its screening from general public view. Because the artists have no right under VARA to the display of their car planter without any such screen, the City argues they have failed to state a claim for which relief can be granted under this statute and amendment would be futile. Of course, the ordinances at issue do allow the City to confiscate the car planter, which Plaintiffs argue is tantamount to destroying it, if the car planter is not screened from public view. More to the point, Kleinman, Wade, and Travis are suing to enjoin a municipal court order instructing the City to seize the planter. In these circumstances, the issue is not limited to the mere placement of the artwork; there is a legitimate risk that the City's enforcement of the junked vehicle ordinances will constitute an "intentional distortion [or] mutilation" of the car planter in violation of

VARA. The City's argument that Kleinman is the party responsible for any such violation is unavailing – it is the City, not Kleinman, who will be taking destructive action against the car planter.

The City argues the car planter is not entitled to protection under VARA because it is a work of "applied art" specifically excluded from the scope of the statute. VARA itself does not define "applied art" other than to note that applied art is not protected as a work of visual art under the statute. 17 U.S.C. § 101. In contrast, one-of-a-kind sculpture is a "work of visual art" within the meaning of VARA. *Id.* It is not clear on this record whether the car planter is "applied art" or a unique sculpture. Accordingly, the motion to amend to add VARA claims is not obviously futile. Because leave to amend should ordinarily be freely given, *see* Fed. R Civ. P. 15, and Defendants have not demonstrated futility, undue prejudice, or other good cause to deny the amendment, the Court GRANTS Plaintiff's Motion to Amend the Complaint.

IV. Motion for Preliminary Injunction

The Court has discretion to grant a preliminary injunction if the Plaintiff establishes (1) an imminent risk of irreparable injury; (2) a substantial likelihood of success on the merits; (3) the hardship to the nonmovant if the injunction were granted would not outweigh the harm to the movant if relief were denied; and (4) the public interest would be served (or at least not harmed) by granting injunctive relief. *See*

eBay Inc. v. Mere-Exchange, *LLC*, 126 S.Ct. 1837, 1840 (2006). In this case, Plaintiffs oppose a municipal court order authorizing the City to seize the car planter. The merits of Plaintiffs' constitutional and statutory challenges to this seizure depend on factual issues that are not yet developed in the record before the Court. However, the balance of harms tips in Plaintiffs' favor: the seizure of the artwork allegedly infringes Plaintiffs' constitutional right to free expression, traditionally counted an "irreparable" injury. *See, e.g. Laredo Rd. Co. v. Maverick County*, 389 F. Supp. 2d 729, 748 (W.D. Tex. 2005). On the other hand, the car planter has been "rendered safe" by the removal of fluids and the welding shut of its doors and latches, so that the City's interest in the abatement of public nuisances is minimally impacted by the continued presence of the car during this litigation. The public interest will not be harmed by a preliminary injunction in this case; on the contrary, the public interest in broad protection of First Amendment rights will be served by an injunction pending this Court's decision on the merits.

Conclusion

In accordance with the foregoing,

IT IS ORDERED that Plaintiff's Motion and Corrected Motion for Reconsideration [#14, 15], and Defendant's Motion for Leave to File Late Response thereto [#19] are GRANTED;

IT IS FURTHER ORDERED that this Court's ORDER of MARCH 7, 2008 granting Defendants' Motion to Dismiss, and the Court's final ORDER OF DISMISSAL entered March 7, 2008 are WITHDRAWN. On reconsideration, it is ORDERED that Defendants' Motion to Dismiss [#3] is DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion and Amended Motion for Leave to File First Amended Complaint [#16, 17] is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Preliminary Injunction [#21] is GRANTED. Defendants are hereby enjoined from taking any action to remove the car planter at issue in this case until this Court enters a final decision on the merits.

IT IS FINALLY ORDERED that the above-styled case is **set for trial** on **May 27, 2008**, at 9:00 a.m. in Courtroom No. 2, United States Courthouse, 200 West Eighth Street, Austin, Texas.

SIGNED this the 30th day of April 2008.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MICHAEL KLEINMAN,
SCOTT WADE, and
JOHN "FURLY" TRAVIS

Plaintiff,

-vs-

CITY OF SAN MARCOS,

Defendant. /

Case No.
A-08-CA-058-SS

ORDER

(Filed Jul. 31, 2008)

BE IT REMEMBERED on the 31st day of July 2008 the Court reviewed the file in the above-styled cause, specifically the City's Motion to Exclude the testimony of Doctor Robert Bednar [#41] and Plaintiffs' Response thereto. Having reviewed these documents, the applicable law, and the case file as a whole, the Court finds Dr. Bednar's proposed testimony appears relevant to the central question in the case: whether the junked car is inextricably entwined with Kleinman's public speech and thus part of the content, rather than the time, place, or manner, of his expression. The record establishes Dr. Bednar has an extensive history of scholarly, peer-reviewed publications regarding the communicative impact of site-specific and medium-specific forms of communication.

Defendant points out this cultural analysis is not readily susceptible to review under the *Daubert* factors. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). However, the Supreme Court has repeatedly clarified that the "factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue . . . " *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999). The *Daubert* factors are not exhaustive, and the Court's task is not to apply *Daubert* as "a definitive checklist or test," but to "make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the field." *Id.* at 152.

Defendant does not dispute Dr. Bednar's qualifications as an expert in his field. The Court finds the *Daubert* factors relied on by Defendant are largely inapplicable to the non-scientific expert testimony in this case.

Accordingly,

IT IS ORDERED that the Motion to Exclude [#41] is DENIED without prejudice to re-urging on grounds applicable at trial.

SIGNED this the 31st day of July 2008.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 08-50960

MICHAEL KLEINMAN; SCOTT WADE;
JOHN FURLY TRAVIS

Plaintiffs-Appellants

v.

CITY OF SAN MARCOS

Defendant-Appellee

Appeal from the United States District Court
for the Western District of Texas, Austin

ON PETITION FOR REHEARING EN BANC

(Filed Mar. 8, 2010)

(Opinion February 10, 2010, 5 Cir., ___, ___, F.3d ___)

Before JONES, Chief Judge, and PRADO and HAYNES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having

requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MICHAEL KLEINMAN; SCOTT WADE and JOHN "FURLY" TRAVIS, Plaintiffs	§ § § §	CIVIL ACTION NO. A 08 CA 058 SS
v.	§	
CITY OF SAN MARCOS, Defendants.	§ § §	

PROPOSED STIPULATED FACTS

(Filed Aug. 1, 2008)

Plaintiffs Michael Kleinman, Scott Wade, and John "Furly" Travis and Defendant City of San Marcos stipulate to the following facts and exhibits for purposes of this case:

1. The City of San Marcos is a home-rule municipality in the State of Texas.

2. Plaintiff Michael Kleinman is a resident of Travis County, Texas. He owns multiple Planet K businesses in Texas.

3. Planet K is a novelty shop which sells, among other things, T-shirts, posters, and specific types of memorabilia.

4. In November of 2007, Plaintiff Kleinman opened a new Planet K business in San Marcos, Texas

located at 910 North IH-35, San Marcos, Texas. This area is zoned as a Community Commercial District by the City of San Marcos. Attached hereto as Exhibit A is a true and correct copy of the section of the City of San Marcos Zoning Map depicting Planet K's location.

5. The store manager for Planet K – San Marcos is Joe Ptak. Another employee is Terri Haggerton.

6. During the grand openings of some Planet K stores, Plaintiff Kleinman held events allowing people to smash an old vehicle to raise money for charity. The destroyed vehicles would then be painted and turned into a planter.

7. On November 1, 2007, Plaintiff Kleinman held an event whereby he charged $1 per swing to allow participants to smash a donated vehicle (an Oldsmobile 88) at the grand opening of Planet K – San Marcos. An automobile was donated as part of a fundraiser for a local charitable organization.

8. The vehicle was donated, but there was no transfer of the certificate of title to Michael Kleinman or his business.

9. The vehicle in question was driven to the Planet K – San Marcos site a few days before the event. The vehicle was then smashed during this charitable event.

10. After the vehicle was smashed, the vehicle was moved to the north side of the property.

11. The vehicle's location makes it visible from IH-35 and other public roads and easements.

12. On November 7, 2008, Terri Haggerton of Planet K – San Marcos was issued a Notice to Comply with the City's Junk Vehicle Ordinance and a notice of a right to a hearing to challenge the determination the vehicle was a junk vehicle under Chapter 34, Division 3 of the Code of Ordinance of the City of San Marcos.

13. The doors on the car were welded shut. The vehicle's glass was removed, the top was cut off and the hood and trunk lids removed. The ties and all loose items were removed. The doors and other removable parts were welded together. The vehicle was filled with a load of dirt, making it suitable for growing plants. Prickly Pear and Spanish Dagger cacti were planted in the dirt.

14. The vehicle/planter is no longer operational and cannot be driven. The vehicle/planter does not currently have either a State inspection sticker or license plate affixed to it.

15. Plaintiff Kleinman is the owner of the vehicle/planter, depicted in the photographs attached as Exhibit B and Exhibit C. The work is located entirely on private property under Plaintiff Kleinman's control.

16. Defendant City of San Marcos acknowledges that the vehicle/planter is an object which contains and projects some level of artistic expression after it

was painted by Plaintiffs Wade and Travis and altered to allow it to grow plant-life.

17. Plaintiffs Wade and Travis are visual artists and joint authors of the work. Plaintiff Wade painted the portion of the work depicted in Exhibit B while Plaintiff Travis painted the portion of the work depicted in Exhibit C. Both artists retain the copyright in their respective contributions.

18. Plaintiff Kleinman had always intended to turn the donated vehicle into an artwork planter suitable for growing plants. He had previously done this at other Planet K locations in Texas.

19. Plaintiffs Wade and Travis were asked to paint on each side of the vehicle/planter. Each artist painted unique, one-of-a kind images on the vehicle chassis. Each artist used his own tools, controlled the time and manner of which he painted, and had discretion over what to paint. Neither artist was paid for his work.

20. Plaintiff Wade intended his artwork to convey, among other possible expressions, the idea of transforming "a large gas-guzzling vehicle" into "something that's more respectful of the planet and something that nurtures life as opposed to destroys it." In Plaintiff Wade's mind, the fact that his canvas is a "vehicle that used to be a polluter" is integral to his expression.

21. Plaintiff Travis intended his artwork to convey, among other possible expressions, the idea that "you

could take a junked vehicle, junk canvas, and create something beautiful out of it, something pleasing to see." In Plaintiff Travis' mind the fact that his canvas was a "junked vehicle" is integral to his expression.

22. The location of the vehicle/planter has not changed after it was painted and converted and is still visible from public streets and roadways after the painting.

23. There is no fencings, screenings, or obstructions to prevent view of the vehicle/planter from the public roadways.

24. The vehicle/planter is not isolated or restricted off by any rope or barriers.

25. The Code of Ordinances of the City of San Marcos is codified and the Court may take judicial notice of the Code's provisions.

26. The City of San Marcos Code of Ordinances §§ 34.191- 201 are attached hereto as Exhibit D.

27. The City of San Marcos Code of Ordinances, Subpart B, Chapter 8, Article 1 is attached hereto as Exhibit E.

28. The City of San Marcos Code of Ordinances, Subpart B, Chapter 1, Article 9, Division 5 is attached hereto as Exhibit F.

29. The City of San Marcos Code of Ordinances Subpart B, Chapter 6, section 6.3.3.3 is attached hereto as Exhibit G.

30. After his employee received a notification of a junked vehicle, Plaintiff Kleinman requested a public hearing pursuant to Section 34.199 of the City Code of Ordinances, which was held on January 10, 2008. At the hearing, the Municipal Court judge determined that the work was a junked vehicle pursuant to Chapter 34, Division 3 of the Code of Ordinances of the City of San Marcos, and ordered its removal or that it otherwise be brought into compliance with City Code. A copy of the transcript of the hearing and the resulting judgment are respectively attached as Exhibits "H" and "I."

31. At the hearing, Plaintiff Kleinman's attorney gave notice in open court of Kleinman's intent to appeal the decision. The municipal court judge provided Plaintiff Kleinman a certain number of days to "file a TRO in district court." Plaintiff Kleinman filed suit in State District Court in Hay County, and did not appeal to the Hay County Court.

32. Plaintiff Kleinman incurred attorney's fees and costs totaling $8,851.29 in responding to the City of San Marcos' citation and the Municipal Court hearing.

AGREED AS TO FORM AND SUBSTANCE:

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PLAINTIFF'S
EXHIBIT
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MK 0008


MAKE LOVE
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