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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

STEVE KLEIN, et al.,)	CASE NO. CV 07-3747 AHM (JTLx)
Plaintiffs,)	
v.)	ORDER DENYING
)	PRELIMINARY INJUNCTION
CITY OF SAN CLEMENTE, et al.,)	
Defendants.)	

I. INTRODUCTION

A. Procedural Background

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

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

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

10 On June 26, 2007, Plaintiffs moved for a Temporary Restraining Order
11 (“TRO”), prohibiting defendant City from enforcing Section 8.40.130 until the
12 Court could hear and resolve a motion for a preliminary injunction. On July 6,
13 2007, the Court denied Plaintiffs’ motion because they “failed to meet the
14 requisite standard for obtaining injunctive relief.”

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

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

21 **B. The Ordinance**

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

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

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

27 **C. New Factual and Legal Allegations Supporting this Motion**

28

¹ Docket No. 29.

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

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

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

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

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

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

19 Because their attempts at “speech” are confined to private property,
20 Plaintiffs argue next, what the Court must focus on is “the law’s effect on willing
21 recipients’ constitutional right to receive speech.”²

22
23 ² According to Professor Erwin Chemerinsky, “[t]here is not a right to use private
24 property owned by others for speech. Because it is private property, the Constitution
25 does not apply. Most of the cases involving a right to use private property for
26 speech have concerned claims of a right to use privately owned shopping centers for
27 expression.” Erwin Chemerinsky, *Constitutional Law: Principles and Policies* §
28 11.4.3, 1103 (Aspen 2d ed. 2002). Professor Chemerinsky notes that under the First
Amendment there is no right to use such centers for speech, citing *Hudgens v.*
National Labor Relations Board, 424 U.S. 507 (1976). However, as discussed
below, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) the Supreme

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

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

16 **D. Issues Requiring Additional Analysis**

17 The new or modified issues that now require analysis are:

- 18 (1) On the basis of their California Constitution claims, are Plaintiffs
19 entitled to a preliminary injunction?
20 (2) Does the clarified and narrowed manner of expression that Plaintiffs
21 seek to engage in (*i.e.*, to place leaflets only underneath the windshield
22 wiper) require a different result on their First Amendment claims - - *i.e.*,
23 does it warrant entering an injunction?
24 (3) Did the City tailor the Ordinance narrowly enough to allow for its
25 enforcement?
26

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

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

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

7
8 **II. LEGAL STANDARD FOR A PRELIMINARY INJUNCTION**

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

10 “‘The standard for granting a preliminary injunction balances the
11 plaintiff’s likelihood of success against the relative hardship to the
12 parties.’ *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340
13 F.3d 810, 813 (9th Cir. 2003). We have two different criteria for
14 determining whether preliminary injunctive relief is warranted.

15 ‘Under the traditional criteria, a plaintiff must show (1) a strong
16 likelihood of success on the merits, (2) the possibility of irreparable
17 injury to [the] plaintiff if preliminary relief is not granted, (3) a
18 balance of hardships favoring the plaintiff, and (4) advancement of
19 the public interest (in certain cases).’ *See Save Our Sonoran, Inc. v.*
20 *Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005) (internal quotations
21 omitted). We also use an alternative test whereby a court may grant
22 the injunction if the plaintiff demonstrates either: (1) a combination
23 of probable success on the merits and the possibility of irreparable
24 injury, or (2) that serious questions are raised and the balance of
25 hardships tips sharply in his favor.”

26
27 The two alternative formulations ‘represent two points on a
28 sliding scale in which the required degree of irreparable harm

1 increases as the probability of success decreases. They are
2 not separate tests but rather outer reaches of a single
3 continuum.’ *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d
4 1097, 1100 (9th Cir. 1998) (internal quotation marks and
5 citations omitted). *Id.* at 858.
6

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

9 **A. The Court Must Apply California Law First.**

10 Initially, the Court must determine if the California Constitution provides
11 “independent support” for Plaintiffs’ claim. *Kuba v. I-A Agr. Ass’n*, 387 F.3d
12 850, 856 (9th Cir. 2004) (citing *Carreras v. City of Anaheim*, 768 F.2d 1039,
13 1042 (9th Cir. 1985), abrogated on other grounds by *Los Angeles Alliance for*
14 *Survival v. City of Los Angeles*, 22 Cal.4th 352 (2000)). If the California
15 Constitution does provide “independent support” for Plaintiffs’ claim, “then there
16 is no need for decision of the federal issue.” *Carreras*, 768 F.2d at 1042 (“The
17 doctrine that federal constitutional issues should be avoided if a case can be
18 decided on state law grounds is a corollary of the general principle that federal
19 courts should avoid the adjudication of federal constitutional issues when
20 alternative grounds are available.”) (citations omitted).

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

23 The First Amendment provides in relevant part: “Congress shall make no
24 law . . . abridging the freedom of speech, or of the press” U.S. Const.
25 Amend. I. This is somewhat narrower than Article I, § 2(a) of the California
26 Constitution (the “Liberty of Speech Clause”), which provides: “Every person
27 may freely speak, write and publish his or her sentiments on all subjects, being
28

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

3 “The California Constitution provides protections for speakers in some
4 respects broader than provided by the First Amendment of the Federal
5 Constitution.” *Kuba*, 387 F.3d at 856 (citing *Los Angeles Alliance for Survival*,
6 22 Cal.4th at 352, 367 (“This court, and the California Courts of Appeal, likewise
7 have indicated that the California liberty of speech clause is broader and more
8 protective than the free speech clause of the First Amendment.”). For example, in
9 *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 910 (1979), *aff’d. sub nom.*
10 *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the California
11 Supreme Court held that “sections 2 and 3 of article I of the California
12 Constitution protect speech and petitioning, reasonably exercised, in shopping
13 centers even when the centers are privately owned.” The California Supreme
14 Court based its conclusion on “the public character of the shopping center” and
15 the fact that the owner “has fully opened his property to the public.” *Robins*, 23
16 Cal.3d at 910 (citation omitted). These factors are not present here. Moreover, in
17 *Golden Gateway Center v. Golden Gateway Tenants Assn.*, 26 Cal.4th 1013, 1016
18 (2001), the California Supreme Court held that a tenants association had no right
19 under the California Constitution to distribute a newsletter in a privately owned
20 apartment complex. In its opinion, the Court filled a “gap” in *Robins* by holding
21 that “California’s free speech clause contains a state action limitation.” *Id.* at
22 1023. In so doing, it cast doubt on whether *Robins* was correctly decided. *Id.* at
23 1022. And in a concurring opinion, Chief Justice George stated, in dicta, that
24 “[e]ven if the apartment complex at issue had been publicly owned (and thus the
25 state action doctrine clearly satisfied), the state constitutional right of free speech
26 would not extend to the unsolicited distribution of pamphlets in the interior
27 hallways of an apartment building that is not generally open to the public.” *Id.* at
28 1036. The Court of Appeal for the 4th District quoted Chief Justice George’s

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

4 **C. Although the Issue Is Not Settled, it Appears That California**
5 **Courts Use Federal Forum Analysis to Determine the Nature of a**
6 **Forum.**

7 The first, or threshold, inquiry in analyzing whether an ordinance violates
8 the First Amendment or California’s “Liberty of Speech Clause” is to determine
9 whether strict scrutiny or a more relaxed standard of review is applicable. That
10 requires deciding, among other factors, the nature of the forum where the
11 “speech” was to be communicated.³

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

14 Accordingly, we apply a forum analysis to determine
15 when the government has legitimate interests in restricting
16 the use of a forum to certain intended purposes that
17 outweigh a speaker's interest in using the forum for a
18 different purposes. [sic] . . . Forum analysis has
19 traditionally divided government property into three
20 categories: public fora, designated public fora, and
21 nonpublic fora. Once the forum is identified, we
22 determine whether restrictions on speech are justified by
23 the requisite standard

24 On one end of the fora spectrum lies the traditional public
25 forum, “places which by long tradition ... have been
26 devoted to assembly and debate.” . . . Next on the
27 spectrum is the so-called designated public forum, which
28 exists “[w]hen the government intentionally dedicates its
property to expressive conduct.” . . . A designated public
forum cannot exist in the absence of specific action on the
part of the government . . . A content-based restriction on
speech in a public or designated public forum is subject to
strict scrutiny, requiring the state to show a compelling
interest in the restriction that is drawn narrowly to meet

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

1 that interest . . . A content-neutral time, place, and manner
2 restriction is permissible so long as it is “narrowly tailored
3 to serve a significant government interest, and leave[s]
open ample alternative channels of communication. . . .”

4 At the opposite end of the fora spectrum is the
5 non-public forum. The non-public forum is “[a]ny
6 public property that is not by tradition or
7 designation a forum for public communication.” . . .
8 We subject speech restrictions in a non-public
9 forum to less-exacting judicial scrutiny: “[A]s long
as the regulation on speech is reasonable and not an
effort to suppress expression merely because public
officials oppose the speaker's view,” the
government may preserve the forum for its intended
purposes. *Perry*, 460 U.S. at 46, 103 S.Ct. 948.
(Most citations deleted.)

10
11 Plaintiffs contend that the California Constitution “allows a more
12 lenient test for determining whether a particular area is suitable for speech.”
13 They cite *Kuba* for the proposition that “[t]he standard under the California
14 Constitution for whether a particular area is a ‘public forum’ is one aspect
15 of constitutional law in which the California Constitution varies from its
16 federal cousin.” *Kuba*, 387 F.3d at 856.

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

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

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

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

14 **E. The Merits of Plaintiffs’ California-Based Claims**

15 1. **Burden of Proof**

16 Although Plaintiffs have the burden of establishing the elements
17 necessary to obtain injunctive relief, “[t]raditionally and logically . . . the
18 party seeking to restrict protected speech has the burden of justifying that
19 restriction.” *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir.
20 2000). California courts agree. *See e.g., Kaufman v. ACS Systems, Inc.*,
21 110 Cal.App.4th 886, 906 (2003) (holding that the “party seeking to uphold
22 a restriction on commercial speech carries the burden of justifying it.”). On
23 this motion, then it was up to the City to justify the Ordinance, not just in
24 terms of its stated purpose, but also in terms of its application to these facts.

25 As recently reiterated in *Desert Outdoor Advertising, Inc. v. City of*
26 *Oakland*, ___ F.3d ___, 2007 WL 3225883 at *3 (9th Cir. October 30,
27 2007), a court is “obligated to interpret a statute, if it is fairly possible, in a
28 manner that renders it constitutionally valid.” (citations deleted)

1 2. “Time, Place and Manner” Standards Govern

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

11 Although the windshield of a vehicle differs greatly as a forum from a
12 shopping center and here a city enacted the restriction rather than the owner of a
13 shopping center, the clearest articulations of California law with respect to rights
14 of expression on private property arise in cases where shopping centers are
15 involved. In such circumstances, California courts also apply the federal “time,
16 place and manner” standards. *See Costco Companies, Inc. v. Gallant, supra*, 96
17 Cal.App.4th at 745 (“In recognizing the right of free expression extends in some
18 instances to privately owned property, the [California Supreme Court in *Robins*]
19 nonetheless expressly acknowledged private property owners, like governmental
20 agencies, may regulate speech as to ‘time, place and manner.’”); *Savage v.*
21 *Trammell Crow Co.*, 223 Cal.App.3d 1562, 1572 (1990) (After reviewing a series
22 of California decisions addressing the free speech rights of California citizens in
23 privately owned shopping centers, the court concluded that although a citizen’s
24 “right to engage in expressive activity at shopping centers is found solely in the
25 broader protection provided by California’s Constitution, a shopping center’s
26 power to impose time, place and manner restrictions on such activity is
27 nonetheless measured by federal constitutional standards.”); *Kuba*, 387 F.3d at
28 857 (“California’s ‘formulation of the time, place, and manner test was fashioned

1 from a long line of United States Supreme Court cases.”) (citation omitted).
2 Accordingly, the Court will rely on mostly federal authorities in analyzing the
3 constitutional issues.⁴

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

10 3. The Ordinance Serves a Significant Government Interest

11 The City argues that “the Ordinance advances two significant interests: (1)
12 the government’s interest in prohibiting litter and visual blight thereby preserving
13 the aesthetics of the community, and (2) the individual’s interest in having their
14 [sic] private property left alone by those who do not have permission to use it.”
15 While Plaintiffs concede that litter prevention is a legitimate state interest, they
16 argue that it is not a significant state interest. This Court disagrees. If littering is
17 allowed to occur and does occur, the litter undermines the City’s significant
18 interests in promoting esthetic values. *See Taxpayers for Vincent*, 466 U.S. at 806
19 (Curbing littering and the visual blight that comes with it advances the city’s
20 “weighty, essentially esthetic interest in proscribing intrusive and unpleasant
21 formats for expression.”); *Metromedia Inc. v. City of San Diego*, 453 U.S. 490,
22

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

1 507-08 (1981) (four-justice plurality) (“Nor can there be substantial doubt that the
2 twin goals that the ordinance seeks to further-traffic safety and the appearance of
3 the city-are substantial governmental goals. It is far too late to contend
4 otherwise.”). The most applicable precedent is *Jobe v. City of Catlettsburg, supra*,
5 409 F.3d at 273-74. The careful opinion in that case begins with this pithy
6 formulation of the issue present here: “May a city, consistent with the First and
7 Fourteenth Amendments, prohibit individuals from placing leaflets on car
8 windshields and other parts of a vehicle without the consent of the owner?” *Id.* at
9 262. The court concluded that a city may do so, summarizing its reasons as
10 follows:

11
12 Because the law represents a content-neutral restriction on the time,
13 place and manner of speech, because the law narrowly regulates the
14 problems at hand (littering, visual blight and unauthorized use of
15 private property), because the law leaves open ample alternative
16 avenues for distributing leaflets in an inexpensive manner (face-to-
17 face on a public street and door-to-door in a neighborhood) and
18 because the law has much in common with a ban on placing signs on
19 utility poles, see *Members of City Council of Los Angeles v.*
20 *Taxpayers for Vincent*, 466 U.S. 789 (1984) . . .

21 *Jobe*, 409 F.3d at 262.

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

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

3 Plaintiffs next cite *Desert Outdoor Advertising, Inc. v. The City of Moreno*
4 *Valley*, 103 F.3d 814, 819 (9th Cir. 1996) for the proposition that the Ordinance
5 here does not pass constitutional muster because prior to the filing of this lawsuit,
6 San Clemente provided no reason or purpose for its enactment. *Desert Outdoor*
7 *Advertising* is of little help to Plaintiffs, because a city has a recognizable and
8 legitimate interest in preventing littering, and Section 8.40.130 reflects San
9 Clemente’s objective to do so. That Ordinance is part of Chapter 8.40 of the
10 Municipal Code of San Clemente, which is entitled “LITTER.” Recently, in *Get*
11 *Outdoors II, LLC v. City of San Diego*, ___ F.3d ___, 2007 WL 3197108 at *5
12 (9th Cir. Nov. 1, 2007), the Ninth Circuit upheld a city’s restrictions on billboards.
13 It stated,

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

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

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

1 1214, 1221-22 (8th Cir. 1998). The court in *Jobe*, which was decided seven years
2 after *Krantz* and five years after *Khademi*, declined to adopt the *Krantz* court’s
3 reasoning. Indeed, *Jobe* expressed flat disagreement with three facets of the
4 *Krantz* analysis. It rejected the Eighth Circuit’s decision to assume that the
5 placing of fliers on cars is not littering. It faulted *Krantz* for not addressing
6 *Taxpayers for Vincent*. And it criticized *Krantz* for failing to account for the
7 fundamental difference between traditional leafleting on the one hand and the
8 activities of both *Jobe* and *Krantz* on the other. In that regard, *Jobe* sensibly noted
9 that the windshield of a vehicle does not occupy the same place “in the long-
10 accepted traditions of leafleting . . . that governments may regulate only with the
11 utmost care.” *Id.* at 274.

12 4. The Ordinance is Narrowly Tailored

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

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

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

9
10 Placing unrequested leaflets on privately owned cars, moreover, amounts to
11 a form of littering no less than placing leaflets on privately owned lawns or
12 directly on the public streets. There is nothing special about a car-or, for
13 that matter, about a bicycle, a baby stroller, an individual's back or a
14 lawn-that invites others to place leaflets or advertisements on it without the
15 owner's consent . . . [Thus], parking a car on a public street is not an
16 invitation to place literature on the car or, worse, to become a vehicular
sandwich board for another citizen's message of the day . . . Unlike
traditional leafletting, the recipient of an advertisement or other pamphlet on
a car windshield has no choice in receiving the literature, no choice in
accepting the burden of disposing of it and no choice in peeling it off the
windshield after a rain shower.

17 409 F.3d at 270-71.

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

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

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

17 5. The Ordinance Leaves Open Ample Alternative Channels for the
18 Communication of Plaintiffs’ Message.

19 Plaintiffs contend that placing leaflets on vehicles is the safest and most
20 cost-effective means to communicate their message. Although courts are sensitive
21 to the need to permit inexpensive methods of spreading information, “this
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23 ⁵ It is true that in *Deida v. City of Milwaukee*, 176 F.Supp. 2d 859 (E.D. Wisc.
24 2001), the court held that an ordinance that prohibited anyone from “plac[ing] any
25 . . . pamphlet in or on any vehicle, whether or not the vehicle is occupied” violated
26 the First Amendment. The ordinance in question was content-based, so the court
27 applied a “strict scrutiny” test, and found that the city’s justification for the
28 ordinance did not meet the “compelling” standard. Because the City is not required
to demonstrate that its interest in preventing litter is “compelling,” the holding in
Deida is not dispositive here.

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

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

15 **F. First Amendment Rights of Putative Recipients**

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

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

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

6 **G. Irreparable Injury**

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

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

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24 ⁶ Plaintiffs also rely on *Clement v. Cal. Dept. of Corrections*, 364 F.3d 1148, 1151
25 (9th Cir. 2004), in which the Ninth Circuit held that a regulation prohibiting prison
26 inmates from receiving mail containing material downloaded from the Internet
27 violated the inmates’ First Amendment rights. In *Clement*, contrary to what
28 Plaintiffs contend, the Ninth Circuit did not apply a test that analyzed a law’s effect
on willing recipients’ constitutional right to receive speech; the Ninth Circuit instead
applied the Supreme Court’s “four factor test to determine whether a prison policy
serves legitimate penological objectives.” *Id.* at 1151-52.

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

IV. CONCLUSION

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

IT IS SO ORDERED.

DATED: November 27, 2007



A. HOWARD MATZ
United States District Judge

