

PLANET K'S JUNKED VEHICLE
AND THE FIRST AMENDMENT

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AND THE FIRST AMENDMENT

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TABLE OF CONTENTS

	Page
ACKNOWLEDGEMENTS.....	v
ABSTRACT.....	vii
CHAPTER	
I. INTRODUCTION.....	1
II. BACKGROUND.....	3
III. LEGAL HISTORY.....	4
Municipal Court.....	4
United States District Court.....	5
5th U.S. Circuit Court of Appeals.....	6
IV. FIRST AMEDNMENT HISTORY.....	11
V. DISCUSSION.....	14
VI. CONCLUSION.....	16

ABSTRACT

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Many of the landmark free speech decisions made by the Supreme Court involve proactive expressions made during times of unrest. For example, the high court recognized the right of a citizen to burn a United States flag as symbolic speech and political protest in 1989. It had also protected the right of people to use hate speech, to burn crosses, and to support the violent overthrow of the government as an abstract doctrine. While some free speech issues have been resolved for many years by the court, other topics arise from struggles involving free speech. The purpose of this thesis is to examine one such free speech controversy in San Marcos, Texas. Planet K, an adult novelty store, claimed that a junked car on the lot was under protection of the First Amendment and went as far as the 5th Circuit Court of Appeals. Under the guidelines of intermediate scrutiny the car was ultimately removed from the lot.

INTRODUCTION

Many of the landmark free speech decisions made by the United States Supreme Court involve proactive expressions made during times of unrest. For example, the high court recognized the right of a citizen to burn a United States flag as symbolic speech and political protest in 1989. It has also protected the right of people to use hate speech, to burn crosses, and to support the violent overthrow of the government as an abstract doctrine.

While some free speech issues have been resolved for many years by the court, other topics arise from struggles involving free speech. For example, Occupy Wall Street, the series of ongoing demonstrations in New York City protesting social and economic equality, has inspired other Occupy protests throughout the country.

The purpose of this thesis is to examine one such free speech controversy in San Marcos, Texas. In 2007, a novelty gift store used an old vehicle as an obscure advertising device. The City of San Marcos ticketed store owner Michael Kleinman as well as other employees claiming that the vehicle violated an ordinance banning junked vehicles.

Kleinman fought the tickets protesting the car as a work of art and having protection under the First Amendment. After three years, the case went as far as the 5th U.S. Circuit Court of Appeals, which resulted in a removal of the car from the San Marcos Planet K. Intermediate scrutiny and strict scrutiny - tests developed by the U.S. Supreme Court to determine whether laws are constitutional - played a large role in the decision of this First Amendment Case in the 5th Circuit as well as the removal of the junked vehicle from the lot of the Planet K establishment in San Marcos, Texas. The 5th Circuit ruled that the

junked vehicle ordinance did not violate the First Amendment because the ordinance was not intended to regulate speech.

After a trial, an appellate review by the 5th U.S. Circuit Court of Appeals and a rejection by the U.S. Supreme Court, the story of the novelty shop's free speech battle concluded in 2011, serving as another example of what the First Amendment protects and what it does not.

BACKGROUND

Planet K is a chain of shops that sells a variety of novelty items and gifts such as smoking accessories, books and incense. Kleinman operates 11 stores throughout Austin and San Antonio, Texas. Kleinman has a tradition of celebrating the new Planet K store openings with a “car bash,” a charity event in which participants pay \$1 for the privilege of taking a sledgehammer to a car for five strikes. This particular junked vehicle outside a Planet K in San Marcos along Interstate 35 was a 1988 Oldsmobile car.

After one particular charity event the top half of the car was demolished, the tires, hood and trunk lid were removed the engine fluids were drained, and employees dumped a few cubic feet of dirt inside and planted several native cacti and yucca. Kleinman had the car painted with scenes of local landmarks, Ralph the Swimming Pig and Texas State University’s Old Main building. Kleinman hired two local artists, Scott Wade and John Travis, to paint the Oldsmobile. Kleinman did not dictate the content of the designs, however he requested that the phrase “make love not war” to be incorporated into the design on the vehicle. The vehicle was positioned in front of the store and made visible to motorists traveling north on Interstate 35 which served as an unusual advertising device.

LEGAL HISTORY

I. Municipal Court

On numerous occasions after the alteration of the Oldsmobile into a junked vehicle, the City of San Marcos ticketed Planet K and quite a few Planet K employees under an ordinance banning junked vehicles, the city said the “junked vehicle” was not art, but a nuisance. San Marcos Code of Ordinances §§ 34.194, 34.196(a) 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.

Chapter 34 of the San Marcos City Code states that anyone creating a nuisance risks a fine up to \$200 for each day that the nuisance exists. Kleinman claimed that he had protection under the First Amendment to have the junked car on his premises. According to city and state laws, junked vehicles are subject to removal for destruction if it is not completely enclosed in a building or screened by means of a heavy-duty contour-fitting cover so that no part of the vehicle except the tires is exposed to public view. The City of San Marcos saw the junked car as a threat to public health and safety.

On Nov. 7, 2007, Armando Gil, a San Marcos code enforcement officer, sent a letter to the store manager, Joe Ptak, declaring the vehicle as a nuisance. After several citations the City of San Marcos held a hearing on Dec. 20, 2007. After receiving various tickets concerning the junked vehicle, Kleinman contested the tickets and requested a hearing to determine whether the vehicle falls within that definition of a junked vehicle or a piece of art. In the January 2008 trial Municipal Court Judge John Burke ordered the

store's owners to remove the vehicle. The San Marcos Municipal Court found that the Oldsmobile did fall into the definition of a junked vehicle and ordered the junked car be removed or brought into compliance by concealment behind a fence or in an enclosure. Kleinman did not appeal the Municipal Court hearing; instead, he brought a separate civil suit in state court asserting that the city rules violated his right to free speech. Kleinman sued the city to keep it from seizing the vehicle, stating that would be a violation of his First Amendment rights. The case was transferred from state to federal court.

II. United States District Court

In March 2008, U.S. District Court Judge Sam Sparks ruled that junked vehicle ordinances are permissible and dismissed Kleinman's claim. Judge Sparks ordered Planet K to remove its junked vehicle or to screen it from public view. The federal judge dismissed claims by plaintiffs Kleinman, Wade, and Travis that the city's junked car rules violated their rights to free speech. Sparks' ruling centered on the car as an expression of free speech. Sparks stated, "That though a junked vehicle may be a particularly effective mode of expressing concern over pollution caused by automobiles, the use of an automobile as an artistic medium is still part of the manner in which Plaintiff's statement is expressed, not the statement itself. Judge Sparks stated, "It is clear the City's ordinance is not aimed at restricting speech about automobile pollution, and Plaintiff is free to express his concern over automobile pollution in a host of other ways that do not violate city ordinances. The ordinance is reasonably tailored to protect the public's interest in removing the 'urban blight' caused by junked vehicles in public places."

III. 5th U.S. Circuit Court of Appeals

Planet K argued that the San Marcos ordinance violated Planet K's First Amendment rights of freedom of speech, because the vehicle was an effective mode used to express concern over pollution caused by automobiles as well as the phrase "make love not war" painted on the side of the vehicle. However, the City of San Marcos's ordinance is not aimed at restricting speech about automobile pollution and Kleinman is able to express his concern of air pollution in a host of other ways that do not violate the city's ordinance of junked vehicles.

On Feb. 20, 2010, the case was heard by the 5th U.S. Circuit Court of Appeals. The Court ultimately found that the appellants' principal contention was simple: visual art is fully protected by the First Amendment. The Court stated neither the city ordinance nor the state statute standing behind the ordinance may impose a "content-based regulation" that prohibits the car-planter's public display. The appellants, while recognizing that the car-planter is a "junked vehicle," state that the ordinance fails to satisfy intermediate scrutiny as applied to their creation. That this advertisement for a novelty shop could be considered a constitutionally protected expression expresses more to the law's ambiguity than to the capability or intention of the artists. In fact, the city of San Marcos specified 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." The Supreme Court, in the development of applying the First Amendment to an expressive act 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 is limited to expressions conveying a “particularized message.”

The 5th Circuit declared in the ruling, regardless of the intentions of its creators or Planet K’s owner, the junked vehicle is an advertisement as well as a junked vehicle. Appellants acknowledge that the car did fall within the definition of the San Marcos ordinance. Furthermore, the 8th U.S. Circuit Court of Appeals, challenged before Hurley, a separate case involving a junked vehicle, involved a wrecked auto that was displayed street side to remind the public how the owner’s son had passed, had no difficulty finding that the auto’s removal under a junked-vehicle ordinance endured intermediate scrutiny. 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.

The City concedes that the junked vehicle did have some protected expressive content; the Fifth Circuit applied the intermediate scrutiny test expressed by the Supreme Court in *United States v. O’Brien* (1968), which balances the individual’s right to free speech with the government’s power of regulation. The O’Brien test rests on the principle that when “speech” and “non-speech” elements are combined in a course of conduct, a valid governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. Under O’Brien, the three pronged test, a regulation is constitutional if it is within the constitutional power of the government, if it furthers an important or substantial governmental interest, the government interest is isolated to the suppression of free expression as well as the incidental restriction on

alleged First Amendment freedoms is no greater than is vital to the furtherance of that interest.

The 5th Circuit ruling centered on four main points. The 5th Circuit stated in the ruling that firstly, 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. The San Marcos Ordinance states that junked vehicles are also an eye-catching nuisance to children. Rodents, pests, and weeds flourish in and around these junked vehicles. A junked vehicle can become a public nuisance when the vehicle is visible from a public place or is harmful to the safety and welfare of the general public, tends to reduce the value of private property, may produce vandalism, creates fire hazards as well as constitutes an attractive nuisance creating a hazard to the health and safety of others. The junked vehicle can also become a nuisance when it is damaging to the economic welfare of the city by producing urban blight which is contrary to the maintenance and continuing development of the City and is a public nuisance.

The city of San Marcos pursued more than 1,300 junked vehicle cases in the two years prior to this in particular trial. These facts, found by the district court, fully support the City's interests in regulating junked vehicles. The Appellants' insistence that the junked vehicle has been rendered safe is irrelevant to the constitutionality of the ordinance. The City's right to regulate junked vehicles is the concern of First Amendment review, not the individual status of each vehicle.

The 5th Circuit stated in the ruling that the city of San Marcos argued that the junked-vehicle ordinance is not intended to regulate “speech” at all but is a content-neutral health and safety ordinance issue. Appellants argue that the City’s enforcement of the ordinance is inspired by disagreement with the content of the junked vehicles message of “make love not war” and consequently should be subject to the strict scrutiny reserved for content-based speech regulations. However, the district court made no finding of an impermissible motivation and was subject to intermediate scrutiny.

Lastly, the 5th Circuit stated 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 the vehicle is enclosed from public view. Appellants contend that the ordinance is not narrowly tailored because it permits an exception for dealerships and junkyards. However, the underlying state statute forbids the City of San Marcos 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. Consequently, the City of San Marcos has an all-encompassing legal basis for exempting dealerships and junkyards from its junked vehicle statute. The exemption for businesses that deal with junked vehicles reinforces rather than discredits the content-neutrality of the junked vehicle ordinance. Both the City of San Marcos and the State of Texas reasonably differentiate individual conduct from commercial conduct, which creates different hazards and requires different regulations. Also, the ordinance is limited to regulating the medium and location of the junked vehicle and in so doing it reduces the blight and attractive nuisance problems caused by vehicular accidents.

The 5th Circuit cited the case of *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston* as a precedent of the Planet K case. For example, in the Hurley case, a 1995 United States Supreme Court Case regarding the right to assemble and for groups to determine what message is actually conveyed to the public. The Court found that private citizens organizing a public demonstration may not be compelled by the state to include groups who impart a message the organizers do not do not want to be included in their demonstration, even if such a law had been written with the intent of preventing discrimination.

In 1992, the Irish-American Gay, Lesbian and Bisexual Group of Boston, otherwise known as GLIB, requested that it be allowed to march in the parade alongside the usual attendees. GLIB argued that they were not primarily a group aimed at conveying a “gay, lesbian, and bisexual message”; rather, they said they were Irish descendants who also happened to be gay, lesbian, and bisexual, and who are proud of both their sexual orientation as well as their Irish ancestral nationality. GLIB was not allowed to march in the parade; because of this GLIB sought a court order compelling the Council to allow them to march. GLIB was able to cite a Massachusetts law that prohibited “discrimination or restriction on account of... sexual orientation... relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement.” The court order was granted, and GLIB was allowed to march in the parade “uneventfully.”

FIRST AMENDMENT HISTORY

The First Amendment prohibits the making of any law respecting an establishment of religion, obstructing the free exercise of religion, abridging the freedom of speech, infringing on the freedom of the press, interfering with the right to peacefully assemble, or prohibiting the petitioning for a governmental redress of grievances. However, the First Amendment covers a broad umbrella of circumstances.

Trager, Russomanno, and Ross (2010) state that when the First Amendment is understood as a mode through which the individual expresses his freedom of speech, freedom of speech and freedom of the press receive protection only when they are necessary to advance such social benefits as the search for truth, an open marketplace of ideas or the process of self-governance. Within the First Amendment, the Court must take into the account strict scrutiny as well as intermediate scrutiny.

The Supreme Court generally views content-based laws as presumptively invalid. Like prior restraint, laws that punish the expression of specific ideas after the fact pose a direct and serious threat of government censorship. To stop government censorship of disfavored ideas, the Supreme Court generally applies a very rigorous test to determine when content-based laws are constitutional. Under the test, strict scrutiny, the Court strikes down all content-based laws unless they are the least-restrictive means to advance a compelling government interest. Very few laws actually pass the strict scrutiny test. To survive strict scrutiny, a law must be necessary and use the least restrictive means to advance a compelling government interest.

For example, in *Texas v. Johnson*, the Supreme Court employed strict scrutiny to strike down a Texas law that made it a crime to desecrate the American flag. Gregory Lee Johnson had been convicted, sentenced to a year in prison and fined \$2,000 for

deseccration of a venerated object for burning the flag at a protest at the Republican National Convention in Dallas in 1984. The state of Texas said its ban on flag deseccration preserved an important symbol of national unity and helped prevent breaches of the peace. However, Johnson challenged the law and argued that it violated his right to free speech. After determining that flag burning was a form of symbolic speech, the Supreme Court ruled that the Texas law prohibiting flag deseccration was unconstitutional. In reaching its decision, the Court found that the state's interest was inadequate to justify the law's content-based suppression of speech. The law was unconstitutional because it failed to serve a compelling interest and it did not use the least intrusive means to advance its goals.

The Supreme Court is more willing to find content-neutral laws, as opposed to content-based laws, constitutional. Content-neutral laws usually regulate the non-speech elements of a message, such as the time, the place or the manner in which the speech occurs. Accordingly, some content-neutral are called the time/place/manner laws. Although, content-neutral laws such as noise ordinances do not censor specific ideas, they may seek to achieve some legitimate government goal and, in fact reduce the overall quantity and diversity of speech available in the market place of ideas or reduce the ability of a speaker to reach a large audience.

In a case arising out of protests of the Vietnam War, the Court established its foundational First Amendment test for content-neutral laws. In 1968, when David Paul O'Brien burned his draft card at the Boston Courthouse to protest the war, he was convicted under a federal law that made it a crime to destroy or mutilate the card. The law required 18-year-old males to obtain and carry a draft card at all times to aid in the

smooth functioning of the draft and the United States Military and to protect the national security. In the *United States v. O'Brien*, the Court rejected O'Brien's argument that the law violated his First Amendment rights. The Court found that the law was content-neutral, applied intermediate scrutiny, a form of heightened review, and upheld the law as constitutional. Although the Supreme Court agreed that burning a draft card was a form of symbolic speech, it held that the government's important interest in maintaining a military outweighed O'Brien's First Amendment right to express his views by burning his card. In reviewing his case, the Court established a test that contains three substantive parts to determine that a content-neutral law is constitutional if: it is not related to the suppression of speech, advances an important government interest, and is narrowly tailored to achieve that interest with only an incidental restriction of free expression. Most laws reviewed under intermediate scrutiny are upheld.

DISCUSSION

Kleinman states that he had protection under the First Amendment because the vehicle was used as a mode through which he expressed his freedom of speech with the phrase “make love not war” and was also used to combat air pollution. However, the City of San Marcos ordinance bans the use of junked vehicles on public property.

Depending on whether the 5th Circuit chose to use the intermediate or strict scrutiny test plays a large role in the overall ruling of the case. There is an automatic presumption that a law is unconstitutional under strict scrutiny. One must determine if the law is necessary to advance a compelling government interest and go no further in harming First Amendment rights. However, the 5th Circuit used intermediate scrutiny to decide the case of *Kleinman v. City of San Marcos*, because the junked vehicle ordinance in San Marcos is content-neutral, not content-based. Content-neutral laws generally regulate the non-speech elements of a message, such as the time, the place or the manner in which the speech occurs.

In a persuasive argument, the 5th Circuit determined that the ordinance was unrelated to the suppression of speech and that the ordinance was in place to regulate junked vehicles. The ordinance advances an important government interest in protecting citizens from hazardous parts of the vehicle, and is narrowly tailored to achieve that interest incidental of free expression.

The intermediate scrutiny test articulated by the Supreme Court in the case of *O’Brien*, 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, like a junked vehicle with the phrase “make love not

war”, a valid governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. Under O'Brien, a regulation is constitutional if it 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.

In the case of *Kleinman v. City of San Marcos*, the 5th Circuit suggests that the junked-vehicle ordinance is not intended to regulate “speech” at all but is a content-neutral health and safety ordinance. If viewed as some form of protected speech, the car-planter represents commercial speech entitled to a lesser level of constitutional protection. Ultimately the City of San Marcos viewed the junked vehicle as hazardous to the safety of others, and the phrase “make love not war” as well as the use of the junked vehicle to regulate air pollution was not the City’s concern. Kleinman viewed the ordinance as a violation of his First Amendment right to free speech, but Kleinman had the option to express his right to free speech any place that does not violate the City’s ordinance and would not pose as a danger to others.

CONCLUSION

The First Amendment freedom of speech cases involve proactive expressions made during times of unrest. For example, the right of a citizen to burn a flag as symbolic speech, the First Amendment offers protection for people to use hate speech and burn crosses. This examination of free speech controversy in *Kleinman v. The City of San Marcos* proves through intermediate scrutiny that a junked vehicle on the premise of a Planet K novelty store is not a violation of freedom of speech.

Although Kleinman protested that the San Marcos junked vehicle ordinance violated his First Amendment rights, the intermediate scrutiny test proved that this content-neutral San Marcos ordinance was unrelated to the suppression of speech, because it was in place to protect others from hazardous material from the vehicle. The ordinance advances an important government interest and is narrowly tailored to achieve that interest incidental of free expression. Kleinman could have chosen to express his freedom to speak in various other ways besides using a junked vehicle. The City of San Marcos did not attempt to regulate Kleinman's freedom of speech in no way, but as protection to other San Marcos inhabitants. The junked vehicle now resides in Austin at the Planet K location on Stassney Lane. The City of Austin has not cited that store over the car.

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