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CARS AS AN APPROPRIATE VEHICLE FOR COMMUNICATION? EXPLORING “THE SHORT, THOUGH REGULAR, JOURNEY”* FROM THE WINDSHIELD TO THE PAVEMENT

NICOLE RUBIN**

INTRODUCTION

Imagine that you are walking to your car after a long, exhausting day at the office. You climb into the driver’s side and immediately turn on the heat to combat the dark, cold night from which you have just temporarily escaped. As you are pulling out of the parking garage, you notice an advertisement on your windshield for the grand opening of a new nail salon in town. The advertisement is all too familiar – last week you received the same one advertising the impending opening, the week before your windshield promoted drink specials for a nightclub. Do you start thinking about the constitutional right to freedom of speech, or are you frustrated that you have found yourself frantically turning on your windshield wipers to dispose of this flier, once again, before you get onto the highway?

This hypothetical scenario recently has become the subject of spirited legal debate.¹ While the Supreme Court has protected solicitations that are distributed door-to-door,² courts have struggled to figure out how much protection this particular kind of speech—speech that is contained by your

* *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983) (quoting *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880 (S.D.N.Y. 1967), *summarily aff’d* 386 F.2d 449 (2d Cir. 1967)). In that case, the Court struck down restrictions on unsolicited mailed advertisements, rationalizing that the “short, though regular, journey from mail box to trash can” was an acceptable burden to place on those unwilling to receive such speech. *Id.* This Note suggests that, with regard to vehicle leafleting, the true final destination for this kind of speech is not the trash can, but the street.

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¹ See *infra* Part II.

² See *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (striking down a ban on door-to-door distributions of literature); *Schneider v. State*, 308 U.S. 147, 165 (1939) (voiding an ordinance that, in part, prohibited door-to-door leafleting); *Watchtower Bible and Tract Soc’y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 151–52 (2002) (invalidating a permit requirement for door-to-door canvassers).

car windshield—should receive. So far, Circuit Courts are split regarding the constitutionality of vehicle leafleting bans.³ All have applied a three-part test, resembling intermediate scrutiny, for determining the constitutionality of a time, place, or manner restriction, but have reached different outcomes.⁴ This is because the constitutionality of time, place, and manner restrictions is governed by the nature of the place where the speech occurs, and courts have been conflicted as to what type of forum a private vehicle parked on a public street or in a parking lot constitutes.⁵ For the purposes of analyzing time, place, and manner regulations, courts have likened vehicles with either the public forum or private property. Most recently, in *Klein v. City of San Clemente*, the Ninth Circuit considered vehicles private property, and invalidated a municipal ban on vehicle leafleting by analogizing cars to homes, a place where leafleting traditionally has been protected.⁶ Similarly, the Seventh Circuit in *Horina v. City of Granite* considered vehicles private property and struck down vehicle leafleting regulations, rejecting the government’s argument that automobiles were nonpublic fora.⁷ These cases stand in contrast to the Sixth Circuit’s decision in *Jobe v. City of Catlettsburg*, which also considered a vehicle private property but upheld a ban on vehicle leafleting because there is no “traditional right of access” to a car windshield.⁸ In yet another case, the Eighth Circuit in *Krantz v. City of Fort Smith* did not even reach the issue of what type of forum vehicles should constitute for the purpose of free speech analysis because both parties conceded that vehicles parked on public streets and parking lots were public fora, and not private property.⁹

This Note argues that courts are using the wrong forum classification for vehicles in analyzing ordinances that ban vehicle leafleting. Vehicles parked on city streets and in city parking lots should be considered nonpublic fora—not private property and not public fora—for the purposes of free speech analysis, and thus subject to rationality review.¹⁰ There are

³ See *infra* Part II.

⁴ See *infra* Part II.

⁵ See *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (holding that the nature of a place determines the reasonableness of time, place, and manner regulations); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985) (finding that the government’s control of a speaker’s right to access is based on the nature of the property).

⁶ 584 F.3d 1196 (9th Cir. 2009).

⁷ 538 F.3d 624 (7th Cir. 2008).

⁸ 409 F.3d 261 (6th Cir. 2005).

⁹ 160 F.3d 1214 (8th Cir. 1998).

¹⁰ CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 46 (3d ed. 2009) (explaining that under rationality review, the challenger has the burden of proving that the regulation is

several reasons why vehicles are more appropriately classified as nonpublic fora rather than private property or public fora. First, vehicles are not analogous to homes, which have been classified as private property. The government has more control over vehicles, there is no traditional right of access to vehicles, and there are other alternatives available for leafleters to reach car owners. Second, the amount of government control over vehicles is similar to the government's control over private mailboxes, which have been considered nonpublic fora in free speech jurisprudence. Third, vehicle leafleting ordinances are legitimate exercises of a local government's police power. Local governments deserve deference in this regard because they are in the best position to effectively balance the general needs of the citizens within their territories. Lastly, deferring to municipalities by subjecting vehicle leafleting ordinances to rationality review will bring uniformity to judicial treatment of vehicle leafleting bans. While courts differ as to whether litter prevention is a significant interest, all have agreed that litter prevention is a legitimate interest.¹¹

Part I of this Note provides a historical overview of the development of the public forum doctrine, and explores how courts traditionally have regarded leafleting within each forum. Part II of this Note examines how Circuit Courts have divided in evaluating the constitutionality of municipal bans on vehicle leafleting. Part III of this Note argues that vehicle leafleting regulations should be analyzed under the nonpublic forum doctrine, which would subject the ordinances to rational basis review.

I. THE HISTORICAL PROTECTION AFFORDED TO TRADITIONAL PUBLIC FORA AND TRADITIONAL LEAFLETING

This Section will explain the history of two areas of free speech that customarily have received protection by the courts: speech that occurs in a traditional public forum and speech expressed by traditional leafleting. While these two areas of speech are not the only types of speech that have been given protection, they are among the types of speech that are considered so historically important to the free expression of ideas as to render them deserving of the highest level of constitutional protection.

Even for these two highly protected forms of speech, courts have

not rationally related to a legitimate government objective, and noting that this form of review is deferential to the government); *Mwagile v. Holder*, 374 F. App'x 809, 816 (10th Cir. 2010) (clarifying that, in a rational-basis review, the party challenging the legislation bears the burden of "negativ[ing] every conceivable basis which might support it.").

¹¹ See *infra* Part II.

determined that some government regulation is permissible. For example, speech restrictions in nonpublic fora as well as restrictions that further significant government interests in maintaining the health and safety of citizens have been upheld.¹² Thus, this Section provides an overview of the types of government restrictions that have been considered acceptable by the courts, as well as the kinds of regulations deemed unacceptable by courts.

A. *Public v. Nonpublic Fora*

a. Speech on Property That Has Been Considered a Public Forum

The public forum doctrine originated in *Hague v. CIO*,¹³ where the Court recognized that “[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public” and held that “[s]uch use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”¹⁴ It is well established that streets and parks are traditional public fora for speech,¹⁵ but any place that has been devoted to public expression by tradition or government authorization could be considered a traditional public forum.¹⁶ Once a traditional public forum is implicated, the Court will usually apply strict scrutiny to the government’s regulation of speech.¹⁷

In 1946, the protection of free speech on public property was expanded beyond the traditional forum of public streets and parks in *Marsh v. Alabama*.¹⁸ Although the appellant, a Jehovah’s Witness, was distributing literature on a sidewalk, Gulf Shipbuilding Corporation privately owned the sidewalk.¹⁹ The Court held that under some circumstances, privately

¹² See *infra* Part I.A.2, I.B.2.

¹³ 307 U.S. 496 (1939).

¹⁴ *Id.* at 515.

¹⁵ See *Schneider v. State*, 308 U.S. 147, 160, 163 (1939) (stressing the duty of municipal authorities to keep their communities’ streets “open and available” for the people, since this is the primary purpose to which the streets are dedicated and because streets are the “natural and proper place[] for the dissemination of information and opinion”); *Hague*, 307 U.S. at 515.

¹⁶ See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (describing traditional public fora as “places which by long tradition or by government fiat have been devoted to assembly and debate . . .”); *Hague*, 307 U.S. at 515.

¹⁷ See *Perry*, 460 U.S. at 45 (stating that in traditional public fora, “the rights of the state to limit expressive activity are sharply circumscribed.”); see also *United States v. Grace*, 461 U.S. 171, 180 (1983) (mentioning “[t]raditional public forum property occupies a special position in terms of First Amendment protection . . .”).

¹⁸ 326 U.S. 501, 502–03 (1946).

¹⁹ *Id.*

owned property may be considered publicly held for free speech purposes when such places were “accessible to and freely used by the public in general,” and there was nothing to distinguish them from public places.²⁰ After *Marsh*, the Court considered places such as privately owned shopping centers²¹ and auditoriums in privately owned buildings²² to be public places for the purposes of free speech analysis.

The civil rights movement further extended the concept of the public forum by creating constitutional rights of access to public places where speech and protest were not the primary functions of the property.²³ For example, in the 1961 decision of *Garner v. Louisiana*, speech protection was provided to black students who staged a sit-in at a whites-only lunch counter.²⁴ Four years later, First Amendment protection was given to protestors conducting a peaceful sit-in at a public library in *Brown v. Louisiana*.²⁵ In 1972, the Court struck down regulations of a demonstration in front of a high school in *Grayned v. City of Rockford*.²⁶ Thus, the evolution of the public forum preceded the Court’s decision in *Perry Education Association v. Perry Local Educators’ Association*²⁷ in 1983, which formally classified the various types of public fora into three distinct categories: the traditional public forum,²⁸ the limited public forum,²⁹ and the nonpublic forum.³⁰

²⁰ *Id.*

²¹ *Almagamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 319 (1968) (providing speech rights in a privately-owned shopping center).

²² *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (striking down restrictions of a speech delivered in a Chicago auditorium).

²³ See Eric D. Strand, *Constitutional Law—The Supreme Court’s Misapplication of Public Forum Doctrine Creates Governmental Veto of Political Speech by Ballot-Qualified Candidates—Arkansas Educational Television Commission v. Forbes*, 73 TEMP. L. REV. 331, 346 (1998) (“Corresponding with the civil rights movement of the 1960s and 1970s, the Supreme Court extended its public speech analysis beyond the traditional forum of streets and parks.”); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 112 (1986) (“A significant factor . . . in expanding public forum was the civil rights movement of the 1960s.”).

²⁴ 368 U.S. 157, 173–74 (1961).

²⁵ See *Brown v. Louisiana*, 383 U.S. 131, 143 (1966) (“A State or instrumentality may, of course, regulate the use of its libraries or other public facilities. But . . . [i]t may not invoke regulations as to use . . . as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights.”); see also *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (protecting a protest on statehouse grounds).

²⁶ 408 U.S. 104, 118 (1972) (protecting speakers’ access on or “adjacent to” school grounds).

²⁷ 460 U.S. 37 (1983).

²⁸ See *supra* note 17.

²⁹ *Perry*, 460 U.S. at 45. A limited public forum is public property that the government intentionally designates for “use by the public as a place for expressive activity.” *Id.*

³⁰ See *supra* note 21 and accompanying text.

b. Speech on Property That Has Been Considered a Nonpublic Forum

Courts have held that the government's rights in nonpublic fora are "most analogous to that of a private owner," and that the government therefore enjoys "maximum control over communicative behavior."³¹ Nonpublic fora may be subject to prohibitions of speech, leafleting, picketing, or other forms of communication without running afoul of the First Amendment,³² because government regulations in nonpublic fora need only be reasonable.³³ Accordingly, the character of the property to which speakers seek access determines the extent of First Amendment protection the speech will receive, because strict judicial scrutiny will be applied to speech regulations in public fora, and rational-basis review will be applied to speech regulations in nonpublic fora.³⁴

The foundation for the nonpublic forum doctrine was laid in 1967 in *Adderley v. State of Florida*,³⁵ where the Court gave state officials the power to stop demonstrations on public jailhouse grounds, and found that the "State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated."³⁶ Sixteen years later, the Court in *Perry* formally defined the nonpublic forum as public property that is "not by tradition or designation a forum for public communication."³⁷ *Perry* held that an interschool mail system used by a school district was a nonpublic forum because it was not

³¹ *Paulsen*, 925 F.2d at 69.

³² See *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981) (upholding a ban on depositing unstamped papers in mailboxes, because such mailboxes were not a public forum); see also Philip L. Hirschhorn, *Noncommercial Door-To-Door Solicitation And The Proper Standard Of Review For Municipal Time, Place, and Manner Restrictions*, 55 *FORDHAM L. REV.* 1139, 1149 (1987) ("Unlike the public or the limited public forums, there is no constitutional right of access to nonpublic forums.").

³³ Public property that is not by tradition or designation a forum for public communication is governed by a "reasonableness" standard. *Perry*, 460 U.S. at 46. The government may restrict speech in a nonpublic forum "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because [of the speaker's] most relevant in the vehicle icular message the speech conveys, are considered content-based restricts and are subject to the highest form of scrutiny. *U.S. v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000); *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989).

³⁴ See *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) ("[T]he 'existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.'" (quoting *Perry*, 460 U.S. at 44)).

³⁵ 385 U.S. 39 (1967).

³⁶ *Adderley*, 385 U.S. at 47.

³⁷ *Id.* at 46; see also *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991) (defining nonpublic fora as places which, "by tradition, nature, or design, are not appropriate platforms for unrestrained communication-military installations and federal workplaces, for instance, fall into this category.").

open for use by the general public.³⁸

After the unofficial creation of the nonpublic forum doctrine in *Adderley*, the Court went on to consider other public places nonpublic fora. Government regulations were upheld in military bases,³⁹ charity drives for federal employees,⁴⁰ utility poles on public streets,⁴¹ residential mailboxes,⁴² the sidewalk outside a post office,⁴³ and the advertising space on city buses⁴⁴ because these all were deemed nonpublic fora.

In the 1981 decision of *United States Postal Service v. Greenburgh Civic Association*, the Court recognized that the First Amendment does not guarantee access to property “simply because it is owned or controlled by the government.”⁴⁵ The Court acknowledged that the question of whether a particular piece of personal or real property owned or controlled by the government is a public forum is a blurry one, but nonetheless held that residential mailboxes were nonpublic fora for free speech purposes.⁴⁶ Thus, the Court upheld a statute that prohibited depositing unstamped matter into residential mailboxes.⁴⁷ The Court accepted the government’s justifications for the challenged statute, including the protection of mail revenues, the efficient and secure delivery of mail, and the protection of postal customers’ privacy.⁴⁸ The Court reasoned that although the postal customer

³⁸ *Perry*, 460 U.S. at 47. The Court went on to note that “[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity.” *Id.* at 49.

³⁹ See *United States v. Albertini*, 472 U.S. 675, 684, 686 (1985) (“Military bases are not generally public fora . . . [t]here is ‘no generalized constitutional right to make political speeches or distribute leaflets’ on military bases, even if they are generally open to the public.”) (quoting *Flower v. United States*, 407 U.S. 197, 838 (1976)); *Greer v. Spock*, 424 U.S. 828, 840 (1976) (upholding government regulations that banned all political speeches and demonstrations on a military base and holding that military bases were nonpublic forums).

⁴⁰ See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 804 (holding that the government did not violate First Amendment rights of various advocacy organizations by excluding them from participation in a charity drive, because the drive was a nonpublic forum and “the principal function of the property would be disrupted by [the] expressive activity[.]”).

⁴¹ See *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (noting that the application of the public forum doctrine to utility poles was inappropriate, because “the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government.”) (quoting *U.S. Postal Service v. Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981)).

⁴² See *supra* note 27.

⁴³ See *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (distinguishing post office sidewalks from public sidewalks because they were not traditionally open to the public for speech related activities, and upholding a regulation prohibiting solicitation on postal property because post office sidewalks were nonpublic fora).

⁴⁴ See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 301–02 (1974) (concluding that car card space on a city transit system was not a public forum).

⁴⁵ 453 U.S. at 129.

⁴⁶ *Id.* at 132.

⁴⁷ *Id.* at 133–34.

⁴⁸ *Id.* at 117.

paid for the “physical components” of a mailbox, the mailbox was not purely private property because the customer also agreed to abide by the Postal Service’s regulations in exchange for the Postal Service agreeing to deliver and pick up his or her mail.⁴⁹ The Court further explained that while people are not required to become postal customers, those that do wish to receive and deposit their mail do so under the direction and control of the Postal Service.⁵⁰ Finally, the Court concluded that there was “neither historical nor constitutional support for the characterization of a [mailbox] as a public forum,” because access to mailboxes had been unlawful since 1934 “except under the terms and conditions specified by Congress and the Postal Service.”⁵¹ This further distinguished these authorized depositories from traditional public forums such as streets and parks.⁵²

Relying on *Greenburgh*’s rationale, the Court in *Members of the City Council v. Taxpayers for Vincent* upheld ordinances that forbid posting signs on public utility poles because the challengers failed to demonstrate “a traditional right of access respecting such items . . . for purposes of their communication comparable to that recognized for public streets and parks.”⁵³ The Court considered the government interest of avoiding “visual clutter” as an acceptable justification for the ordinance,⁵⁴ recognizing that at some point, the government’s relationship to things under its dominion and control is “virtually identical to a private owner’s property in the same kinds of things[.]”⁵⁵ The Court reasoned that the mere possibility that government property can be used as a vehicle for communication did not necessarily mean that the Constitution mandated such uses to be allowed.⁵⁶ Hence, both *Vincent* and *Greenburgh* illustrate the difficulty the Court has had in determining whether public property constitutes a public or a nonpublic forum.

B. Leafletting Regulations

Traditional leafletting is a form of expression where individuals offer handbills, pamphlets, advertisements, notices, and other information to

⁴⁹ *Id.* at 128.

⁵⁰ *Greenburgh*, 453 U.S. at 125–26.

⁵¹ *Id.* at 128–29.

⁵² *See id.* at 130–31.

⁵³ 466 U.S. 789, 814 (1984).

⁵⁴ *Id.* at 816–17 (holding that the state has a legitimate interest in property’s esthetic value because the condition of the environment affects the value of property and quality of life).

⁵⁵ *Id.* at 815 n.31.

⁵⁶ *See id.* at 814 (citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981)).

individuals on the street or sidewalk who remain free to accept or reject the documents.⁵⁷ Leafleting, in its traditional form, has a powerful history.⁵⁸ Colonists like Thomas Paine and Paul Revere regularly utilized this method of communication because it was the only way to express their opposition to England during the American Revolution.⁵⁹ This history explains why courts have given special solicitude to this form of communication, which in the past has been used by those who would not otherwise have been able to express their ideas.⁶⁰ Courts as well as scholars have recognized that leafleting is an inexpensive and efficient way to disseminate information to a large audience.⁶¹

a. Impermissible Government Regulations of Leafleting

The Supreme Court has made clear that bans on door-to-door leafleting are invalid.⁶² In its 1943 decision in *Martin v. City of Struthers*, for example, the Court held that whether leafleters are permitted into private homes depends upon “the will of the individual master of each household, and not upon the determination of the community.”⁶³ Similarly, four years

⁵⁷ *Vincent*, 466 U.S. at 809–10; see also *Schneider v. State*, 308 U.S. 147, 156–57 (1939) (noting that some recipients of leaflets announcing a protest meeting, threw the materials on the sidewalk and into the street).

⁵⁸ See *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (observing that the distribution of religious literature is a long held tradition of missionary evangelism, “as old as the . . . printing presses.”); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (discussing the importance of leaflets in American history).

⁵⁹ *Lovell*, 303 U.S. at 452 (“[P]amphlets and leaflets . . . have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest.”); JOSEPH M. SCHEIDLER, CLOSED: 99 WAYS TO STOP ABORTION 35 (Life Cycle Books 1985) (“During the American Revolution, the colonists were expert in the use of the leaflet; people like Tom Paine and Paul Revere regularly printed articles and handed them out to people. Since the press at that time was under the sway of England . . . [i]f the colonists wanted to express their views on independence or some other facet of English oppression, they had to resort to the leaflet.”).

⁶⁰ See *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (“Distribution of circulars is essential to the poorly financed causes of little people.”); *U.F.C.W., Local 1518 v. KMart Can. Ltd.*, 1999 Can. Sup. Ct. Lexis 52, 31 (“The distribution and circulation of leaflets has for centuries been recognized as an effective and economical method of both providing information and assisting rational persuasion.”); GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND 119 (Southern Illinois University Press 1999) (“In the case of . . . leafleting, the courts have recognized the importance of extending constitutional coverage to protect the communicative conduct of groups.”).

⁶¹ See cases cited *supra* note 60; SCHEIDLER, *supra* note 63, at 36 (acknowledging that some people see leafleting as the “poor man’s way” to distribute information); see also RICHARD K. TAYLOR, BLOCKADE: A GUIDE TO NON-VIOLENT INTERVENTION 166 (Orbis Books 1977) (pointing out that leafleting is easy to do); Shaun Parker, *The History Of Leaflet Distribution* (2008), <http://www.articlesbase.com/direct-mail-articles/the-history-of-leaflet-distribution-477265.html> (explaining that during the Holocaust the Nazi government used leafleting to widely propagate false information about the Jewish community).

⁶² See *Martin*, 319 U.S. at 149 (striking down an ordinance that forbade ringing a doorbell or otherwise summoning a resident to the door to receive handbills); *Schneider*, 308 U.S. at 165 (invalidating an ordinance that forbade door-to-door leafleters).

⁶³ *Martin*, 319 U.S. at 141.

earlier, the Court in *Schneider v. State* recognized that the most effective way to ensure that individuals have notice of leaflets is to focus their “distribution at the homes of the people.”⁶⁴

The Court in *Schneider* also struck down bans on leafleting in public streets.⁶⁵ The Court found that the government’s interests in “keeping the streets clean and of good appearance” was insufficient to justify an ordinance that prohibited a person from “handing literature to [those] willing to receive it.”⁶⁶ Likewise, in *Jamison v. Texas*, which was decided the same year as *Martin*, the Court held that one who is rightfully on a street that the state has left open to the public has the constitutional right to express his views in an orderly fashion, including through leafleting.⁶⁷

Courts have also struck down licensing requirements for leafleters.⁶⁸ In 1938, the Court in *Lovell v. City of Griffin* voided an ordinance that forbade distributing by hand any literature without the written permission of the city manager.⁶⁹ The Court concluded that regardless of the government’s motive, penalties of license and censorship should not be imposed to abridge the freedom of speech.⁷⁰ In 2002, the Court in *Watchtower Bible & Tract Soc’y of N.Y. v. Village of Stratton* voided similar licensing requirements for door-to-door leafleting, describing the requirement that citizens first inform the government of their desire to speak to their neighbors and then obtain a permit to do so as “offensive” to the First Amendment.⁷¹ Thus, like traditional leafleting, door-to-door leafleting has received substantial protection by the Court.

b. Permissible Government Regulations of Leafleting

Despite the protection afforded to traditional leafleting, courts also have indicated that the reserved police powers of the States permit them to

⁶⁴ *Schneider v. State*, 308 U.S. 147, 164 (1939). It is also important to note that one of the statutes at issue in *Schneider* banned the distribution of handbills to passengers in any street car, and prohibited persons from throwing, placing or attaching “any hand-bill in, to, or upon any automobile or other vehicle,” but the Court did not address this particular issue because it only reached as-applied challenges to leafleting door-to-door and on public sidewalks. *Id.* at 154.

⁶⁵ *Id.* at 163.

⁶⁶ *Id.*

⁶⁷ 318 U.S. 413, 416 (1943).

⁶⁸ See *Watchtower Bible & Tract Soc’y of N.Y. v. Village of Stratton*, 536 U.S. 150 (2002) (striking down an ordinance that prohibited canvassers from going door-to-door in residential neighborhoods without a permit); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (invalidating an ordinance prohibiting the “distribution of literature of any kind at any time, at any place, and in any manner without a permit”).

⁶⁹ 303 U.S. at 451–52.

⁷⁰ *Id.* at 451.

⁷¹ 536 U.S. at 165–66.

impose reasonable time, place, and manner restrictions on leafleting.⁷² As a result, courts have upheld some regulations of leafleting activities as constitutional, recognizing that privacy rights and state interests can, in certain circumstances, outweigh First Amendment rights.⁷³

For example, in the 1988 decision of *Frisby v. Schultz*, the Court held that a municipal ordinance that banned picketing and leafleting “before or about the residence . . . of any individual” was constitutional, because it served a significant government interest in protecting residential privacy and only prohibited targeted picketing and leafleting that took place in front of a particular home.⁷⁴ Seven years earlier, significant government interests were also held to justify restrictions on speech in *Heffron v. International Society for Krishna Consciousness*, where a state fair restricted leafleting to assigned booths.⁷⁵ The Court considered the state interest in maintaining the orderly movement of crowds at the fair a sufficient time, place, and manner restriction on the First Amendment right to distribute literature.⁷⁶

The States’ police power to “protect the health and safety of their citizens” also has been used to justify restrictions on free speech in the context of anti-abortion leafleting.⁷⁷ In the 1997 decision of *Schenck v. Pro-Choice Network of Western New York*, for instance, an injunction that created fixed buffer zones that prevented leafleters and protestors from approaching within fifteen feet of health clinic doorways was upheld on the ground that it served a significant government interest in securing “unimpeded . . . access to . . . clinics.”⁷⁸ The injunction also promoted interests such as ensuring public safety and order, protecting the free flow of traffic, safeguarding property rights, and upholding a woman’s freedom

⁷² See *Cantwell v. Conn.*, 310 U.S. 296, 304 (1940) (stating that a State may “by general and non-discriminatory legislation” regulate the times, places and manner of soliciting information to protect the “peace, good order and comfort of the community”); *Ward v. Rock Against Racism*, 491 U.S. 781, 785 (1989) (“[E]ven in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’”) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

⁷³ See *infra* notes 78–86 and accompanying text.

⁷⁴ 487 U.S. 474, 477 (1988).

⁷⁵ 452 U.S. 640, 643, 648 (1981).

⁷⁶ *Id.* at 649–50.

⁷⁷ *Hill v. Colorado*, 530 U.S. 703, 715 (2000) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); see *Planned Parenthood Shasta-Diablo v. Williams*, 10 Cal. 4th 1009 (1995) (holding that a permanent injunction imposing place restrictions on the picketing activities of anti-abortion activists was proper where the restrictions were content neutral, supported a significant state interest, and burdened no more speech than necessary).

⁷⁸ 519 U.S. 357, 376 (1997).

to seek pregnancy-related services.⁷⁹ Similarly, in the 2000 decision of *Hill v. Colorado*, a regulation forbidding leafleters who were within one hundred feet of a health care facility to come within eight feet of another person without first receiving that person's consent was considered constitutional because it served significant government interests in ensuring safety and unobstructed access for patients entering such facilities.⁸⁰ The Court recognized a privacy interest for unwilling listeners to avoid unwanted communications, noting that privacy interests are "far less important 'when strolling through Central Park' than when 'in the confines of one's own home,' or [other situations] when persons are powerless to avoid" the communication.⁸¹ The Court found that the statute protected "those who enter a health care facility from the harassment, the nuisance, the persistent importuning . . . and the implied threat of physical touching that can accompany an unwelcome approach" by a person wishing to "thrust an undesired handbill upon her."⁸² These cases reflect the notion that government interests can validate limits on speech in nonpublic fora and, even occasionally, in public fora.

II. THE SPLIT AMONG CIRCUIT COURTS REGARDING VEHICLE LEAFLETING BANS

Courts have been confused about how to apply the public forum doctrine to municipal time, place, and manner restrictions on vehicle leafleting. This Section highlights the facts and rationales of Circuit Court decisions that have addressed this issue. Each court analyzed the government regulations using a three-part test that assessed the reasonableness of time, place, or manner restrictions.⁸³ Under this test, speech restrictions must: (1) be content-neutral, (2) be narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels of communication.⁸⁴ Section A discusses the Eighth Circuit's decision in *Krantz v. City of Fort Smith*, which struck down a city ordinance that prohibited leafleting of vehicles parked on public property.⁸⁵ Section B

⁷⁹ *Id.*

⁸⁰ *Hill*, 530 U.S. at 725–26.

⁸¹ *Id.* at 716 (quoting *Cohen v. California*, 403 U.S. 15, 21–22 (1971)).

⁸² *Id.* at 724.

⁸³ See *infra* Part II.A–D.

⁸⁴ See *Ward v. Rock Against Racism*, 491 U.S. 781, 798–800 (1989) (setting forth the time, place, and manner test); see also *United States v. Albertini*, 472 U.S. 675, 688–89 (1985) (holding that neutral regulations that control the time, place, and manner of expression are permissible so long as the neutral regulation would be achieved less effectively absent the regulation).

⁸⁵ 160 F.3d 1214, 1222 (8th Cir. 1998).

explores *Horina v. City of Granite City*, where the Seventh Circuit invalidated an ordinance that banned leafleting of cars parked on city streets.⁸⁶ Section C examines the recent Ninth Circuit decision of *Klein v. City of San Clemente* that invalidated a similar ordinance.⁸⁷ Lastly, Section D reviews the Fifth Circuit's decision in *Jobe v. City of Catlettsburg*, which differed from its sister circuits by upholding an ordinance that banned vehicle leafleting.⁸⁸

A. The Eighth Circuit: *Krantz v. City of Forth Smith*

The plaintiffs in *Krantz* were church members who were arrested or threatened with arrest for placing religious literature under the windshield wipers of unattended vehicles that were parked on public property.⁸⁹ A series of ordinances from four cities had made it a misdemeanor to place a handbill or advertisement on vehicles parked on public streets, but allowed this practice if an occupant of the vehicle was willing to accept the leaflet.⁹⁰ The plaintiffs sought declaratory and injunctive relief, arguing that the ordinances were facially unconstitutional because the ordinances violated plaintiffs' First Amendment right to free speech.⁹¹ Specifically, the plaintiffs contended that the state interest in litter prevention could not justify a complete ban on plaintiffs' speech activities.⁹² The defendants responded that the ordinances were narrowly tailored to serve significant governmental interests and left open alternative forms of communication, such as traditional leafleting.⁹³ While the defendants conceded that public streets and parking lots were public fora, they maintained that the city had the power to regulate activities "affecting the safety and aesthetics of such public areas through direct or indirect regulation."⁹⁴ However, instead of applying strict scrutiny for regulations occurring in public fora, the court

⁸⁶ 538 F.3d 624, 638 (7th Cir. 2008).

⁸⁷ 584 F.3d 1196, 1208 (9th Cir. 2009).

⁸⁸ 409 F.3d 261, 273–74 (6th Cir. 2005).

⁸⁹ *Krantz*, 160 F.3d at 1215.

⁹⁰ *Id.* at 1216. One of the four ordinances, which all contained similar language, provided that: "It shall be unlawful for any person to place or deposit any commercial or non-commercial handbill . . . upon any vehicle not his own, or in his possession, upon any public street, highway, sidewalk, road, [or] alley within the City of Van Buren, providing, however, that it shall not be unlawful upon any such street or other public place for a person to hand out and distribute to the receiver therefore, any handbill to any occupant of the vehicle that is willing to accept it." *Id.*

⁹¹ *Id.*

⁹² *Id.* at 1218.

⁹³ *Id.*

⁹⁴ *Id.*

applied the time, place, and manner test without any explanation.⁹⁵

The Court of Appeals agreed with the District Court that the ordinances were content-neutral, and accordingly the city satisfied the first prong of the time, place, or manner test.⁹⁶ As for the second prong, the court relied on *Schneider* (which struck down an ordinance that forbade ringing a doorbell or otherwise summoning a resident to the door to receive leaflets) and *Martin* (which invalidated an ordinance that forbade door-to-door leafleters) to hold that the ordinances were not narrowly tailored to serve a significant governmental interest.⁹⁷ This departed from the District Court's reasoning, which held that the ordinances were narrowly tailored to achieve a significant government interest because "unsightly litter is [a] blight in this country the eradication of which requires the expenditure of limited local government resources and presents a myriad of public health and safety concerns."⁹⁸ The Eighth Circuit stressed that a court can take into consideration the opportunity for the "would-be recipient to provide effective notice that the communications are not wanted" in the narrow tailoring analysis.⁹⁹ This factor influenced the court to strike down the ordinance as overbroad, because it reasoned that those who do not want leaflets placed on their cars can "quite easily and effectively provide notice, for example, by placing a sign on the dashboard."¹⁰⁰

Finally, the court held that the government failed to demonstrate a "reasonable fit" between its asserted goal and the means it used to accomplish that goal.¹⁰¹ Despite evidence that government officials had received complaints regarding leaflets left on cars, the court held that the government did not establish a "factual basis for concluding that a cause-and-effect relationship actually exist[ed] between the placement of handbills on parked cars and litter that impacts the health, safety, or aesthetic well-being of the defendant cities."¹⁰² Therefore, the ordinances were deemed unconstitutional because they suppressed "substantially more speech that [was] necessary" to accomplish their asserted purpose.¹⁰³

⁹⁵ *Id.*

⁹⁶ *Id.* at 1219.

⁹⁷ *Id.*; see *supra* Part I.B.1 for a discussion of *Schneider* and *Martin*.

⁹⁸ *Krantz*, 160 F.3d at 1217.

⁹⁹ *Id.* at 1220.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1221.

¹⁰² *Id.* at 1221–22.

¹⁰³ *Id.* at 1222.

B. The Seventh Circuit: Horina v. City of Granite City

The Seventh Circuit in *Horina* employed a similar rationale as the Eighth Circuit to strike down an ordinance that stated, in relevant part: “No person shall deposit or throw any handbill in or upon any vehicle . . . [or] deposit, place, or throw any handbill upon any private premises which are temporarily or continuously unoccupied.”¹⁰⁴ While the court considered the city’s asserted interests in preventing litter, intrusion, trespass, and harassment substantial, the court could not accept the city’s argument that common sense dictated that the ordinance was needed to combat these problems.¹⁰⁵ The court did not necessarily require empirical evidence, but held that the government “must proffer *something* showing that the restriction actually serves a government interest,” and that in this case, the city had introduced “absolutely no evidence” that the ordinance would prevent litter, intrusion, trespass, and harassment.¹⁰⁶ The court likewise did not accept the city’s argument that other states and cities have similar restrictions, because it revealed nothing regarding the specific defendant city.¹⁰⁷ Thus, the court held that the ordinance was not narrowly tailored, and that the ordinance failed to provide adequate alternatives.¹⁰⁸ Although the ordinance left persons with the opportunity for traditional leafleting or door-to-door leafleting, the court did not find these alternatives “realistic” because they “require a speaker significantly . . . more time to reach the same audience.”¹⁰⁹

Horina differed from *Krantz* in that the parties had not conceded that vehicles were public fora. Rather, the city argued that the windshields of privately owned automobiles and privately unoccupied buildings constituted a nonpublic forum, and thus should only be assessed for reasonableness.¹¹⁰ The court disagreed on the grounds that this analysis only applies when a government restricts speech “on property that the government itself owns,” and emphasized that the term nonpublic forum “is not synonymous with privately owned property.”¹¹¹ Thus, the court applied the time, place, and manner test because it considered vehicles private

¹⁰⁴ *Horina v. City of Granite City*, 538 F.3d 624, 628 (7th Cir. 2008) (quoting section 2(c) of the challenged ordinance).

¹⁰⁵ *Id.* at 633.

¹⁰⁶ *Id.* at 633–34.

¹⁰⁷ *Id.* at 634.

¹⁰⁸ *Id.* at 635–36.

¹⁰⁹ *Id.* at 636.

¹¹⁰ *Id.* at 632.

¹¹¹ *Id.*

property. In the court's view, because the city had not shown sufficiently the connection between its regulation and the eradication of litter or intrusion, the court held that the city failed the time, place, and manner test and struck down the ordinance as unconstitutional.¹¹²

C. The Ninth Circuit: Klein v. City of San Clemente

Most recently, the Ninth Circuit relied on *Krantz* and *Horina* to invalidate a similar statute, which stated in relevant part: "No person shall throw or deposit any commercial or noncommercial advertisement in or upon any vehicle."¹¹³ Like the statute in *Krantz*, this ordinance allowed persons to leaflet to occupants of vehicles who were willing to accept the documents.¹¹⁴ The city contended that the ordinance preserved the aesthetics of the community by curbing litter and visual blight, and protected against the unauthorized use of private property.¹¹⁵

Like *Krantz* and *Horina*, the court in *Klein* held that the city had not provided any evidence that placing leaflets on cars caused litter. Specifically, the court stated that the city would have to show "some nexus between leaflets placed on vehicles and a resulting substantial increase in litter on the streets" before the court could hold that the ordinances were justified.¹¹⁶ Thus, the city had the burden of showing not only that such leafleting created litter, but that it created "an abundance of litter significantly beyond the amount the [c]ity already manag[ed] to clean up."¹¹⁷

The court also deemed the city's interest in "preserving an individual's right to decide how and when [his] private property will be used" insufficient.¹¹⁸ As in *Krantz*, the court found that the ordinance prohibited persons from distributing leaflets to those who might want to receive such speech, even if they were absent at the time of distribution.¹¹⁹ As to unwilling recipients, the court considered the burden on these persons minimal, stating that "the mere fact that [a person] must take the unsolicited leaflet from her windshield and place it in the garbage cannot

¹¹² *Id.* at 636.

¹¹³ *Klein v. City of San Clemente*, 584 F.3d 1196, 1199 (9th Cir. 2009) (quoting Section 8.40.130 of the City's municipal code).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1201–02.

¹¹⁶ *Id.* at 1202.

¹¹⁷ *Id.* at 1203.

¹¹⁸ *Id.* at 1204.

¹¹⁹ *Id.*

justify an across-the-board restriction.”¹²⁰

According to the court, the city could also allow potential recipients to opt-out of receiving leaflets, just as homeowners can opt-out of door-to-door soliciting through the use of “No Solicitations” signs.¹²¹ The court recognized that vehicles are entitled to “less assiduous” protection than homes, which have always been afforded “a higher degree of privacy under our law,” thus if privacy interests could not justify door-to-door solicitation bans, it likewise could not justify an outright ban against vehicle leafleting.¹²² Ultimately, the court held that the ordinances were unconstitutional.¹²³ Under the time, place, and manner test, the ordinances were not narrowly tailored because the court did not consider the city’s interests in preventing litter and the unauthorized use of private property significant.¹²⁴

D. The Sixth Circuit: Jobe v. City of Catlettsburg

While *Klein* and *Horina* followed the reasoning of *Krantz* regarding the evidentiary showing needed to prove a significant government interest in litter prevention, *Jobe* declined to follow *Krantz* in this respect.¹²⁵ The ordinance at issue in *Jobe* prohibited persons to place, deposit, or affix “any handbill, sign, poster, advertisement, or notice of any kind whatsoever” to “any automobile or other vehicle . . . without first having secured in writing the consent of the owner thereof.”¹²⁶ The court held that this was a reasonable time, place, and manner regulation of speech, and thus upheld the ordinance.¹²⁷

The plaintiff argued that his leafleting occurred on cars parked on public streets, while the city argued that his leafleting occurred on privately owned cars.¹²⁸ Relying on *Taxpayers for Vincent*, the court agreed with the defendants, reasoning that if the public forum doctrine “does not apply to public items (e.g., utility poles) permanently located on public streets and sidewalks, it assuredly does not apply to private cars temporarily parked on

¹²⁰ *Id.*

¹²¹ *Id.* at 1205.

¹²² *Id.*

¹²³ *Id.* at 1207.

¹²⁴ *Id.* at 1208.

¹²⁵ See *Jobe v. City of Catlettsburg*, 409 F.3d, 261 (6th Cir. 2005); see also discussion *supra* Part II.A–C.

¹²⁶ *Jobe*, 409 F.3d at 263.

¹²⁷ See *id.* at 268.

¹²⁸ *Id.* at 266.

public streets.”¹²⁹ The court further stated that there was no “traditional right of access” to car windshields and that vehicle leafleting is not analogous to the forms of communication that have “long taken place on our ‘public streets and parks.’”¹³⁰ Thus, since the court concluded that vehicles were not public fora, it applied the traditional time, place, and manner test instead of strict scrutiny.¹³¹ The court noted, however, that an argument could have been made that the protection of private property rights mandated a lower standard of review, but the parties did not make such an argument.¹³²

The court accepted the city’s asserted interests of preventing litter, visual blight, and protecting the unauthorized use of private property as significant.¹³³ The court held that the “common-sense explanations for these types of laws” did not require proof that these problems occurred in the past or were presently necessary, because this would be a “daunting task” for the government.¹³⁴ The court recognized that this ordinance was enacted in 1952, and that there might have been an absence of information due to the passage of time, and that it would be difficult for the city to show the “empirical necessity for a law that has been in place for more than 50 years.”¹³⁵ Further, the court broadened littering to include the very act of vehicle leafleting, stating that littering on private property “is not merely a possible by-product of the activity, but is created by the medium of expression itself.”¹³⁶ Therefore, the court held that the ordinance was narrowly tailored to address the “substantive evil” of littering on both private and public property.¹³⁷

The court held that the ordinance also satisfied the third prong of the time, place, and manner test by “leav[ing] open ample alternative channels of communication.”¹³⁸ The court stated that plaintiffs could leaflet in the same place by waiting in the parking lot and approaching car owners, that they could solicit door-to-door, that they could mail information to residents, or that they could leave leaflets at private residences so long as

¹²⁹ *Id.* at 267 (emphasis in original).

¹³⁰ *Id.* (quoting *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984)).

¹³¹ *Id.*

¹³² *Id.* (“While one could argue that the protection of private property rights here calls for a lower standard of review . . . that argument has not been made . . .”).

¹³³ *Id.* at 269–70.

¹³⁴ *Id.* at 269.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 270.

they were securely fastened to the door.¹³⁹

After holding the ordinances constitutional, the court gave three reasons why it declined to follow *Krantz*.¹⁴⁰ First, *Krantz* did not consider vehicle leafleting itself to be a form of littering.¹⁴¹ Second, *Krantz* ignored the decision in *Taxpayers for Vincent*, which recognized that not all items on public streets are automatically transformed into public fora.¹⁴² Third, *Krantz* failed to account for the “fundamental difference” between traditional leafleting and vehicle leafleting, which is that the car windshield has not historically been used as a communicative tool, and the recipients of leaflets under their car windshield have “no choice in accepting the burden of disposing of it and no choice in peeling it off the windshield after a rain shower.”¹⁴³

III. HOW COURTS SHOULD ADDRESS LEAFLETING REGULATIONS

This Section argues that the standard of review for vehicle leafleting regulations should parallel the standard applied in nonpublic fora. Despite arguments that cars should be treated like homes for free speech purposes—because both are private property where the right to receive speech must be protected—cars differ from homes in three significant ways. First, there has never been a traditional right of access to a car the way there has been for private residences. Second, more alternative forms of communication exist to reach car owners than homeowners. Third, the government exercises considerably more control over cars than it does homes, as drivers are required to obtain a license, register their vehicle, and get insurance before driving. Therefore, cars more closely resemble private mailboxes, which have been considered nonpublic fora in the Supreme Court’s free speech analysis. Classifying vehicles as nonpublic fora will bring uniformity and guidance to lower courts in evaluating vehicle leafleting bans, and will give municipalities the deference they deserve.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 273.

¹⁴¹ *Id.* at 273.

¹⁴² *Id.*

¹⁴³ *Id.* at 271, 274.

A. Vehicles Are Different From Residences And Are More Akin To Mailboxes

a. There is No Traditional Right of Access to Car Windshields

The importance of door-to-door solicitation lies in the historical right of access to a homeowner's doorstep. Traditionally, the home has been a place where a homeowner receives company and collects information, and the front door has symbolized a homeowner's consent to a visitor's entry.¹⁴⁴ Because of this, it has been argued that speech regulations involving the home can be analyzed similarly to regulations in the public forum, where speakers also have a right of access to willing listeners.¹⁴⁵ Of course, regulations of home solicitations are not absolute, and a homeowner also has the right to exclude any kind of communication on his or her property.¹⁴⁶ Some have viewed the homeowners' right to exclude as a basis for treating homes similar to the nonpublic forum, but this has been considered unpersuasive because the argument ignores the traditional right of access to the home.¹⁴⁷ This traditional right of access has been continually recognized in the Supreme Court's door-to-door solicitation cases, which have stated that when a homeowner's desires are unknown, a speaker's right to seek entry falls within the ambit of the First Amendment.¹⁴⁸

Unlike a homeowner's front door, a car windshield has never had a traditional right of access.¹⁴⁹ This is not for lack of historical longevity—

¹⁴⁴ See *Breard v. Alexandria*, 341 U.S. 622, 626 (1951) (stating that “[i]t is true that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers. . . .”); *Jobe*, 409 F.3d at 272 (recognizing that the “well-trodden path to the front door” exists to encourage communication).

¹⁴⁵ See *Hirschhorn*, *supra* note 32, at 1154 (“Private property that is held open by the homeowner is similar to the public forum. Both are places where speakers traditionally have access to willing listeners. This similarity is the basis for the argument that the standard of review for regulations of solicitation on private property must parallel the standard applied in the public forum.”); see also *Dean v. Byerley*, 354 F.3d 540, 551 (6th Cir. 2004) (upholding the right to engage in residential picketing just outside the home by analyzing the speech according to the same standard typically applied to speech within the public forum).

¹⁴⁶ See *Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 619 (1976) (“There is, of course, no absolute right under the Federal Constitution to enter on the private premises of another and knock on a door for any purpose”); *Wis. Action Coal. v. City of Kenosha*, 767 F.2d 1248, 1251 (7th Cir. 1985) (positing that the peaceful enjoyment of one's home is a legitimate governmental objective sufficient to support regulation of door-to-door solicitation and canvassing).

¹⁴⁷ See *Hirschhorn*, *supra* note 32, at 1154 (noting that the argument equating private property with nonpublic fora “fails to consider the traditional right to seek access to open private property.”); but see *City of Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547, 1576 (7th Cir. 1986) (making the argument for analogizing the nonpublic forum with private property) (Coffey, J., dissenting).

¹⁴⁸ See *Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton*, 536 U.S. 150 (2002); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Schneider v. State*, 308 U.S. 147 (1939).

¹⁴⁹ *Jobe v. City of Catlettsburg*, 409 F.3d 261, 272 (2005) (“[T]he windshield wiper does not exist,

Mary Anderson's first patent for the device was issued in 1903 and windshield wipers became standard equipment on all American cars in 1916.¹⁵⁰ The purpose of the invention was to prevent drivers from having to reach outside their windows in bad weather to clear their front windshield.¹⁵¹ Conversely, Joseph Henry's invention of the electronic doorbell in 1831 was intended to alert a homeowner to the presence of visitors wishing to gain access to the home.¹⁵² Given that the practice of leafletting has been used since the 1800s, predating both of these inventions as well as the invention of the first gasoline-powered American automobile in 1891,¹⁵³ it is significant that courts have never recognized a traditional right of access to car windshields, or any other historical forms of transportation for that matter, the way they have for homes.¹⁵⁴ This is probably because a car windshield, unlike the front door to a home, does not symbolize a driver's consent to receiving visitors or information.¹⁵⁵ Thus, analogizing cars to homes for the purposes of analyzing restrictions on speech is improper because the traditional right of access that justifies

formally or informally, to encourage communication."); *Klein v. City of San Clemente*, 2007 U.S. Dist. LEXIS 87328 (C.D. Cal. 2007) (quoting *Jobe*).

¹⁵⁰ See JEAN F. BLASHFIELD, *WOMEN INVENTORS* 12–13 (1996) (identifying Mary Anderson as the patentee of the windshield wiper in 1903, but stating that the device did not sell until 1916, when a man copied the invention after Anderson's patent rights had lapsed); PAUL NIEMANN, *MORE INVENTION MYSTERIES: 52 LITTLE-KNOWN TRUE STORIES BEHIND WELL-KNOWN INVENTIONS* 21 (2006) (stating that Mary Anderson came up with the idea in 1903 and it took about ten years to become standard equipment).

¹⁵¹ See BLASHFIELD, *supra* note 150, at 10 (explaining that Mary Anderson contemplated the fact that streetcars had to run every day, in all kinds of weather); NIEMANN, *supra* note 150 (explaining that, after watching a streetcar driver repeatedly lean out the window to wipe snow from the front of the car, Anderson thought there must be a better way to contend with bad weather).

¹⁵² See BETHANNE PATRICK & JOHN THOMPSON, *AN UNCOMMON HISTORY OF COMMON THINGS* 146 (2008) (describing the function of a doorbell as a signal "to gain access to a home or other building" and identifying Joseph Henry, a distinguished scientist who was the first secretary of the Smithsonian Institution, as the inventor of the electronic doorbell in 1831); FRANK P. BACHMAN, *GREAT INVENTORS AND THEIR INVENTIONS* 78 (1918) (discussing the mechanism that makes a doorbell work and naming Joseph Henry as the inventor).

¹⁵³ The first gasoline-powered automobile was dubbed the "Lambert car," after the automobile's creator, John W. Lambert. See *Automobile History, About.com: Inventors - Famous Automobile Makers*, at <http://inventors.about.com/od/astartinventors/tp/Famous-Automobile-Makers-.htm>.

¹⁵⁴ See Brief in Opposition at 9, *Jobe v. City of Catlettsburg*, 409 F.3d 261 (2005) (No. 05-188) ("Neither *Krantz* nor any other case has identified any 'traditional right of access' to private motor vehicles, or for that matter their progenitors: privately owned horses, wagons, carriages or bicycles. Handbilling is far from cutting edge technology and motor vehicles are only the latest step in our 'mobile society.'") (emphasis in original); see also *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (rejecting reliance on public forum principles for failing to demonstrate "the existence of a traditional right of access respecting such items as utility poles . . . comparable to that recognized for public streets and parks").

¹⁵⁵ See *Jobe*, 409 F.3d at 270 ("There is nothing special about a car - or for that matter, about a bicycle, a baby stroller, an individual's back or a lawn - that invites others to place leaflets or advertisements on it without the owner's consent"); see also *Schneider v. State*, 308 U.S. 147, 162 (1939) (discussing, in the context of leafletting on public streets, that some people are willing recipients of the information being distributed).

higher speech protection for homes is not present for cars.

Requiring vehicle owners to place a “no solicitation” sign on the dashboard, like those that are placed on the door or window of private residences, is an impractical burden to place on drivers. If the signs are too small, solicitors will not see them, yet if they are large, such signs may create safety hazards by impairing the driver’s vision. Moreover, drivers that live outside of these cities would have no need for these kinds of signs otherwise and hence might not know about them. Thus, out of town drivers entering the city and wishing to have their vehicles remain free from unwanted leaflets would have to obtain or carry one of these signs when they happened to park inside cities with “no solicitation” requirements. Putting this kind of burden on drivers would be unnecessary, impractical, and unsafe.

b. More Alternative Forms of Communication Are Available to Reach Vehicle Users

There are more options available to reach car owners than there are to reach homeowners. For example, drivers typically wait in line to enter or exit public parking garages, giving solicitors ample opportunity to reach numerous car owners that remain free to accept or reject the leaflets.¹⁵⁶ Even in private parking garages, automobiles are required to come to a complete stop, making it easy for solicitors to approach drivers.¹⁵⁷ Approaching vehicles at stoplights, whether on the passenger or the driver side, is also a convenient and more direct way to distribute leaflets to drivers. Additionally, time restrictions for parking on city streets put canvassers on notice as to what time car owners must move their cars in order to avoid getting ticketed. If solicitors want to reach a group of vehicles in a given area, all they need do is solicit on the streets around the designated times that cars are allowed to park. These opportunities are unavailable to reach those in private residences.

Most importantly, upholding vehicle leafleting bans will not foreclose

¹⁵⁶ Answering Brief of Defendant-Appellee at 28 n.11, *Klein v. City of San Clemente*, 584 F.3d 1196, 1199 (9th Cir. 2009) (No. 08-55015) (“[R]esidents of private houses do not have to queue up to enter or leave public garages or lots where they can be handed leaflets if they are willing to accept them[.]”); see *Lloyd Corp. v. Tanner*, 407 U.S. 551, 556–57 (1972) (discussing the ease with which literature could be given to a driver who has stopped his car to enter or exit a private parking lot).

¹⁵⁷ See *Lloyd Corp.*, 407 U.S. 551, 556–57 (1972) (“When moving to and from the privately owned parking lots, automobiles are required by law to come to a complete stop. Handbills may be distributed conveniently to pedestrians, and also to occupants of automobiles, from these public sidewalks and streets.”); see also *Hague v. CIO*, 307 U.S. 496 (1939) (reaffirming the traditional notion that public streets were the domain of the people and could be used as a forum for discussion); *Schneider*, 308 U.S. at 162 (noting that some people willingly receive proffered leaflets).

leafletting in its most venerable form.¹⁵⁸ Solicitors may still leaflet along the public streets where cars are parked, or inside parking lots to willing passersby, and can also wait in such parking lots until drivers return, all of which enables solicitors to communicate in the exact same areas.¹⁵⁹ They can leaflet door-to-door in any given community, or mail the information to residents in the city. They may also stand and advertise in the desired areas with large signs, or temporarily place signs around the parking garages.¹⁶⁰ These alternatives will still enable solicitors to reach their intended audience. Furthermore, they are adequate substitutes to the medium of expression closed off by the ordinances, because they provide an even more direct and effective means of communicating. Leaflets have less of a chance of reaching their target audience because they may be blown off of an unoccupied vehicle before the driver ever sees it. Since a leaflet that is placed under the windshield wiper is susceptible to being blown off by wind, rain, or even by an unaware driver who turns the wipers on, there is no guarantee that even those who would be willing to accept it will actually receive it. Therefore, these alternative forms of communication provide more protection for the willing listeners' right to receive speech, not less, because they ensure that leaflets end up in the hands of these listeners instead of in the street as litter.

c. The Government Has Extensive Control Over Vehicles

Since the government has a substantial amount of authority to regulate vehicles, it is not inappropriate for the government to also regulate the kind of speech that can be placed on such vehicles. In *South Dakota v. Opperman*, the Supreme Court held that the Fourth Amendment allows for warrantless car searches because “automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls.”¹⁶¹ For

¹⁵⁸ See *supra* notes 60–64 and accompanying text.

¹⁵⁹ See *Hill v. Colorado*, 530 U.S. 703, 727 (2000) (recognizing that a statute that required leafleters to remain eight feet away from persons entering a health care facility did not “prevent the leafletter from simply standing near the path of pedestrians and proffering his or her material, which the pedestrians [could] easily accept.”); see also *Heffron v. Int’l Soc’y For Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981) (upholding a state fair regulation that required a religious organization desiring to distribute literature to conduct that activity only at an assigned location due to “the State’s interest in confining distribution, selling, and fund solicitation activities to fixed locations”).

¹⁶⁰ See *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (striking city ordinance that banned all residential signs except those falling within exemptions because it “almost completely foreclosed venerable means of communication that is both unique and important”); see also *Jamison v. Texas*, 318 U.S. 413, 417 (1943) (holding invalid an ordinance that completely banned the door-to-door distribution of literature).

¹⁶¹ 428 U.S. 364, 368 (1976).

example, car owners must abide by a plethora of registration,¹⁶² inspection,¹⁶³ licensing,¹⁶⁴ and insurance requirements.¹⁶⁵ In addition, drivers understand that they may be stopped at any time for violating traffic laws.¹⁶⁶ In particular, when drivers park their vehicles on city streets or in city parking lots, the government controls where, when, and for how long a given automobile can remain parked, and failure to obey these parking regulations will result in either a ticket or a driver's car being towed at his or her expense. Further, the Ninth Circuit recently held in *United States v. Pinedo-Moreno* that it is permissible under the Fourth Amendment for federal agents to secretly plant a GPS locator on one's car without a warrant, even if it is parked in a private driveway.¹⁶⁷

As the Supreme Court recognized in *California v. Carney*, the public is "fully aware that it is accorded less privacy in its automobiles because of th[e] compelling governmental need for regulation. Historically, 'individuals always [have] been on notice that movable vessels may be stopped and searched[.]'"¹⁶⁸ On the other hand, the occupants of homes are shielded from these exercises of government discretion while in the security of their dwellings, since "protecting the well-being, tranquility and privacy of the home is certainly of the highest order in a free and civilized

¹⁶² See Carprice.com, *Driving Legal Requirements & Laws* (2011), <http://www.carprice.com/legal-requirements>. Car owners must apply for registration with the Department of Motor Vehicles in any given state in order to drive. Registration requirements vary from state to state. Typically, an owner needs a signed certificate of title for the vehicle, proof of insurance, a driver's license, and a home address in order to register. An auto title is a legal certificate of ownership that shows who the owner of the vehicle is. It lists the current owner's name and address, the make, model, and year of the car, as well as the date of sale. *Id.*; see also DMV.org, *The Unofficial DMV Guide* (1999-2011), <http://www.dmv.org>.

¹⁶³ See e.g., New York State Department of Motor Vehicles Safety Inspection, available at <http://www.nydmv.state.ny.us/vehsafe.htm> (explaining the vehicle inspection requirements for New York); see also *Delaware v. Prouse*, 440 U.S. 648, 658 (1979) (ruling that states have a vital interest in confirming that licensing, registration, and vehicle inspection requirements are followed).

¹⁶⁴ See Carprice.com, *supra* note 162. Before an individual is allowed to drive, one must obtain a driver's license. Age requirements vary from state to state, ranging from 16-18. Additionally, dealerships must be licensed with the state in order to sell cars; see also *Prouse*, 440 U.S. at 658.

¹⁶⁵ See Carprice.com, *supra* note 162 ("It is illegal to drive a car in the USA without the minimum levels of insurance required for each state."); see also *Collins v. Nat'l Gen. Ins. Co.*, No. 10-13344, 2011 U.S. Dist. LEXIS, at *12 (E.D. Mich. Sept. 28, 2011) (noting how insurance minimum requirements vary across states and drivers may be subject to such requirements).

¹⁶⁶ See *California v. Carney*, 471 U.S. 386, 392 (1985) (noting that the public is "fully aware" that it is accorded less privacy with regard to vehicles, since historically, "individuals always [have] been on notice that movable vessels can be stopped and searched") (quoting *United States v. Ross*, 456 U.S. 798, 806 n.8 (1982)); see also *Carroll v. United States*, 267 U.S. 132, 151 (1925).

¹⁶⁷ 591 F.3d 1212, 1215 (9th Cir. 2010). The court emphasized that there is no reasonable expectation of privacy to a driveway or "curtilage of a residence," nor to the "undercarriage" of a vehicle, nor to cars parked on a street or in a parking lot.

¹⁶⁸ 471 U.S. 386, 392 (1985) (quoting *United States v. Ross*, 456 U.S. 798, 806 n.8 (1982)).

society.”¹⁶⁹ As the Court’s Fourth Amendment jurisprudence has illustrated, vehicles are much more heavily regulated than are homes, and thus vehicles are “obviously” more public in nature.¹⁷⁰

Further, some activities are legal to partake in when inside one’s home, but not inside one’s car. In New York, for example, operating a motor vehicle while intoxicated “upon public highways, private roads open to motor vehicle traffic [or] any other parking lot”¹⁷¹ is a misdemeanor that can result in suspension or revocation of a driver’s license in addition to a potential fine or imprisonment.¹⁷² Additionally, under section 154 of the United States Code, each State must pass a law that “prohibits the possession of any open alcoholic beverage container, or the consumption of any alcoholic beverage” in any motor vehicle located on a “public highway, or the right-of-way of a public highway, in the State.”¹⁷³ Under section 920 of the United States Code, indecent exposure is prohibited “in any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor’s family or household.”¹⁷⁴ Hence, by simply stepping outside the confines of one’s own home and into an vehicle—a place where a person’s conduct can readily be seen by others—one potentially becomes subject to a host of criminal liability, which further highlights the more public nature of a car. Therefore, contrary to the Seventh Circuit’s decision, the defendants in *Horina* were not mistaken in characterizing vehicles as nonpublic fora, since automobiles can be considered the *government’s* property, not private property—especially when they are parked on city streets or in city parking lots. Accordingly, vehicle leafleting ordinances should be subject only to rational-basis review because local governments should be given deference when regulating speech in nonpublic fora.

¹⁶⁹ *Carey v. Brown*, 447 U.S. 455, 471 (1980).

¹⁷⁰ *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976). “The expectations of privacy as to automobiles is further diminished by the obviously public nature of automobile travel.” *Id.* The Court went on to hold that a routine inventory search of the defendant’s locked automobile was not an “unreasonable” search and did not violate the Fourth Amendment. *Id.* at 376.

¹⁷¹ N.Y. VEH. & TRAF. LAW § 1192 (2009). The statute defines “parking lot” for the purposes of this section as “any area or areas of private property, including a driveway, near or contiguous to and provided in connection with premises and used as a means of access to and egress from a public highway to such premises and having a capacity for the parking of four or more motor vehicles. The provisions of this section shall not apply to any area or areas of private property comprising all or part of property on which is situated a one or two family residence.” *Id.*

¹⁷² N.Y. VEH. & TRAF. LAW § 1193 (2010).

¹⁷³ 23 U.S.C.A. § 154(b)(1) (2005).

¹⁷⁴ 10 U.S.C.A. § 920(n) (2007).

d. The Same Degree of Government Control Exists in Cars And Mailboxes, And Leafleting Interferes Equally With The Functions of Both

Cars are more analogous to residential mailboxes for the purposes of free speech analysis than to homes. In *Council of Greenburgh*, the Court acknowledged that postal customers pay for the physical components of their mailboxes, but also agree to abide by the Postal Service's regulations in exchange for the delivery and pickup of the customers' mail.¹⁷⁵ Similarly, while an individual purchases his or her own vehicle, that individual also agrees to abide by the Department of Motor Vehicle's regulations in order to enjoy the privilege of driving on government-provided roads, as previously discussed.¹⁷⁶

While distributing leaflets door-to-door does little to interfere with the functioning of a home, unlimited leafleting on cars and mailboxes can have burdensome consequences. For example, leaflets on car windshields physically block a driver's vision and disable the windshield itself from functioning properly. Similarly, if unsolicited leaflets are allowed to be deposited into mailboxes in addition to stamped mailings, eventually a mailbox will become overstuffed, impairing its utility. Despite this loss of function, drivers as well as those who receive mail have no way to prevent unwanted leaflets, because most of the time, no one is around their car or their mailbox. However, homeowners have more opportunities to avoid unwelcome leaflets because solicitors must ring their doorbell and greet the occupants of a home in order to distribute materials. Thus, while in a home, the occupant has the power to exclude visitors—and the leaflets they may bring. Cars and mailboxes do not give individuals this same option.

Since the government exercises just as much control over vehicles as it does mailboxes, and regulates vehicles far more than it does individual homes, courts should consider vehicles, like mailboxes, to be nonpublic fora when analyzing vehicle leafleting ordinances. As regulations of nonpublic fora, ordinances banning vehicle leafleting should only be subject to rational-basis review to determine whether they are reasonable, and should not be scrutinized under the time, place, and manner test.

B. Deference to Municipalities is Appropriate

Giving deference to municipalities that enact vehicle leafleting bans is

¹⁷⁵ See *supra* notes 45–56 and accompanying text.

¹⁷⁶ See *supra* Part III.A-3.

appropriate because cities are in the best position to recognize the needs of their citizens and the community at large. Local governments possess an inherent authority, through its police powers, to impose reasonable restrictions on private rights for the sake of general public welfare, health, safety, order, and security.¹⁷⁷ This is because local governments can most effectively balance the general needs of the citizens within their territories.¹⁷⁸ Most importantly, if individuals within a given jurisdiction do not agree with local government regulations, they are free to voice their concerns, contact local government officials, or vote against officials they feel are not adequately representing their needs.¹⁷⁹ These devices ensure that local governments will pay attention to the public's concerns and reactions, thereby giving them leeway to use an investigational approach in assessing how individual rights are to be preserved when they enact laws for the general public.¹⁸⁰

Solicitation regulations in streets and other public places fall within the local governments' police powers.¹⁸¹ As the Court in *Berman v. Parker* recognized as early as 1954, "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."¹⁸² Vehicle leafleting regulations are a legitimate exercise of these police powers. In this instance, local governments have determined that the unauthorized placing of leaflets on vehicles parked on city streets and in

¹⁷⁷ See M. DAVID GELFAND, *FEDERAL CONSTITUTIONAL LAW AND AMERICAN LOCAL GOVERNMENT* 357 (1984) ("Local governments often invoke their police power as a basis for various regulations designed to maintain public order"); see also BLACK'S LAW DICTIONARY 1156 (6th ed. 1990) (defining "police power").

¹⁷⁸ See CURRENT CONDEMNATION LAW: TAKINGS, COMPENSATION AND BENEFITS 312 (Alan T. Ackerman & Darius W. Dynkowski eds., 2d ed. 2006) [hereinafter CURRENT CONDEMNATION LAW] ("In support of its decision to defer to legislative decisions regarding public use, the [Rehnquist] Court notes that state and local governments have a better understanding of their area and the needs of their constituents"); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U.L. REV. 698, 721 (2011).

¹⁷⁹ See CURRENT CONDEMNATION LAW, *supra* note 178, at 312 (noting that it is easier for people to contact local politicians and have their voices heard); see also Marci Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 320 (2003) (discussing that local governments both provide more opportunity for input from the people and creates greater accountability from the politicians).

¹⁸⁰ See *Kelo v. City of New London*, 545 U.S. 469, 482 (indicating varied needs in different parts of the nation and "great respect" the Court owes to state legislatures in determining local public needs); see also CURRENT CONDEMNATION LAW, *supra* note 178, at 315 (noting that courts may be following an "experimental approach" when they allow States to reach various solutions to the public use question in takings law).

¹⁸¹ *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 619 (1976); GELFAND, *supra* note 177, at 358 ("[L]ocal governments regulate the use of streets and other public areas for solicitation, advertising, and demonstrations.").

¹⁸² 348 U.S. 26, 33 (1954).

city parking lots is an annoyance to individuals, and a visual blight for the general public. As the facts of *Krantz* and *Horina* illustrate, cities receive complaints regarding vehicle leaflets.¹⁸³ Given the political accountability that local governments have, their response to these complaints should be deferred to.

C. Rationality Review Will Resolve a Direct Circuit Split

Courts that have struck down bans on vehicle leafleting have recognized that while it may be debatable whether the prevention of littering is a significant interest under the time, place, and manner test, it is beyond debate that it is a legitimate state interest.¹⁸⁴ Therefore, in most cases, as in other areas of the law, rational basis review will have the effect of validating these kinds of bans, which will promote judicial efficiency and uniformity. Since the Supreme Court denied certiorari review on the issue of vehicle leafleting in 2005,¹⁸⁵ lower court cases have become the law. Establishing a presumption of legitimacy for litter prevention will give lower courts more guidance and consistency and will enable higher courts to make precedent.

While this standard may be criticized as being too deferential, it will still require cities to prove that their regulations are reasonable. This standard will not simply require courts to take judicial notice, even though this has been done in areas of the law dealing with constitutional rights that are as just historically important.¹⁸⁶ For instance, if a city's vehicle leafleting regulation forecloses too many avenues of communication, or is content-based, it will likely be found unreasonable.

¹⁸³ See *supra* Part II.A–B; see also Answering Brief of Defendant-Appellee at 13–14, *Klein v. City of San Clemente*, 584 F.3d 1196 (9th Cir. 2009) (No. 08-55015) (noting that the plaintiff presented evidence that “many intended recipients would be angry to the point of belligerence, threats and violence when offered leaflets”).

¹⁸⁴ See *Krantz v. City of Forth Smith*, 160 F.3d 1214, 1221 (8th Cir.) (“Nor do we disagree with defendants’ assertion that they may, consistent with prevailing constitutional standards, protect legitimate aesthetic and safety interests through indirect regulations that impose some burden on speech.”); *Van Nuys Publ’g Co. v. City of Thousand Oaks*, 489 P.2d 809, 821 (Cal. 1971) (referring to litter prevention as a “legitimate and, indeed an increasingly urgent, government objective”); Answering Brief of Defendant-Appellee at 33, *Klein v. City of San Clemente*, 584 F.3d 1196 (9th Cir. 2009) (No. 08-55015) (“Of course, here, even [plaintiff] concedes that preventing litter is a legitimate government interest, while the City has shown that it is a significant one.”).

¹⁸⁵ *Jobe v. City of Catlettsburg*, 409 F.3d 261, *cert. denied*, 546 U.S. 876 (2005).

¹⁸⁶ See *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 199 (2008) (taking judicial notice of the State’s interest in deterring and detecting voter fraud in a challenge to a state law requiring government issued photo identification to vote as violative of the Fourteenth Amendment); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (recognizing that the plaintiff’s strong interest in exercising “the ‘fundamental political right’ to vote countered the State’s compelling interest in preventing voter fraud.”) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)).

CONCLUSION

Classifying vehicles as nonpublic fora will bring uniformity to lower courts that have had difficulty categorizing vehicles within the public forum framework. Since nonpublic fora are scrutinized under rationality review where a legitimate interest is needed, placing vehicles in this category will resolve the ongoing battle between Circuit Courts as to whether or not litter prevention is a significant government interest. Significant governmental interests are unnecessary under rational-basis review, because municipalities are given deference in areas where their legitimate police powers are exercised. This will allow local governments to judge whether litter prevention is needed in their particular jurisdictions and whether their constituents desire these kinds of bans. It will respect the decision of states like New York, where the Court of Appeals has interpreted its free speech clause broadly, as well as the thirty-eight other cities that have enacted vehicle leafleting bans.¹⁸⁷ This level of review also accounts for the many alternative forms of communication that are still left available to potential vehicle-leafleters. Indeed, one Circuit Court judge has already acknowledged that a lower form of review is appropriate with regard to vehicle leafleting.¹⁸⁸

Most importantly, rational-basis review accounts for the fundamental difference in the government's control over vehicles and over homes. While the government's control over cars and mailboxes is pervasive, it has much less authority to regulate actions in and around homes. Therefore, it makes sense for courts to consider vehicles, like mailboxes, nonpublic fora in analyzing vehicle leafleting bans—especially when they are parked on city streets or in city parking lots. As a result, ordinances that forbid vehicle leafleting will be subject to rational-basis review and local governments—who exercise a great amount of control over such vehicles—will be given the deference they deserve.

¹⁸⁷ See *Jobe*, 409 F.3d at 274 (listing all of the cities that have enacted vehicle leafleting bans); *People v. Remeny*, 40 N.Y.2d. 527, 530 (1976).

¹⁸⁸ See *supra* note 132 and accompanying text. It should be noted that while Judge Sutton agreed that vehicle leafleting ordinances should be scrutinized under rational-basis review, he did so because he considered vehicles private property, not nonpublic fora. See *Jobe v. City of Catlettsburg* 409 F.3d 261, 267 (5th Cir. 2005).

