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I. INTRODUCTION

As "historic weapons in the defense of liberty,"[1] leaflets have played a critical role in the United States. In 1776, Thomas Paine's pamphlet *Common Sense* argued for independence and sparked the American Revolution.[2] The federal government also promoted the use of leaflets to advertise for war bond selling campaigns during World War II.[3] The importance of leafleting lingered into the twentieth century, and in 1938, the Supreme Court recognized that the First Amendment protected leafleting.[4] However, the right to leaflet is not absolute.[5]

The Supreme Court has addressed whether local governments may regulate the distribution of leaflets in several contexts, but has yet to address ordinances that prohibit windshield leafleting. The issue pits a speaker's First Amendment right to free speech against both a city's esthetic interest in preventing litter and citizens' private property interests in their vehicles.[6] The United States Circuit Courts of Appeals

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1. Lovell v. Griffin, 303 U.S. 444, 452 (1938).

2. RICHARD B. BERNSTEIN, THE FOUNDING FATHERS RECONSIDERED 41 (2009). Thomas Paine, a founding father of the United States, is most well-known for his pamphlet, *Common Sense*, which argued "that independence was desirable, well-deserved, and within reach." *Id.* at 41. Many colonists read *Common Sense*, and it is considered to have played a pivotal role in igniting the Revolutionary War. *Id.*

3. *See* Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (citations omitted).

4. *See Lovell*, 303 U.S. at 452 ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.").

5. *See* Horina v. Granite City, 538 F.3d 624, 631 (7th Cir. 2008) ("[T]he right to handbill is not absolute."); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 809–10 (1984) (upholding ordinance that prohibited the placement of signs or leaflets on utility poles); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654–56 (1981) (upholding a restriction on leafleters to specific booths at a state fair); *see also* Schneider v. New Jersey, 308 U.S. 147, 155 (1939) ("[T]he right of free expression is not absolute but subject to reasonable regulation.") (citation omitted); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) ("[T]he peace, good order, and comfort of the community may imperatively require regulation of the time, place, and manner of [literature] distribution.") (citation omitted).

6. *See* Krantz v. City of Fort Smith, 160 F.3d 1214, 1218–20 (8th Cir. 1998); Jobe v. City of Catlettsburg, 409 F.3d 261, 262–63 (6th Cir. 2005); *Horina*, 538 F.3d at 633; Klein v. City of San

are split on this issue. The following Comment analyzes this controversy.

Part II surveys the line of Supreme Court cases at the heart of the circuit split. Part III then outlines each side of the circuit split. Next, Part IV argues that local government bans on windshield leafleting are constitutional time, place, and manner restrictions. Lastly, Part V urges the undecided circuits to adopt this position.

II. SUPREME COURT BACKGROUND

Windshield leafleting presents a conflict between the First Amendment right to distribute literature and a city's interest both in maintaining a clean, esthetically appealing environment and in protecting a citizen's private property.[7] Considering these competing interests, the Supreme Court has addressed leafleting directly to persons in the streets,[8] door-to-door leafleting,[9] sending leaflets through the mail,[10] and posting leaflets on public utility poles.[11] The circuit courts are split regarding the proper interpretation of this line of cases and its application to windshield leafleting.[12]

The Supreme Court first addressed leafleting in 1939 in *Schneider v. New Jersey*, which struck down several city bans on person-to-person leafleting on public streets.[13] The cities argued that litter prevention justified the ordinance; the Court disagreed, holding that "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to *one willing to receive it*."[14] The Court further found that through general anti-litter laws, cities have other avenues of preventing litter, such as punishing "those who actually throw papers on the streets."[15]

Four years later, in *Martin v. City of Struthers*, the Court struck down

Clemente, 584 F.3d 1196, 1200 (9th Cir. 2009).

7. *See* discussion *infra* Part II.

8. *See Schneider*, 308 U.S. at 155 (involving a city's right to prevent littering caused by leafleting directly to persons in the street).

9. *See Martin*, 319 U.S. at 144 (involving the property rights of a homeowner and door-to-door leafleting).

10. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 60 (1983) (regarding the property rights of a homeowner and the reception of mail).

11. *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 792–94 (1984) (regarding a city's right to prevent visual blight from the posting of signs on utility poles).

12. *See* discussion *infra* Part III.

13. *Schneider*, 308 U.S. at 162–63.

14. *Id.* at 162 (emphasis added).

15. *Id.*

a city ban on door-to-door leafleting.[16] While recognizing an interest in protecting homeowners and indicating that "[c]onstant callers . . . may lessen the peaceful enjoyment of a home,"[17] the Court noted that door-to-door leafleting "is one of the most accepted techniques of seeking popular support" and "is essential to the poorly financed causes of little people."[18] The Court held that the burden is on the homeowner to first warn the speaker to stay off their property.[19] The Court noted that after a homeowner warns a speaker to stay off their property, traditional trespass statutes effectively serve the government's interest in protecting the homeowner from annoyance and crime.[20]

In 1983, the Court returned to the competing interests of a speaker and homeowner in *Bolger v. Youngs Drug Products Corp*.[21] In *Bolger*, the Court struck down an ordinance that prohibited mailing unsolicited leaflets concerning contraceptives.[22] Unlike *Martin* and *Schneider*, the relevant ordinance in *Bolger* was content-based and thus not analyzed as a time, place, and manner restriction;[23] nonetheless, the Court importantly emphasized the ability of the homeowner to reject the leaflets.[24] As in *Martin*, the Court put the burden on the homeowner to reject the leaflets, holding that the homeowner may opt out of further mailings.[25] The Court reasoned that homeowners are not a "'captive' audience"[26] and "may 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.'"[27] The Court further found that the homeowner can simply throw the leaflets away because "'the short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.'"[28]

Although the aforementioned Supreme Court decisions all struck

16. Martin v. City of Struthers, 319 U.S. 141, 149 (1943).

17. *See id.* at 144 ("Ordinances of the sort now before us may be aimed at the protection of the householders from annoyance, including intrusion upon the hours of rest, and at the prevention of crime.").

18. *Id.* at 146.

19. *Id.* at 147–48 ("We know of no state which . . . makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away.").

20. *Id.* at 148.

21. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

22. *Id.* at 61.

23. *Id.* at 68 (analyzing the issue as commercial speech) (citing Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 477 U.S. 557, 566 (1980)).

24. *Id.* at 72.

25. *Id.* (citing Rowan v. Post Office Dep't, 397 U.S. 728, 737 (1970)).

26. *Id.* (quoting Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 542 (1980)).

27. *Bolger*, 463 U.S. at 72 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)) (citation omitted).

28. *Id.* (citation omitted).

down the respective ordinances, in 1984, the Court upheld an ordinance that prohibited the placing of signs on utility poles in *Members of City Council v. Taxpayers for Vincent*.[29] In *Taxpayers for Vincent*, the city argued that the prevention of litter and visual blight justified the ordinance.[30] The Court agreed and held that cities "have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression,"[31] and "the visual assault on the citizens . . . by an accumulation of signs . . . constitutes a significant substantive evil within the City's power to prohibit."[32] The Court further held that the ordinance was narrowly tailored, distinguishing *Schneider* and rejecting the notion that the city must resort to general anti-littering laws.[33] The Court reasoned that *Schneider* involved the right to "communicate directly with a willing listener," while speakers, who post signs on utility poles, communicate indirectly because they are not present when the speech is communicated to the listener.[34] The Court further noted that an anti-littering law would only serve to punish leaflets that fall to the ground, but would not remedy the visual blight created by the actual posting of signs.[35]

The aforementioned cases show that the Supreme Court has indeed stressed the broad scope of the First Amendment and provided the speaker with vast protection to distribute literature. The Court struck down ordinances that banned leafleting directly to persons in the street, leafleting homes, and leafleting through the mail. However, as *Taxpayers for Vincent* demonstrates, speakers do not have unlimited rights, and local governments may restrict the distribution of literature in appropriate contexts.

III. CIRCUIT SPLIT

A circuit split has developed over the interpretation and applicability of the aforementioned Supreme Court precedent to windshield leafleting. The Sixth Circuit, in *Jobe v. City of Catlettsburg*,[36] upheld a ban on windshield leafleting,[37] citing *Taxpayers for Vincent*, rather than

29. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984).
30. *See id.* at 805–07.
31. *Id.* at 806.
32. *Id.* at 807.
33. *Id.* at 809–10.
34. *Id.* at 810.
35. *See Taxpayers for Vincent*, 466 U.S. at 810.
36. 409 F.3d 261 (6th Cir. 2005).
37. *Id.* at 262.

Schneider, as the controlling case.[38] In contrast, the Seventh, Eighth, and Ninth Circuits applied *Schneider* to strike down such bans as unconstitutional.[39] Both sides of the split considered *Bolger*, but applied it differently.[40]

This Part further surveys the circuit split. Subsection A discusses the Sixth Circuit's decision in *Jobe* while subsection B discusses the three circuit decisions that struck down windshield leafleting bans, focusing on the Seventh Circuit's decision in *Horina v. Granite City*.[41]

A. Ban on Windshield Leafleting Upheld

The Sixth Circuit stands alone in holding that bans on windshield leafleting are constitutional. In 2005, the Sixth Circuit upheld a city ban on windshield leafleting in *Jobe v. City of Catlettsburg*.[42] The ordinance stated:

> It shall be unlawful for any person to place or deposit or in any manner to affix or cause to be placed or deposited or affixed to any automobile or other vehicle or other automotive vehicle, any handbill, sign, poster, advertisement, or notice of any kind whatsoever, unless he be the owner thereof, or without first having secured in writing the consent of the owner thereof.[43]

The court analyzed the ordinance as a time, place, and manner restriction.[44] Time, place, and manner restrictions must (1) be content-neutral, (2) serve a significant government interest, (3) be narrowly tailored to serve a significant government interest, and (4) leave open ample alternative channels of communication.[45] Because the ordinance did not consider the content of the speech, the court focused on the last three requirements.[46]

Regarding the second element, the government argued that the

38. *See id.* at 268–71.

39. *See* Krantz v. City of Fort Smith, 160 F.3d 1214, 1222 (8th Cir. 1998); Horina v. Granite City, 538 F.3d 624, 638 (7th Cir. 2008); Klein v. City of San Clemente, 584 F.3d 1196, 1208 (9th Cir. 2009).

40. *See, e.g.*, *Krantz*, 160 F.3d at 1221; *Jobe*, 409 F.3d at 271.

41. 538 F.3d 624 (7th Cir. 2008).

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

43. *Id.* at 263.

44. *Id.* at 267 (holding that the issue did not fall under the public forum doctrine because vehicles parked on the streets are not a setting that "deal[s] with a method of communication for which one can say there has been a 'traditional right of access' and in neither instance does it offer an apt analogy to the forms of communication that have long taken our place on our 'public streets and parks'" (quoting U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981))).

45. *Id.* at 267 (citations omitted).

46. *See id.* at 268.

ordinance furthered two significant interests: litter prevention and the protection of private property.[47] The Sixth Circuit agreed that common sense supported both interests, in part because thirty-eight other cities had similar laws.[48] Thus, the court did not require the city to proffer its own independent evidence, but rather allowed it to rely on other cities' past evidence and judgment.[49] The court also noted that windshield leafleting "shares as many qualities with littering as placing the fliers on the front lawn of a residence, on the top of a boat or . . . any piece of private property that is not otherwise designed by intent or usage to receive and hold literature distributed by others."[50]

Discussing the third element, the court held that the ordinance burdened no more speech than necessary and compared the issue to that in *Taxpayers for Vincent*, which upheld a ban on placing signs on utility poles.[51] The court reasoned that leaflets on windshields are analogous to signs on utility poles in that the visual blight "'is created by the medium of expression itself.'"[52] The court noted that *Schneider*, contrarily, only involved leaflets that fell to the ground, a littering problem caused by the "'by-product of the activity.'"[53] Thus, the court concluded that the ordinance "targeted the precise problems—littering on private automobiles and unauthorized use of private property—that it wished to correct."[54]

The plaintiff disagreed and, drawing support from *Schneider*, argued that the city could control littering through general anti-littering laws.[55] The court distinguished *Schneider* because *Schneider* did not consider the private property interests of the recipient.[56] Additionally, the court reasoned that "'[t]he right recognized in *Schneider* . . . is to *tender* the written material to the passerby *who may reject it or accept it*.'"[57] Emphasizing that absent vehicle owners have "*no choice* in receiving the literature, *no choice* in accepting the burden of disposing of it, and *no*

47. *Jobe*, 409 F.3d at 268.

48. *Id.* at 269. The ordinances existed in several small cities, as well as large cities such as Atlanta, Philadelphia, Charlotte, Portland, and San Antonio. *Id.* at 265. Additionally, New York instituted a state-wide ban. *Id.*

49. *Id.* at 269–70.

50. *Id.* at 273–74.

51. *Id.* at 269.

52. *Id.* (quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984)).

53. *Jobe*, 409 F.3d at 269 (quoting *Taxpayers for Vincent*, 466 U.S. at 810).

54. *Id.*

55. *Id.* at 270 (citing Schneider *v.* New Jersey, 308 U.S. 147, 162 (1939)).

56. *Id.*

57. *Id.* at 271 (emphasis added) (quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 809–10 (1984)).

choice in peeling it off the windshield after a rain shower," the court found that the current ordinance did not prohibit the traditional leafleting right recognized in *Schneider*.[58]

The plaintiff argued that vehicle owners could reject the leaflets by placing a "No Solicitation" sign on the windshield, comparing the burden to a "do-not-call" or "do-not-spam list."[59] The court rejected this argument because, unlike e-mail or the telephone, a windshield is not a traditional method of communication, and a "No Solicitation" sign is an "unorthodox burden" to place on vehicle owners.[60] Furthermore, the court disagreed that vehicle owners should have the burden of looking away or discarding the leaflet, as in *Bolger*.[61] The court reasoned that:

> [A]lthough the 'short, though regular, journey from mail box to trash can . . . is an acceptable burden' to place on mailbox owners, that burden stems from an individual's choice to erect a mailbox. In marked contrast, parking a car on a public street is not an invitation to place literature on the car . . . or to become a vehicular sandwich board for another citizen's message of the day.[62]

Regarding the final element, the court held that the ordinance leaves the speaker with several other channels of communication,[63] such as door-to-door distribution, securely placing leaflets on porches, mailing, and person-to-person leafleting—including direct distribution to those who return to their cars.[64] However, the plaintiff argued that the aforementioned methods are not nearly as efficient in reaching residents who come downtown.[65] The court responded that, although the Supreme Court is sensitive to cheap and efficient methods of communication, "'this solicitude has practical boundaries,'"[66] and "[a]t some point, the very cheapness of a mode of communication may lead to its abuse."[67]

Therefore, the court upheld the ban as a valid time, place, and manner restriction.[68] The court held that the ordinance burdened no more

58. *Id.* (emphasis added) (citations omitted).

59. *Jobe*, 409 F.3d at 272.

60. *Id.*

61. *Id.* at 270–71.

62. *Id.* (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983)).

63. *Id.* at 270.

64. *Id.*

65. *Jobe*, 409 F.3d at 272.

66. *Id.* (quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 n.30 (1984)).

67. *Id.* at 273.

68. *Id.* at 262.

speech than necessary to prevent litter and protect private property interests and that the ordinance left speakers with other suitable methods to deliver their message.[69]

B. Ban on Windshield Leafleting Is Unconstitutional

The Seventh, Eighth, and Ninth Circuits each struck down ordinances prohibiting windshield leafleting.[70] The Eighth Circuit first ruled on the issue in 1998 when it decided *Krantz v. City of Fort Smith*,[71] a decision that preceded the Sixth Circuit's decision in *Jobe*. However, the Seventh and Ninth Circuits did not join the split until 2008 and 2009, respectively, both after the Sixth Circuit's decision in *Jobe*.[72]

The Seventh Circuit, in *Horina v. Granite City*,[73] held that a ban on windshield leafleting violates the First Amendment.[74] The ordinance stated, "[n]o person shall deposit or throw any handbill in or upon any vehicle."[75] As in *Jobe*, the court analyzed the ordinance as a time, place, and manner restriction.[76]

The court accepted that litter prevention and the protection of private property can be significant government interests but required "'evidence supporting [the government's] proffered justification.'"[77] The court stated that the government does not have to produce "a panoply of 'empirical studies, testimony, police records, [or] reported injuries,'"[78] but it "must nevertheless proffer *something* showing that the restriction actually serves a government interest."[79]

69. *Id.*

70. *See* Krantz v. City of Fort Smith, 160 F.3d 1214, 1222 (8th Cir. 1998); Horina v. Granite City, 538 F.3d 624, 638 (7th Cir. 2008); Klein v. City of San Clemente, 584 F.3d 1196, 1208 (9th Cir. 2009).

71. 160 F.3d 1214 (8th Cr. 1998).

72. *See* Horina v. Granite City, 538 F.3d 624 (7th Cir. 2008); Klein v. City of San Clemente, 584 F.3d 1196 (9th Cir. 2009).

73. 538 F.3d 624 (7th Cir. 2008).

74. *Id.* at 638.

75. *Id.* at 628. The court also struck down another ordinance that prohibited placing any handbill on any unoccupied private property. *Id.* However, because this ordinance is much broader than the current issue, the constitutional analysis would be beyond the scope of this Article.

76. *Id.* (concluding that the public forum analysis does not apply because privately owned vehicles parked on streets are not nonpublic fora).

77. *Id.* at 633 (quoting Weinberg v. City of Chicago, 310 F.3d 1029, 1038 (7th Cir. 2002)).

78. *Id.* at 633.

79. *Horina*, 538 F.3d at 634 (emphasis in original) (citing *Weinberg*, 310 F.3d at 1039; Watseka v. Ill. Pub. Action Council, 796 F.2d 1547, 1556 (7th Cir. 1986)). *See* Krantz v. City of Fort Smith, 160 F.3d 1214, 1221 (8th Cir. 1998) ("[D]efendants must demonstrate the existence of a 'reasonable fit' between their asserted goal and the means that they have selected to accomplish it." (quoting Cincinnati v. Discovery Network, 507 U.S. 410, 416 (1993))); Klein v. City of San Clemente, 584 F.3d 1196, 1202

Relying primarily on the statistic that thirty-eight other cities have similar laws, the government argued that common sense is sufficient to prove its interests.[80] The court rejected this argument, reasoning that other cities' ordinances do not show that the problem is present in that city.[81] The court also reasoned that a common sense explanation "can all-too-easily be used to mark unsupported conjecture."[82] The court further noted that, even if the government proffered sufficient evidence, the ordinance was not narrowly tailored.[83] Analogizing the case to *Schneider*, the court found that the government's interests could be effectively addressed using traditional anti-littering and trespass laws.[84]

Lastly, the court held that the ordinance did not leave open ample alternative methods of communication, rejecting both the use of the mail and person-to-person distribution as suitable alternatives.[85] The court emphasized that cheaper forms of expression have been given "'special solicitude.'"[86] Furthermore, the court noted that person-to-person distribution "is extremely time consuming and burdensome, particularly when the individual intends to convey a message to people who park their automobiles in a certain area of the city or who live in a certain neighborhood."[87] The court next found the use of the mail too expensive[88] and ineffective at reaching those who park at a particular location.[89] In summary, the court struck down the ordinance for failing the second, third, and fourth elements of the time, place, and manner analysis.[90]

The Eighth and Ninth Circuits invalidated similar bans and advanced the same general reasoning as the Seventh Circuit in *Horina*. The Ninth Circuit, in *Klein v. Clemente*,[91] placed additional emphasis on the rights

(9th Cir. 2009) (Local governments must "show some nexus between leaflets placed on vehicles and a resulting substantial increase in litter on the streets before we could find that the City's asserted interest in preventing littering on the street justifies a prohibition on placing leaflets on windshields.").

80. *Horina*, 538 F.3d at 633–34.

81. *Id.* at 634.

82. *Id.* at 633 (citations omitted).

83. *Id.* at 634.

84. *Id.* at 635 (citations omitted).

85. *Id.* at 635–36.

86. *Horina*, 538 F.3d at 635 (quoting Gresham v. Peterson, 225 F.3d 899, 906 (7th Cir. 2000) (quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 n.30 (1984))).

87. *Id.* at 636.

88. *Id.* (citing *Gresham*, 225 F.3d at 906; *Taxpayers for Vincent*, 466 U.S. at 812 n.30).

89. *Id.* (citing Weinberg v. City of Chicago, 310 F.3d 1029, 1040 (7th Cir. 2002) ("[A]n alternative is not adequate if it 'forecloses a speaker's ability to reach one audience even if it allows the speaker to reach other groups.'" (quoting *Gresham*, 225 F.3d at 907))).

90. *Id.* at 638.

91. 584 F.3d 1196 (9th Cir. 2009).

and burdens of the recipient. The court stressed that the ordinance punished vehicle owners who may want to receive the leaflets, commenting that "the 'right to distribute literature . . . necessarily protects the right to receive it.'"[92] The court placed the burden on the recipient to throw the leaflet in the trash.[93] Thus, the court took the opposite interpretation of *Bolger* than the Sixth Circuit in *Jobe*, arguing that "[j]ust as the 'short though regular, journey from mail box to trash can . . . is an acceptable burden,' . . . so the burden on recipients of disposing of unwanted leaflets cannot justify hampering speech."[94] The Ninth Circuit recognized that recipients must have the ability to reject speech, but found that vehicle owners are not a "captive audience"[95] and may simply look away or place a "No Solicitation" sign on their vehicle.[96]

IV. DISCUSSION

Similar to the Sixth Circuit, this Part argues that bans on windshield leafleting are constitutional. As highlighted above, the circuit split is caused by conflicting interpretations of three key issues within the time, place, and manner framework: (1) what evidence is required to justify a government's significant interests in litter prevention and the protection of private property; (2) whether, in light of *Schneider* and other Supreme Court precedent, bans on windshield leafleting are narrowly tailored; and (3) whether adequate alternative channels of communication remain for the speaker. This Part does not discuss whether such bans are content-neutral because all four circuits unanimously held that bans on windshield leafleting do not consider the content of the speech.[97]

Subsection A argues that common sense is sufficient to justify the government's interests in preventing litter and protecting private property, and that a government may rely on other cities' evidence. Subsection B argues that bans on windshield leafleting are narrowly tailored. Finally, Subsection C argues that direct distribution to

92. *Id.* at 1204 (quoting Martin v. City of Struthers, 319 U.S. 141, 143 (1943)).

93. *Id.*

94. *Id.* at 1204–05 (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983)).

95. *Klein*, 584 F.3d at 1204 n.6 (quoting *Bolger*, 463 U.S. at 72).

96. *Id.* at 1205 (citing Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 737 (1970)).

97. *Id.* at 1201 ("The parties agree that the ordinance is content-neutral, so the first prong of the traditional 'time, place, and manner' inquiry is not at issue in this case."); Jobe v. City of Catlettsburg, 409 F.3d 261, 268 (6th Cir. 2005) ("The law does not draw distinctions based on the topic of speech at issue or the point of view of the speaker."); Krantz v. City of Fort Smith, 160 F.3d 1214, 1219 (8th Cir. 1998); Horina v. Granite City, 538 F.3d 624, 639 (7th Cir. 2008) (Manion, J., dissenting) ("It is undisputed that the Ordinance is content-neutral.").

passersby and homes are more than adequate alternatives to windshield leafleting.

A. Significant Government Interest

All four circuits generally agree that litter prevention and the protection of private property can serve as significant government interests. However, they fundamentally disagree as to whether a local government must proffer evidence that littering is a problem in that particular city. The Seventh, Eighth, and Ninth Circuits require independent evidence, while the Sixth Circuit held that a common sense explanation is sufficient.

The Sixth Circuit's holding is more persuasive. Common sense is a valid tool to judge the constitutionality of a statute and should received similar treatment in this context.[98] While appropriate in some instances, governments should not have to show independent evidence where common sense supports their proffered interests. In *Metromedia, Inc. v. San Diego*, the Supreme Court considered whether a ban on billboards directly advanced traffic safety and esthetic interests.[99] The Court deferred to "the accumulated, *commonsense* judgments of local lawmakers"[100] and held that "[i]t is not speculative to recognize that billboards *by their very nature* . . . can be perceived as an 'esthetic harm.'"[101]

Common sense and daily experience show that litter prevention and the protection of private property are significant government interests in *any* city. Windshield leafleting, by its "very nature,"[102] impedes the aforementioned interests. Vehicles are not designed to serve as bulletin boards, and, whether by wind, rain, or simply gravity, leaflets may easily fall to the ground. Additionally, "[w]hile the more thoughtful drivers dispose of such flyers properly, common sense tells us that at least some of the unwanted flyers become litter, even without evidence from the City."[103]

A government's interest in preventing litter embodies a secondary

98. *See* Anderson v. Milwaukee County, 433 F.3d 975, 978 (7th Cir. 2006) ("Common sense must not be and should not be suspended when judging the constitutionality of a rule or statute.").

99. Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981).

100. *Id.* at 509 (emphasis added). *See also* Multimedia Publ'g Co. v. Greenville–Spartanburg Airport Dist., 991 F.2d 154, 160–61 (4th Cir. 1993) ("To advance [its] interests, the [city] need not have adduced specific factual evidence that its interests were advance by the ban . . . ; it was entitled to advanced its interest by arguments based on appeals to common sense and logic.") (citations omitted).

101. *Metromedia, Inc.*, 452 U.S. at 510 (emphasis added).

102. *Id.*

103. Horina v. Granite City, 538 F.3d 624, 640 (7th Cir. 2008) (Manion, J., dissenting).

interest in preventing visual blight.[104] Thus, even if leaflets remain affixed to vehicles and do not fall to the ground, the resulting visual blight justifies city action. If signs on utility poles cause sufficient visual blight to justify a city ban,[105] then the same common sense justification applies to leaflets on windshields; leaflets on windshields are as significant an eyesore as signs posted on utility poles.

With regard to private property interests, it is hardly speculative to conclude that upon returning to their cars, many vehicle owners would be displeased to find a leaflet pinned under their windshield wipers. Justice Manion, dissenting in *Horina*, commented that:

> It would be the rare driver indeed who has not experienced the intrusion of a flyer placed under a car windshield and the annoyance of removing the flyer, especially in inclement weather or when the driver doesn't notice it tucked under the passenger side windshield wiper until after fastening his seatbelt and starting his car.[106]

Evidence of other cities' windshield leafleting bans further supports a common sense justification. When the Sixth Circuit decided *Jobe*, thirty-eight other cities had laws banning windshield leafleting.[107] In *Horina*, the Ninth Circuit rejected the government's reliance on other cities' laws on grounds that a city must prove that the problem exists in that particular city. However, both the Sixth Circuit and the Supreme Court agree that a government may rely on another government's findings. In *Renton v. Playtime Theaters, Inc.*, the Supreme Court considered the constitutionality of a zoning ordinance affecting adult theaters.[108] The Court found that the city "was entitled to rely on the experiences . . . of other cities"[109] and did not have to produce evidence "specifically relating to [its] 'particular problems or needs.'"[110] Furthermore, "[t]he First Amendment does not require a city . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."[111] Similarly, in *Metromedia*, discussed earlier, the Court

104. *See* Cincinnati v. Discovery Network, 507 U.S. 410, 417 (1993) (analyzing the government's interest in preventing "visual blight caused by littering"); Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 847 F. Supp. 178, 193 (D. Mass. 1994) (noting that "to regulate littering" is "to regulate [a] form[ ] of visual blight"), *rev'd on other grounds*, 100 F.3d 175 (1st Cir. 1996).

105. *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 816–17 (1984).

106. Horina v. Granite City, 538 F.3d 624, 640 (7th Cir. 2008) (Manion, J., dissenting).

107. Jobe v. City of Catlettsburg, 409 F.3d 261, 269 (6th Cir. 2005).

108. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 41 (1986).

109. *Id.* at 51.

110. *Id.* at 50 (citation omitted).

111. *Id.* at 51–52.

found that San Diego had an esthetic interest in restricting billboards largely based on evidence that other states and municipalities had similar laws.[112]

In the current context, a common sense approach is essential because it may be impossible to collect evidence of littering and invasion of private property. Complaints are potentially the only type of independent, direct evidence that a city can proffer, and they are likely to be small in number, if present at all. Without a common sense justification, recognizing that litter prevention and the protection of private property are significant interests would only be realizable in theory.

In review, Supreme Court precedent clearly shows that common sense can justify a government's interests, especially when numerous other cities have passed similar laws. Because a significant number of cities have banned windshield leafleting,[113] a local government should not have to offer independent evidence to justify such a ban. Nevertheless, this Comment recognizes that, given the adverse holdings of the Seventh, Eighth, and Ninth Circuits, local governments should take the safe route and not assume all courts will share the views of the Sixth Circuit. As a result, local lawmakers should establish evidence of littering and private property invasions prior to enacting a windshield leafleting ordinance.

The evidence required to satisfy the adverse view is unclear. The Eight Circuit in *Krantz* found complaints from vehicle owners insufficient;[114] similarly, the Ninth Circuit in *Klein* held that "preventing a *marginal* quantity of litter" is insufficient, and the city must show that windshield leafleting "creates an abundance of litter significantly beyond the amount the City already manages to clean up."[115] On the other hand, the Seventh Circuit in *Horina* noted that a city does not have to "produce a panoply of 'empirical studies, testimony, police records, [or] reported injuries,'"[116] and Justice Manion, in dissent, suggested that a city could provide "a statement by a police officer, street cleaner, or

112. Metromedia, Inc. v. San Diego, 453 U.S. 490, 510 (1981) ("San Diego, like many States and other municipalities, has chosen to minimize the presence of" billboards. (footnote omitted)).

113. *See supra* note 48 and accompanying text.

114. Krantz v. City of Fort Smith, 1650 F.3d 1214, 1221–22 (8th Cir. 1998) ("[N]otwithstanding defendants' evidence that government officials received complaints about handbills left on cars and that the ordinances were enacted for the purposes of preventing litter, defendants have not established a factual basis for concluding that a cause-and-effect relationship actually exists between the placement of handbills on parked cars and litter that impacts the [public welfare] of the defendant cities.").

115. Klein v. City of San Clemente, 584 F.3d 1196, 1203 (9th Cir. 2009) (emphasis added).

116. Horina v. Granite City, 538 F.3d 624, 633 (7th Cir. 2008).

other witness with first-hand knowledge" of the problem.[117] Given the aforementioned standards, and because the decision in *Krantz* precedes the recent trend of windshield leafleting litigation,[118] local lawmakers would probably be safe presenting evidence from street cleaners, documented citizen complaints, or police officers.

B. Narrowly Tailored

Two issues have confounded circuit courts under the 'narrowly tailored' analysis. The first issue is whether *Schneider* requires governments to use anti-littering and trespass laws rather than ban windshield leafleting. The second issue is the appropriate burden to place on the recipient to reject the leaflets. The following subsections address each issue.

1. *Schneider* Does Not Require the Use of General Anti-Littering and Trespass Laws in the Windshield Leafleting Context

As mentioned earlier, in *Schneider* the Supreme Court struck down an ordinance that prohibited leafleting on public streets,[119] emphasizing that a general anti-littering ordinance could adequately serve the government's interest in preventing littering.[120] The Seventh Circuit applied this principle in *Horina*.[121] In contrast, the Sixth Circuit persuasively distinguished *Schneider* from *Jobe*.[122]

Schneider involved person-to-person leafleting, and each recipient had the present ability to reject the speech. Vehicle owners, absent from their vehicles, do not have the same opportunity because "the driver is unknown and the receptacle is mobile and lacks the ability to accept or reject the handbill."[123] An argument can be made that vehicle owners have the ability to reject leaflets using a "No Solicitation" sign, and as a result, the activity would fall within the *Schneider* holding. However,

117. *Id.* at 640 n.5 (Manion, J., dissenting).

118. *Krantz* was decided in 1998, while *Jobe*, *Horina*, and *Klein* were decided in 2005, 2008, and 2009, respectively.

119. Schneider v. New Jersey, 308 U.S. 147, 164 (1939).

120. *Id.* at 162.

121. Horina v. Granite City, 538 F.3d 624, 635 (7th Cir. 2008).

122. *See supra* notes 56–58 and accompanying text.

123. *Horina*, 538 F.3d at 639 n.3 (Manion, J., dissenting) (The ordinance "does not restrict traditional leafleting, which, as the court notes, is the offering of written materials to individuals in public places for their acceptance or rejection. . . . Rather, [the ordinance] prohibits the leaving of handbills on automobiles; with an automobile, the driver is unknown and the receptacle is mobile and lacks the ability to accept or reject the handbill.").

requiring vehicle owners to post a "No Solicitation" sign is a much higher burden than that imposed in *Schneider*, which merely required a passerby to say "no." Even if a burden can be placed on the vehicle owner to reject the leaflet, the current issue should fall outside the *specific* holding of *Schneider*—that "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from *handing* literature to *one willing to receive it*."[124]

Additionally, the *Schneider* Court emphasized that "the streets are *natural* and proper places for the dissemination of information and opinion . . . ."[125] Parked vehicles are on the streets, but are in no way "natural" places to convey ideas. Though police officers typically use a windshield to issue parking tickets, this comparison begs a different analysis because an improperly parked vehicle has broken the law. Additionally, as demonstrated by the recent increase in windshield leafleting litigation, windshield leafleting has become increasingly common.[126] Merely because a practice has increased in volume, however, in no way speaks to its legality, or more specifically, establishes it as "natural and proper . . . for the dissemination of information and opinion."[127]

Thus while *Schneider* established the right to leaflet, windshield leafleting does not necessarily fall under the right recognized in *Schneider*. The current issue neither involves direct distribution to people nor are vehicles "natural" receptacles for literature.

2. The Appropriate Burden to Place on the Recipient

Because the principle from *Schneider*—that a general anti-littering or trespass ordinance could address the problem—does not apply, the issue becomes the appropriate burden to place on the vehicle owner. In *Bolger*, the Supreme Court held that "[t]he *First Amendment* 'does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech.'"[128] The Court

124. *Schneider*, 308 U.S. at 162 (emphasis added).

125. *Id.* at 163 (emphasis added).

126. The Eight Circuit first addressed windshield leafleting in 1998. Krantz v. City of Fort Smith, 160 F.3d 1214 (8th Cir. 1998). After a seven year lull, the Sixth Circuit ruled on the issue in 2005, with the Seventh and Ninth Circuits doing so in 2008 and 2009, respectively. Jobe v. City of Catlettsburg, 409 F.3d 261 (6th Cir. 2005); *Horina*, 538 F.3d at 624; Klein v. City of San Clemente, 584 F.3d 1196 (9th Cir. 2009). Thus, all of the litigation on windshield leafleting has taken place in the past twelve years, with all but one case decided in the past five years.

127. *Schneider*, 308 U.S. at 163.

128. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (quoting Consol. Edison Co. v.

found that a mail recipient is not a captive audience and placed the burden on the recipient to opt out of unsolicited mailings.[129] In addition, in *Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, the Court placed the burden on the homeowner to post a "No Solicitation" sign to reject door-to-door leaflet distributors.[130]

The Eighth Circuit in *Klein* similarly determined that a vehicle owner is not a captive audience and placed the burden on the vehicle owner to place a "No Solicitation" sign on the dashboard.[131] However, as the Sixth Circuit in *Jobe* more persuasively noted, placing the burden on a vehicle owner to post a sign is an "unorthodox burden."[132] The difference lies in the nature of a door and a mailbox as modes of communication; both methods are express invitations to reach a homeowner, or at the very least are traditional methods of reaching a homeowner. For example, a sidewalk typically leads to a door, where ringing a doorbell can summon a homeowner, and thus invites visitors. Similarly, a mailbox, by its very nature, is an invitation to send information. In contrast, a vehicle in no way invites a speaker to place a leaflet under its windshield wiper. While a mailbox exists to receive information, a vehicle exists to provide transportation.[133]

Putting the burden on a vehicle owner to post a sign on the dashboard is both absurd and without merit. It is reasonable to assume that very few vehicle owners, even if adamantly opposed to windshield leafleting, will place an unsightly sign on their dashboard. Thus, the concept of a "No Solicitation" sign is only theoretically sufficient, and a reasonable vehicle owner is without recourse.

As previously mentioned, windshield leafleting is increasing in popularity. Each vehicle owner is likely aware of the risk that someone will place a leaflet on their windshield. Nevertheless, mere awareness is not an invitation. To illustrate, albeit in a more dramatic scenario, a homeowner may move into a crime-ridden area aware of the risk that an intruder may break into their home, but such awareness does not create

Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 542 (1980)).

129. *Id.*

130. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 168 (2002) (citing Schaumburg v. Citizens for Better Env't, 444 U.S. 620, 639 (1980) ("[T]he provision permitting homeowners to bar solicitors from their property by posting [no solicitation] signs . . . suggest[s] the availability of less intrusive and more effective measures to protect privacy.")).

131. *See supra* notes 95–96 and accompanying text.

132. Jobe v. City of Catlettsburg, 409 F.3d 261, 272 (6th Cir. 2005) (Windshield leafleting unjustly "put[s] the vehicle owner to the choice of accepting either a ridiculous requirement (removing the windshield wipers) or an unorthodox burden (placing a 'No Handbills, No Posters . . .' sign on the dashboard).").

133. *See id.* ("Unlike a telephone, a mailbox, a computer or the well-trodden path to the front door, the windshield wiper does not exist, formally or informally, to encourage communication.").

an invitation to break and enter.

In conclusion, *Schneider* does not require a government to use anti-littering and trespass laws in lieu of a windshield leafleting ban, and it is inappropriate to place the burden on the vehicle owner to post a sign to opt out of leaflet solicitations. The holding by the Sixth Circuit in *Jobe* is more persuasive. The court in *Jobe* held that the ordinance was narrowly tailored because it "targeted the precise problems—littering on private automobiles and unauthorized use of private property—that it wished to correct."[134] In *Metromedia, Inc.*, the Supreme Court used a similar analysis, noting that "the most direct and perhaps the only effective approach" is to prohibit billboards.[135] The Court emphasized that, because the ordinance did not prohibit all billboards, the city went "no further than necessary" and actually "stopped short of fully accomplishing its ends."[136] As in *Metromedia, Inc.*, the most direct and only effective approach to both prevent littering and protect private property interests is to prohibit windshield leafleting, while allowing other types of leafleting.

C. Ample Alternative Channels

A leafleting ordinance must leave the speaker with adequate alternative methods of communication.[137] Each circuit addressed the use of the mail, door-to-door leafleting, and person-to-person leafleting as possible adequate alternatives to windshield leafleting. While the Sixth Circuit in *Jobe* found all of the aforementioned alternatives adequate,[138] the Seventh Circuit rejected them.[139] The Seventh Circuit argued that the alternatives are time-consuming, burdensome, and do not allow the speaker to reach those who park in a specific area of a city or neighborhood.[140]

The Ninth Circuit reasonably rejected using the mail as a suitable alternative to windshield leafleting. In addition to the expense of stamps, collecting the addresses of the target audience is overly tedious and burdensome. Direct distribution to persons in the street and leafleting at homes, however, are more than adequate alternatives.

There are two relevant contexts where speakers typically windshield

134. *Id.* at 269.

135. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508 (1981).

136. *Id.*

137. *See id.* at 516.

138. *See supra* notes 63–67 and accompanying text.

139. *See supra* notes 85–89 and accompanying test.

140. *See supra* notes 85–89 and accompanying text.

leaflet: (1) along the streets of a neighborhood—where homes line the streets—and (2) along the streets of an inner city—where homes do not line the streets. First, in the neighborhood context, door-to-door leafleting may actually be a superior method to windshield leafleting. The Supreme Court has recognized that "the most effective way of bringing [leaflets] to the notice of individuals is their distribution at the homes of the people."[141] Moving from door to door may take more time than simply strolling down the street from vehicle to vehicle, but the additional burden is insignificant. A distributor may elect to leave the leaflet on the front porch because several state laws suggest that speakers may securely fasten leaflets to a front porch.[142] Such a strategy also allows speakers to reach homeowners that are not home. Thus, the travel time, while requiring an additional walk up the sidewalk, is not a viable basis for invalidating door-to-door leafleting as an *adequate* alternative.

Second, in the city context, streets are lined with parked vehicles, but few homes are present. In such cases, while distribution to homeowners may not reach the desired audience, direct distribution to persons in the streets should suffice. Person-to-person distribution may require the expenditure of a great deal of time if the area is not frequently trafficked. However, it is reasonable to ask a distributor of leaflets to travel a short distance to find a more advantageous location.

In *Taxpayers for Vincent*, the Supreme Court upheld a ban on signs on utility poles because the speaker could still "distribute literature in the same place where the posting of signs on public property is prohibited."[143] The same situation presents itself with regard to windshield leafleting. Speakers may not windshield leaflet, but they may distribute at that exact location, whether it be to persons walking on the adjacent sidewalk or homes that line the street. Moreover, alternatives do not have to be equivalent or superior to windshield leaflets, but rather need only be "adequate."[144] Further, the superiority of a method "has practical boundaries."[145] As discussed, within their

141. Schneider v. New Jersey, 308 U.S. 147, 164 (1939).

142. *See* Van Nuys Publ'g Co., Inc. v. City of Thousand Oaks, 489 P.2d 809, 817 (Cal. 1971) (striking down an ordinance that prohibited fastening leaflets on doorsteps or porches); Statesboro Publ'g Co. v. City of Sylvania, 516 S.E.2d 296, 299 (Ga. 1999) (striking down an ordinance that prohibited the distribution of leaflets on porches).

143. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 792 (1984) (footnote omitted).

144. Horina *v.* Granite City, 538 F.3d 624, 635 (7th Cir. 2008) ("An adequate alternative does not have to be the speaker's first or best choice . . . .") (citations omitted).

145. Jobe v. City of Catlettsburg, 409 F.3d 261, 272 (6th Cir. 2005) (quoting *Taxpayers for Vincent*, 466 U.S. at 812 n.30). *See* Kovacs v. Cooper, 336 U.S. 77, 88–89 (1949) ("That more people

given contexts, both visiting homes in neighborhoods and direct distribution to passersby in the city are more than adequate alternatives to windshield leafleting.

V. CONCLUSION

While the First Amendment carries significant force, the law shifts in favor of allowing bans on windshield leafleting. Local governments have the power to maintain an esthetically pleasing landscape and to protect the property of its citizens. Local governments should not have to proffer independent evidence in support of these interests, as common sense provides adequate justification in this context. However, to play it safe, a legislature should establish independent supporting evidence regardless of whether common sense is sufficient. Proving a significant government interest is the second prong in the time, place, and manner analysis, and a critical judiciary should not be provided an opportunity to easily dismiss the claim.

Additionally, bans on windshield leaflets are narrowly tailored because *Schneider* does not require local governments to resort to general trespass and anti-littering laws, and it is inappropriate to place the burden on vehicle owners to post a "No Solicitation" sign. Lastly, the speaker has ample alternative channels for communication. Whether in a neighborhood or in the city, the speaker may directly distribute to individual homes or to passersby.

Sister circuits should heed the Sixth Circuit's lead and uphold bans on windshield leafleting. Although recent jurisprudence is trending in the opposite direction, eight circuits, and most importantly, the Supreme Court, have yet to rule on the issue. If the recent trend does not reverse, vehicle owners will be subject to the needling annoyance and invasion of personal property that windshield leafleting entails, and local governments will be powerless to protect the esthetics of the city and the rights of its citizens in an efficient manner.

may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.").