No. 08-56914

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHNNY ANDERSON,

Plaintiff-Appellant ,

v.

CITY OF HERMOSA BEACH,
a California Municipal Corporation,

Defendant-Appellee.

Appeal from the United States District Court
For the Central District of California
The Hon. Christina A. Snyder, District Judge, Presiding
Dist. Ct. No. 2:07-cv-05923-CAS-E

OPENING BRIEF OF APPELLANT

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INTRODUCTION

Despite the ubiquity of tattoos and the rapid evolution that has occurred in the design and application of body art in the past few decades, there is no federal appellate decision examining the issue of whether a tattoo artist is engaged in activity protected by the First Amendment when designing and applying custom-designed tattoos. That issue is squarely presented by this case. Appellant Johnny Anderson is a skilled and highly renowned tattoo artist who wishes to open a shop in the appellee City of Hermosa Beach, where tattoo shops are banned. The Court below ruled against Mr. Anderson on cross-motions for summary judgment, holding that creating and applying tattoos was conduct falling outside the protection of the free speech and press clause of the First Amendment.

JURISDICTIONAL STATEMENT

(A) Basis for the District Court's Subject-Matter Jurisdiction. The district Court had jurisdiction over the subject matter of this action under 28 U.S.C. §1331 (federal question) and under 28 U.S.C.§1343 (civil rights).

(B) Basis for the Court of Appeals' Jurisdiction. This is an appeal from an order granting Defendant's motion for summary judgment and denying Anderson's

cross-motion for summary judgment, Excerpts of Record [EOR] 2-12][1], which finally disposed of all issues between the parties. This court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

(C) Filing Dates Establishing the Timeliness of the Appeal. The summary judgment order was issued on October 27, 2008, and entered on October 28, 2008. Notice of appeal was filed on November 20, 2008, within thirty days of the entry of the order granting summary judgment.

(D) The Appeal is From a Final Order that disposes of all parties' claims. As the court below stated in the Conclusion to its order, the court granted defendant's motion for summary judgment and denied plaintiff's motion for summary judgment. The order appearing at EOR 2-12 is therefore a final order disposing of all claims in the action.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the design and execution of a tattoo is expression protected by the

[1]The Excerpts of Record [EOR} (in one volume) contains the all the declarations and supporting exhibits filed in the District Court on the cross-motions for summary judgment. The pages of the EOR are consecutively numbered. When referring to the specific page and line number of the Order Granting Defendant's Motion for Summary Judgment, the EOR cite will be followed by [Order page:line].

Free Speech and Press Clauses of the First Amendment.

STATEMENT OF THE CASE

1. *Nature of the Case*. This is an action for declaratory and injunctive relief brought on behalf of plaintiff and appellant Johnny Anderson, an individual who desires to practice his occupation, tattooing, in the City of Hermosa Beach, California. Defendant and Appellee City of Hermosa Beach [Hermosa Beach] prohibits the practice of tattooing anywhere in the City. Plaintiff claimed, and defendant City of Hermosa Beach [Hermosa Beach] denied, that the design and application of tattoos is expression protected by the First Amendment to the Constitution of the United States. Plaintiff sought a declaration that the sections of the Hermosa Beach Municipal Code prohibiting tattooing violate the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

2. *Course of Proceedings*. The action was filed on September 12, 2007, and assigned to the Hon. Christina A. Snyder, United States District Judge. EOR 152. Cross motions for summary judgment were filed on September 22, 2008. EOR 154. The motions were argued on October 27, 2008, and decided the same day. EOR 157. Mr. Anderson's notice of appeal was filed on November 20, 2008.

3. *Disposition below*. The case was decided on cross-motions for summary

judgment, with judgment being granted in favor of Hermosa Beach and against Mr. Anderson. This appeal followed.

STATEMENT OF FACTS

The opinion of the district court did not rule that any of the evidence offered by the parties was inadmissible. While the ruling of the district court refers to some of the facts offered by the parties, it appears to follow the smattering of decisions that hold as a matter of law that the "act of tattooing is not protected expression under the First Amendment." EOR 9 [Order 8:20-21]. Given the rigorous standard of review of a grant of summary judgment,[2] however, the court's somewhat puzzling comment, "the only evidence [Mr. Anderson] offers as to the communicative intent or effect of tattooing pertains chiefly to his own work," suggests that there may have been triable issues of fact that may bear on the issue in the case.

In any event, there are a number of facts that are not disputed. Hermosa Beach Municipal Code § 17.06.070 provides:

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[2]"We review de novo a grant of summary judgment and must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir.2000) (en banc).

> Except as provided in this title, no building shall be erected, reconstructed or structurally altered, nor shall any building or land be used for any purpose except as hereinafter specifically provided and allowed in the same zone in which such building and land is located.

No provision of the zoning code permits tattoo parlors, and such facilities are therefore banned from Hermosa Beach. EOR 2-3 [Order 1:23-28, 2:1].

In August, 2006, Mr. Anderson filed a similar action, Anderson v. City of Hermosa Beach, C.D. Cal. No. CV 06-5078 CAS (Ex), which was dismissed on November 27, 2006, for lack of ripeness. The ripeness concern arose because Hermosa Beach Municipal Code § 17.26.040 permitted the director of community development to determine that a use not listed in the zoning code might nevertheless be permitted if classified as a "similar use." In May, 2007, counsel for Mr. Anderson requested a finding of "similar use" so that Mr. Anderson could open a tattoo establishment. By letter dated June 21, 2007, the request was denied. EOR 3.

Thus, under the Hermosa Beach code, Mr. Anderson is prohibited from applying artistic and communicative tattoos in the City of Hermosa Beach.

The declaration submitted by Mr. Anderson touched upon the history of tattooing, upon Mr. Anderson's experience and qualifications as a tattoo artist, and described the expressive elements embodied in his tattoos. Tattooing itself is an ancient and complex art form. The "Iceman,"dating to 3300 B.C., and discovered

in 1991 by tourists in the Italian Alps, has markings on his frozen and mummified remains that appear to be tattoos. Tattoos found on Egyptian and Nubian mummies date from about 2,000 B.C. Historical accounts of the Greeks, ancient Germans, Gauls, Thracians and ancient Britons reflect the use of tattoos, but they largely disappeared from Europe during the middle ages. EOR 21.

"Tattoo" comes from the Tahitian word *tattau*, "to mark," and tattoos were mentioned in James Cook's records from his 1769 expedition to the South Pacific. It was contact between European explorers and Polynesians, Native Americans, and other tribal peoples that caused the tattoo to be reintroduced into Europe. EOR 21.

Tattoos have served many functions in many cultures. One objective has been artistic and decorative. But tattoo designs have become enormously varied and complex, reflecting kinship, artistry, the communication of messages, and self-expression. The darkest aspect of tattoo history can be traced from Roman times, when slaves were tattooed to show their status and owner, to the use of tattooed numbers by the Nazis in the slave labor and death camps of the Second World War. For a combination of reasons–their association with primitive culture, with slavery, with the Holocaust, and with sailors and the tawdry port districts housing tattoo parlors–tattooing took on an unseemly character in post-World War II

America. EOR 21-22.

In the past fifteen years, however, tattooing has enjoyed a resurgence of interest and something of a rehabilitation. More than twenty percent of American adults have one or more tattoos, including movie stars, policemen, lawyers, and (rumor has it) a former Secretary of State who attended Princeton University. EOR 22.

The tattoo designs that are applied by Mr. Anderson are individual and unique creative works of visual art, designed by him in collaboration with the person who is to receive the tattoo. The precise design to be used is decided upon after discussion with the client and review of a draft of the design. The choices made by both the artist and by the recipient involve consideration of color, light, shape, size, placement on the body, literal meaning, symbolic meaning, historical allusion, religious import, and emotional content. Mr. Anderson's designs are enormously varied and complex, and include realistic depictions of people, animals and objects, stylized depictions of the same things, religious images, fictional images, and geometric shapes and patterns. Sometimes, several kinds of images are combined into a single tattoo or series of tattoos. Mr. Anderson has studied the history of tattooing and draws significantly on traditional Americana tattoo designs and on Japanese tattoo motifs for his images. EOR 26.

Thus, Mr. Anderson's tattoos are a medium of creative expression for him and a means of personal expression for those to whom they are applied. For the artist, the design and application of tattoos, while an unusual medium, is no different in its expressive content than sculpture, painting, film-making, and all the myriad media that have been held to be protected speech. For the wearer, the tattoo provides a unique medium of expression, and, depending on the design, can express ideas in words or pictures, can communicate affiliation or affection, and can communicate spirituality or sensuality through realistic or abstract designs. EOR 26-27.

Attached as Exhibit 2 to Mr. Anderson's declaration in support of his motion for summary judgment were a number of his tattoo designs, EOR 42-50, and in his declaration he explains the creative objectives in each design. EOR 28-30. His sense of the history of tattooing, his incorporation of various design elements from American, East Asian and other sources, and his ability to draw of traditional symbols to convey particular messages demonstrate that, whatever one may think about tattooing, Mr. Anderson is engaged in the expression of emotion, history and artistry in the creation and application of his designs. *Id.*

SUMMARY OF THE ARGUMENT

This is a case of first impression, not only for the Ninth Circuit, but for all the circuits. The City of Hermosa Beach, California, prohibits all tattooing. On cross-motions for summary judgment, the trial court held as a matter of law that tattooing is not a form of expression protected by the Free Speech and Free Press Clauses of the First Amendment, upholding the ban.

The evidence before the Court demonstrated that Mr. Anderson creates and applies tattoos that serve as a means of expression both for himself and for his clients. Contrary to the ruling below, tattooing is not "conduct" even though it involves a physical process. Instead, it is a manner of expression indistinguishable for First Amendment purposes from other media.

Ideas may remain in one's mind, but all forms of expression involve some physical aspect, whether it be the noise associated with speech, the rumble of newspaper printing presses, the sound and light of motion pictures, the application of paint to canvas, feet pounding the pavement during a march, or music wafting into the night air. Regulation rather than prohibition is the touchstone when it comes to ameliorating any harms occasioned by the exercise of the right of free speech.

Therefore, the judgment of the trial court must be reversed, and judgment entered in favor of Mr. Anderson, invalidating the ban on tattooing imposed by the

City of Hermosa Beach.

ARGUMENT

TATTOOING IS A FORM OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT AND MAY NOT BE BANNED EXCEPT TO SATISFY A COMPELLING GOVERNMENTAL INTEREST.

A. Standard of Review. Johnny Anderson appeals both the grant of summary judgment in favor of Hermosa Beach and the denial of summary judgment in his favor and against Hermosa Beach. This Court has "jurisdiction with regard to both determinations and review[s] both de novo." *Kuba v. 1-A Agricultural Ass'n*, 387 F.3d 850, 856 (9th Cir. 2004). The Court "must determine, 'viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.'" *Id.* (quoting *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021 (9th Cir.2001).

B. The Opinion of The Court Below Erroneously Concluded That Because Tattooing Involves the Physical Act of Injecting Ink Into the Skin, It Is "Conduct" for First Amendment Purposes, Not Speech. The trial court accepted the argument

of Hermosa Beach that tattooing is at best symbolic speech, akin to flag burning and the display of firearms, *Nordyke v. King*, 319 F.3d 1185, 1189 (9th Cir. 2003), rather than speech itself. The crux of the decision below was the trial court's holding that "the act of tattooing is not protected expression under the First Amendment because, although it is non-verbal conduct expressive of an idea, it is not 'sufficiently imbued with elements of communication,'" citing *Spence v. Washington*, 418 U.S. 405, 94 S. Ct. 2727, 41 L. Ed.2d 842 (1974). EOR 9 [Order 8:20-22]. The court went on to note that each tattoo is unique, EOR 8-9, citing *Hold Fast Tattoo v. City of North Chicago*, 580 F. Supp.2d 656 (N.D. Ill. 2008), and that the "customer has ultimate control over which design she wants tattooed on her skin." The court extracts one remark from plaintiff's deposition testimony in another case, the he "provides a service," prefacing it with the word "merely", which does not appear in the testimony, as if that somehow took his creative activity outside the First Amendment. A newspaper reporter is a servant in the legal and literal sense of his publisher, yet no one would doubt that his "service" is an activity protected by the First Amendment, even when he is investigating and writing an article assigned by his editor and subject to the editor's and publisher's revisions. Works for hire are no less protected than those produced by the starving writer in a garret.

Next, "the Court concludes that the tattoo artist does not convey an idea or message discernible to an identifiable audience," citing *State v. White*, 348 S.C. 532, 560 S.E. 2d 420 (2002) . EOR 10 [Order 9:7-8]. Again relying on *White*, the court stated that tattooing is unlike printing or painting or using a pen because it involves the "invasion of human tissue, and therefore may be subject to state regulation which other art forms may not be lawfully subject." EOR 10-11. Consequently, the lower court decreed, "a tattoo is not plaintiff's 'self-expression' because the customer ultimately dictates which image will be tattooed on her arm.'" EOR 11 [Order 10:5-7].

For the reasons set forth below, tattooing may only be properly classified as a medium of expression, not conduct outside the protection of the First Amendment.

C. Tattooing Is Visual and Verbal Expression Fully Protected by the First Amendment. For purposes of First Amendment analysis, the only salient difference between tattooing and any other form of visual or verbal expression is that tattoos are applied to the human skin, rather than painted on canvas, drawn on paper, written on walls, or printed on T-shirts. The character of the images themselves, which may be realistic or abstract, or may contains words, words and images, or images alone, is indistinguishable from the myriad forms of expression that have

been found to lie at the core of the First Amendment. While plaintiff does not dispute that the surface involved and the procedure by which the image is created require special attention to issues of public health, the creation and display of the images is a creative process indistinguishable from other forms of visual expression that are accorded full First Amendment protection. As the full constitutional protection given to instrumental music illustrates, literal meaning and the transmission of a message that can be easily articulated is not a requirement of the Free Speech Clause.

The Free Speech Clause of the First Amendment encompasses a broad range of expressive media, recognizing far more than words to be protected expression. The protection of the First Amendment is not limited to written or spoken words, but includes other media of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures.

> In painting, an artist conveys his sense of form, topic, and perspective. A painting may express a clear social position, as with Picasso's condemnation of the horrors of war in *Guernica*, or may express the artist's vision of movement and color, as with "the unquestionably shielded painting of Jackson Pollock." [*Hurley* and other

> citations.] Any artist's original painting holds potential to "affect public attitudes" [*Burstyn*], by spurring thoughtful reflection in and discussion among its viewers. So long as it is an artist's self-expression, a painting will be protected under the First Amendment, because it expresses the artist's perspective.

White v. City of Sparks, 500 F.3d 953, 956 (9th Cir. 2007). *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569, 115 S. Ct. 2338, 132 L. Ed.2d 487 (1995)("[T]he Constitution looks beyond written or spoken words as mediums of expression."); *Ward v. Rock Against Racism*, 491 U.S. 781, 790, 109 S. Ct. 2746, 105 L. Ed.2d 661 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S. Ct. 2561, 45 L. ED.2d 648 (1975) ("customary 'barroom' type of nude dancing" entitled to First Amendment protection); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578, 97 S. Ct. 2849, 53 L. Ed.2d 965 (1977)("There is no doubt that entertainment, as well as news, enjoys First Amendment protection."); *Kaplan v. California*, 413 U.S. 115, 119-120, 93 S. Ct. 2680, 37 L. Ed.2d 492 (1973)("[P]ictures, films, paintings, drawings, and engravings ... have First Amendment protection[.]"); *Joseph*

Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02, 72 S. Ct. 777, 96 L. Ed. 1098 (1952) (motion pictures); *Bery v. City of New York*, 97 F.3d 689, 695 (2nd Cir.1996)("[V]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection.").[3]

Moreover, speech is protected even when, as here, it is disseminated in a form that is sold for profit. "'The degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away.'" *White v. City of Sparks*, 500 F.3d at 956, *quoting City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 756, n.5, 108 S. Ct. 2138, 100 L. Ed.2d 771 (1988) (newsracks on city streets). *See Smith v. California*, 361 U.S. 147, 150, 80 S. Ct. 215, 4 L Ed.2d 205 (1959) ("It is of course no matter that the

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[3]Other non-verbal but highly protected forms of expression include parades, a form of expression, not just motion. *See Gregory v. Chicago*, 394 U.S. 111, 112, 89 S.Ct. 946, 947, 22 L.Ed.2d 134 (1969) (a "march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment."); *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963) (a march of protest and pride reflected "an exercise of these basic constitutional rights in their most pristine and classic form." "Symbolism is a primitive but effective way of communicating ideas," *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632, 63 S.Ct. 1178, 1182, 87 L.Ed. 1628 (1943), (the First Amendment shields such acts as saluting a flag (and refusing to do so)); *see Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505-506, 89 S.Ct. 733, 735-736, 21 L.Ed.2d 731 (1969), *Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931) (displaying a red flag); *National Socialist Party of America v. Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977)("[m]arching, walking or parading" in uniforms displaying the swastika).

dissemination [of books and other forms of the printed word] takes place under commercial auspices."); *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed.2d 659 (1976)(paid advertisement); *Time, Inc. v. Hill*, 385 U.S. 374, 397, 87 S. Ct. 534, 17 L. Ed.2d 456 (1967) ("'That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.'"), *quoting Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502, 72 S. Ct. 777, 96 L. Ed. 1098 (1952); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed.2d 686 (1964) (solicitation to pay or contribute money). The fact that expressive materials are sold does not diminish the degree of protection to which they are entitled under the First Amendment.

Publishers disseminating the work of others who create expressive materials also come wholly within the protective shield of the First Amendment. *See, e.g., Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S. Ct. 501, 116 L. ED.2d 476 (1991)(both the author and the publishing house are "speakers" for purposes of the First Amendment); *Sullivan*, 376 U.S. at 286-88, 84 S. Ct. 710 (finding New York *Times* fully protected by the First Amendment for publishing a paid editorial advertisement). See also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 782, 98 S. Ct. 1407, 55 L. ED.2d 707 (1978).

As the declaration of Johnny Anderson eloquently explains, his images are expressive and emotionally evocative in precisely the same way as music and painting. One might be hard pressed to explain what a work of music "means," whether the work be one composed by Phillip Glass or the Grateful Dead. Yet those who are feel an emotional reaction listening to the second movement of Beethoven's Third Symphony or the progression from despair to redemption in a John Coltrane solo would have no doubt about the impact of non-verbal communication. No court has ever viewed a painting by Mark Rothko as anything other than speech at the core of the First Amendment, even though the "meaning" of its abstract images might be far less obvious than the "meaning" of a portrait by Rembrandt. Or perhaps not.

> As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," cf. *Spence v. Washington*, 418 U.S. 405, 411, . . . (per curiam), would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.

Hurley, 515 U.S. at 567.

D. While Tattooing May Be Carefully Regulated, There Is No Justification For Banning It Completely. The preference for encouraging a broad range of expression is embedded in First Amendment jurisprudence. While regulations of expressive activity are common, and are frequently upheld, examples do not come to mind where the courts have prohibited a particular means of communication. When the First Amendment was written, paper and ink, and the unamplified human voice, were the principal beneficiaries of its protections. As the understanding of the nature of expression has evolved, and as technology has progressed, the scope of the protections of free speech and press has expanded as well, maintaining nevertheless the strong constitutional preference for expression fettered as little as possible by governmental control.

Tattooing is, like printing or painting, a medium of communication with a physical component, rather than a physical action that may have a communicative import. Tattooing is more akin to playing rock music, *Ward v. Rock Against Racism*, or organized marching in the street, *Shuttlesworth v. City of Birmingham*, 394 U.S 147, 89 S. Ct. 935, 22 L. Ed. Ed 162 (1969), than it is to burning a draft card, *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. ED.2d 672 (1968), or sleeping in a park. *Clark v. Community for Creative Non-Violence*, 468 U.S.

288, 104 S. Ct. 3065, 82 L. ED.2d 221 (1984).[4] A ban on tattooing therefore constitutes a prohibition of a particular means of expression rather than a prohibition of normally non-expressive conduct that might be used to make a political point.

The district court simply got it wrong when it effectively labeled tattooing "symbolic speech." Tattooing may involve symbols, but it is speech. Speech in Yiddish or Spanish may not be comprehensible to large numbers of Americans, but that does not render it anything other than speech for First Amendment purposes. Hieroglyphics involve the use of pictographic images to convey meaning, rather that words as we understand them, but even though few living people can interpret

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[4] *O'Brien* concerned "expressive conduct regarding symbolic items," *Gaudiya Vaishnava Society v. City & County of San Francisco*, 952 F. 2d 1059, 1065 (9th Cir. 1991), not expression itself. Applying a tattoo is expression in the same way that putting a pen to paper, or applying paint to canvas, or turning on the printing presses at the Los Angeles Times, are expression.

Under *O'Brien*, a restriction on conduct will be upheld even if restricting the conduct has an incidental, adverse impact on the right of expression, provided the restriction "[1] is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377, 88 S.Ct. at 1679. Even under the less onerous *O'Brien* test, however, the total ban on tattooing would fail constitutional muster. Banning tattooing is a complete ban on a medium of expression, and far lesser burdens–such as enforcement of Penal Code § 653 and enforcement of the applicable County health ordinances–would satisfy governmental interests.

them, hieroglyphic writing cannot be called anything other than expression.

All communication involves conveying ideas by means of words or pictures which are nothing more than symbols of what they are intended to convey. "Dog" has no fur or wagging tail. A drawing of a dog on the wall of a cave is simply a different, indeed a more universally understood, means of communicating "dog." A tattoo of a dog's image on one's arm is similarly a means of communicating "dog," and may convey the additional messages "my dog" or "my favorite dog" or "watch out I am a bulldog."

A ban on tattooing is nothing less than a total ban on a particular medium of expression, and the constitutional hurdle the ban must get over is extraordinarily high, indeed, virtually insurmountable. In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 101 S. Ct. 2176, 68 L. ED.2d 671 (1981), for example, the Supreme Court assessed "the substantiality of the governmental interests asserted" and "whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment," in striking down the borough's total ban on live commercial entertainment. *Id.*, at 70, 101 S. Ct., at 2183. *Schad* repeated an analysis applied in previous cases concerning total bans of media of expression. For example, in *Schneider v. State*, 308 U.S. 147, 60 S. Ct. 146, 84 L. ED. 155 (1939), the Court struck down total bans on handbill leafleting because there were less restrictive alternatives to achieve the goal of prevention of litter, in

fact alternatives that did not infringe at all on that important First Amendment privilege. *Id*., at 162, 60 S. Ct., at 151. In *Martin v. City of Struthers*, 319 U.S. 141, 63 S. Ct. 862, 87 L. ED. 1313 (1943), the Court invalidated a municipal ordinance that prohibited door-to-door solicitation. *See Jamison v. Texas*, 318 U.S. 413, 416- 417, 63 S. Ct. 669, 671-672, 87 L. ED. 869 (1943) (distribution of handbills); *Hague v. CIO*, 307 U.S. 496, 518, 59 S. Ct. 954, 965, 83 L. ED. 1423 (1939) (opinion of Roberts, J.) (distribution of pamphlets). See generally Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1335-1336 (1970).

Of course, "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501, 101 S. Ct. 2882, 2889, 69 L. ED.2d 800 (1981), quoting *Kovacs v. Cooper*, 336 U.S. 77, 97, 69 S. Ct. 448, 458, 93 L Ed. 513 (1949) (Jackson, J., concurring). Similarly, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S. Ct. 1239, 1246, 43 L. ED.2d 448 (1975), observed, "Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."

While no doubt there are special considerations attached to the medium of tattooing, every form of expression causes its own set of ancillary effects. While

Hermosa Beach may be expected to magnify the problems created by tattooing, the special problems associated with it are not of a different order of magnitude than those associated with commercial live entertainment in the Borough of Mount Ephraim, or with door-to-door literature distribution in the City of Struthers, or with street demonstrations, or adult businesses. A city should be able to ban tattooing only if it can show that a sufficiently substantial governmental interest is directly furthered by the total ban, and that any more narrowly drawn restriction, i.e., anything less than a total ban, would fail adequately to protect the city's interest.

The court below alluded to the health problems allegedly associated with tattooing. EOR 11-12. But it did not (and could not) find that the potential health risks would have been sufficient to overcome a First Amendment right. Instead, they served as a rational basis for upholding a land use regulation which was, in its view, unrelated to the suppression of speech.

Because tattooing is, in fact, protected expression, the answer to concerns about sanitation should be addressed by regulation, not by outright prohibition. Tattooing is now permitted (subject to regulation) in all fifty states, with Oklahoma becoming the last to lift its ban as of November 1, 2006. See Oklahoma City Daily Record (May 11, 2006), http://findarticles.com/p/articles/mi_qn4182/is_/ai_n16412421 (Governor signs statute substituting

regulation for prohibition of tattooing, last state to do so).

Plaintiff himself is a vigorous advocate of aseptic tattooing. Not only does he advocate safe tattooing practices, he set up his own shop specifically so that he could ensure that his clients were in a safe environment. Despite the fact that the City of Los Angeles has been slow to set up adequate regulations, Mr. Anderson has taken the numerous steps detailed in his declaration to conform to the most rigorous standards of other regulators, such as the County of Los Angeles. EOR 22-25.

Mr. Anderson meticulously follows precisely the same aseptic practices that are embodied in Los Angeles County Code title 11, chapter 11,36 (Body Art Establishments) , and Part 1, chapter 36 (Body Art Regulations). Several cities in Los Angeles County have already assigned responsibility for the regulation and enforcement of sanitary standards for tattooing to the County, a trend that will no doubt accelerate once statewide standards are adopted as mandated by Cal. Health & Safety Code § 119301.

If it were argued that these means are less efficient than an outright ban, the answer lies in *Schneider v. State*, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939):

> We are of the opinion 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. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. Amongst these is the punishment of those who actually throw papers on the streets.

Id. at 162.

E. Decisions Upholding Prohibitions of Tattooing Do Not Properly Apply Principles of Free Speech. The trial court correctly noted that, "There is comparatively little case law addressing the issue [of the protection afforded tattooing under the First Amendment], and the vast majority of the courts that have considered it have held that tattooing is not protected." EOR 8 [Order 7:12-14.[5] It

[5]There are hundreds of cases discussing the wearing and display of tattoos, rather than the design and application of tattoos. Many cases involve the admissibility of tattoos showing gang affiliation in criminal trials. While such tattoos have nothing to do with Mr. Anderson's art or with this case, gang tattoos are clearly obtained and brandished for communicative purposes, however malicious.

relied on the cases finding tattooing to be unprotected as speech, primarily *State v. White*, 348 S.C. 532, 560 S.E. 2d 420 (2002), and *Hold Fast Tattoo v. City of North Chicago*, 580 F. Supp.2d 656 (N.D. Ill. 2008).

Thus, there is only a smattering of cases addressing the issue of tattooing,

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A smaller number of cases involves tattoo display by employees and by students. *See, e.g., Riggs v. City of Fort Worth*, 229 F. Supp. 2d 572 (N.D. Tex. 2002) (employee); *Stephenson v. Davenport Comm. School Dist.*, 110 F.3d 1303 (8th Cir.1997) (student). *Stephenson* and *Riggs* have a lot in common, because both involve public display of tattoos in controlled settings. *Stephenson* was the appeal of a student told by school authorities to have her tattoo removed; *Riggs* concerned a police-man whose extensive tattoos were noticed–and became grounds for discipline– after Officer Riggs had the misfortune to have the mayor's illegally parked 1998 green Cadillac towed. Each case has complexities not really pertinent here, but neither case should be read as a sweeping endorsement of a ban on tattoos.

Rather, both cases stand for the principle that schools can regulate the appearance of their students and employers can regulate the expressive activity of employees when they are on duty. If an attorney–or for that matter a judge–wished to wear a lapel pin demonstrating support for a particular cause, she would be free to do so generally, but she could be prohibited from wearing the emblem in front of a jury because of the potential for prejudice. If Mr. Cohen had worn his famous jacket in the courtroom itself, rather than in the hallway outside, his case would never have reached Washington. *See Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). When Sheila Myers circulated her petition to her co-workers, objecting to the way in which Harry Connick was running the New Orleans district attorney's office, she lost her job–not because she did not have a right under the First Amendment to complain about her job, but because she did not have the right to do so in a disruptive manner while she was at work. See *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). The present case makes no claim for an absolute right to create or display a tattoo regardless of circumstances, but merely for the reasonably circumscribed right to engage in artistic expression by the creator and bearers of tattoos.

most of which uphold regulations or prohibitions of tattooing.[6] The cases

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[6]On the other side of the ledger, a criminal charge of tattooing while not being a registered physician was dismissed in *Commonwealth of Massachusetts v. Meuse*, 10 Mass. L. Rptr 661, 1999 WL 1203793 (Super. Ct. Mass. 1999). There, the court found that tattooing deserved to be included among "the many kinds of expression so steadfastly protected by our Federal and State Constitutions." 1999 WL 1203793 at 3. In making its ruling, the court noted:

> America's core cultural reference books, professional journals, newspapers and magazines recognize tattooing as a well-established art form that, over the last three decades, has undergone dramatic changes. In the 1970s, artists trained in traditional fine art disciplines began to embrace tattooing and brought with them entirely new sorts of sophisticated imagery and technique. Advances in electric needle guns and pigments provided them with new ranges of color, delicacy of detail and aesthetic possibilities. The physical nature of many local tattooing establishments also changed as increasing numbers of operators adopted equipment and procedures resembling those of medical clinics--particularly in areas where tattooing is regulated by governmental health agencies.
>
> The cultural status of tattooing has steadily evolved from that of an anti-social activity in the 1960s to that of a trendy fashion statement in the 1990s. First adopted and flaunted by influential rock stars like the Rolling Stones in the early 1970s, tattooing had, by the late 1980s become accepted by ever broader segments of mainstream society. Today, tattoos are routinely seen on rock stars, professional sports figures, ice skating champions, fashion models, movie stars and other public figures who play a significant role in setting the culture's contemporary mores and behavior patterns.
>
> During the last fifteen years, two distinct classes of tattoo business have emerged. The first is the "tattoo parlor" that glories in a sense of urban outlaw culture; advertises

upholding prohibitions of tattooing are generally cursory in their examination of First Amendment claims regarding tattooing. Most of the more recent cases rely on *Yurkew v. Sinclair*, 495 F. Supp. 1248 (D. Minn. 1980), or cases like *State v.*

> itself with garish exterior signage; offers "pictures-off-the-wall" assembly-line service; and often operates with less than optimum sanitary procedures.
>
> The second is the "tattoo art studio" that most frequently features custom, fine art design; the ambiance of an upscale beauty salon; marketing campaigns aimed at middle-and upper-class professionals; and "by-appointment" services only. Today's fine art tattoo studio draws the same kind of clientele as a custom jewelry store, fashion boutique, or high-end antique shop.
>
> The market demographics for tattoo services are now skewed heavily toward mainstream customers. Tattooing today is the sixth-fastest growing retail business in the United States. The single fastest growing demographic group seeking tattoo services is, to the surprise of many, middle-class suburban women.
>
> Tattooing is recognized by government agencies as both an art form and a profession and tattoo-related art work is the subject of museum, gallery and educational institution art shows across the United States.

In *Maiden v. City of Manchester*, No. Civ. 03-190-M, 2004 WL 432189 (D.N.H. Order filed March 8, 2004), an order designated "Not for Publication,"the court considered a challenge to an ordinance limiting the practice of tattooing to physicians. Although it found that the Manchester law had likely been preempted, it noted that the ordinance was "outdated" without reaching any constitutional issues. More recently, *Voight v. City of Medford*, 22 Mass. L. Rptr. 122, 2007 WL 738750 (Mass. Super. Ct. Jan. 30, 2007), noted that "This Court has no difficulty in agreeing that tattooing constitutes expression protected by the First Amendment." *Id.* at *2.

White, 348 S.C. 532, 560 S.E. 2d 420 (2002), one of the few appellate decisions on the subject of tattooing, which relied upon *Yurkew*. In *White,* a divided court upheld a ban on tattooing in Myrtle Beach after one individual was caught tattooing another in a residence, in violation of S.C. Code Ann. § 16-17-700, which prohibited tattooing except by a physician (or someone acting at a physician's direction). Citing *People v. O'Sullivan* 96 Misc.2d 52, 209 N.Y.S. 2d 332 (1978), *State v. Brady*, 492 N.E. 2d 34 (Ind. App. 1986), and *Yurkew v. Sinclair*, 495 F. Supp. 1248 (D. Minn. 1980),[7] the majority found that tattooing was not speech.[8]

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[7]*People v. O'Sullivan*, 96 Misc. 2d 52, 409 N.Y.S. 2d 332 (1978), was a prosecution of an *unlicensed* tattoo practitioner who was arrested while tattooing a woman on a public street. *Id.* at 53. While the court considered the possibility that tattooing is "a barbaric survival, often associated with a morbid or abnormal personality," as an earlier court had found, the issue decided by the court was whether a licensing regulation was an invalid burden on tattooing. Assuming arguendo it was protected by the First Amendment, *O'Sullivan* upheld the conviction as a reasonable health regulation. As plaintiff has made clear in this case, he very much supports training and licensing of tattoo artists. *State v. Brady*, 492 N.E. 2d 34 (Ind. App. 1986), confronted a suit by the Medical Licensing Board seeking a declaration that a tattoo artist was engaged in the unauthorized practice of medicine. At that time, Indiana law defined all tattooing as the practice of medicine. *Brady* dealt with the First Amendment issue in a cursory manner, simply adopting the conclusion of *O'Sullivan* and *Yurkew*. In 1997, the Indiana legislature effectively overruled, by explicitly excluding tattooing from the definition of the practice of medicine, Ind. Stat. Ann § 16-19-3.4.1, and Indiana also has made tattooing a minor without a parent's permission a misdemeanor. Ind. Stat. Ann § 34-42-2-7. Finally, *Yurkew v. Sinclair*, 495 F. Supp. 1248 (D. Minn. 1980), rejected a challenge by an individual who had denied permission to perform tattooing at the Minnesota State Fair. Like the South Carolina Court, Judge MacLaughlin separated the process of applying the tattoo from any expressive elements a tattoo might contain, and analyzed the denial of a permit as a limitation on conduct, not a limitation on expression. 495 F. Supp. At 1253-54.

White erred in two ways: First, it viewed tattooing as symbolic speech, like flag burning, rather than expressive speech, like painting or music. Second, *White* separated the process of applying the tattoo from the creation and wearing of the tattooed message, and found that the physical act of injecting dye under the skin is not expressive. As to the first, the discussion above amply demonstrates that tattooing is actual expression, not symbolic speech as that term has been used in First Amendment cases. As to the second, one might as well say that inking a press can be banned even though books cannot, or that paint may not be applied to canvas even though paintings themselves are protected.

In *Hold Fast Tattoo, LLC v. City of North Chicago*, 580 F. Supp.2d 656 (N.D. Ill. 2008), the court rejected a claim that tattooing was protected by the First Amendment. *Hold Fast* cited the cases discussed above, and, like those cases, based its rejection of First Amendment protection on the distinction between speech and conduct, on the premise that the tattoo artist is an automaton merely

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He relied on the fact that the applicant had not demonstrated that his tattoos conveyed "political or social thought," 495 F. Supp. at 1254, and erroneous standard for First Amendment analysis. It should be noted that Minnesota did, and does, permit tattooing generally, and the issue in *Yurkew* was whether the Minnesota State Fair, determined to be a non-public forum, had to permit a temporary tattoo facility during the Fair.

[8]In 2004, the South Carolina legislature amended § 16-17-700, and added Title 44, chapter 34 (tattooing), which generally permits regulated, lay tattooing in South Carolina, subject to health regulations that are no more restrictive than those adopted by Los Angeles County.

carrying out the expressive wishes of the client.

The fundamental error of *Hold Fast* is its conclusion that the "act of tattooing . . . is not intended to convey a particularized message. The very nature of the tattoo artist is to custom-tailor a different or unique message for each customer to wear on the skin." The *Hold Fast* opinion does not say much about the evidence before the court, but the evidence in the present case makes it clear that Mr. Anderson has a substantial role in designing the tattoo, and that his creative and artistic impulses are embodied in the final design. Whether or not the mechanical application of designs created by a customer, with no input from the tattoo artist, would fall outside the Free Speech Clause need not be decided here, because Mr. Anderson is unquestionably engaged in a personal, creative and expressive endeavor.

Hold Fast analogizes tattooing to a sound truck, relying, oddly enough, on *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386, 112 S. Ct. 2538, 120 L. ED.2d 305 (1992). *R.A.V.* had nothing to do with sound trucks, but struck down an ordinance banning "fighting words," even as narrowly construed by the Minnesota Supreme Court, and makes only passing reference to sound trucks. The precise First Amendment standing of sound trucks is not clear. *Compare Saia v. New York*, 334 U.S. 558, 68 S. Ct. 1148, 92 L. ED. 1574 (1948) with *Kovacs v. Cooper*, 336 U.S. 77, 69 S. Ct. 448, 93 L. ED. 513 (1949); *see Niemotko v. Maryland*, 340 U.S. 268,

280, 71 S. Ct. 328, 95 L. ED. 280 (1952) (Frankfurter, J., concurring).

But in any event, the valid regulation or prohibition of sound trucks on public streets is directed at noise, not at speech. A sound truck may be a more effective (and more intrusive) means to disseminate an oral message to the public, but the same spoken words may be transmitted by unamplified speech on the street, or by amplified speech in appropriate settings, such as auditoriums and amphitheaters. *Ward v. Rock Against Racism*, 491 U.S. 781, 790, 109 S. Ct. 2746, 105 L. Ed.2d 661 (1989) did not ban rock must because "Music, as a form of expression and communication, is protected under the First Amendment." Instead, it allowed regulation of the volume of the music. Hermosa Beach affords no alternative means by which a tattoo artist like plaintiff may communicate his ideas, and there is no comparable governmental interest in banning this particular means of communication.

CONCLUSION

Because tattooing is a form of expression protected by the First Amendment, the ban on tattooing imposed by the City of Hermosa Beach is invalid. The judgment of the court below should be reversed, and judgment should be entered in favor of Mr. Anderson and against Hermosa Beach.

Dated: September 29, 2009

RESPECTFULLY SUBMITTED,

LAW OFFICES OF ROBERT C. MOEST
Robert C. Moest

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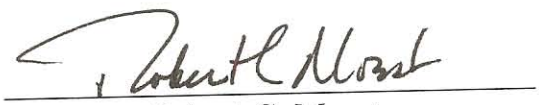
CERTIFICATE OF COMPLIANCE (Fed. R. App. P. 32(a)(7))

I certify that, pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionally spaces, has a typeface of 14 points or more and contains 7890 words.

Dated: September 29, 2009



Robert C. Moest

Proof of Service

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 2530 Wilshire Boulevard, Second Floor, Santa Monica, California 90403.

On September 29, 2009, I served the following document:

Opening Brief of Appellant

on the interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

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The envelope was mailed with first-class postage fully prepaid.

I am a member of the bar of the United States Court of Appeals for the Ninth Circuit. Executed September 29, 2009, in Los Angeles County, California.

Robert C. Moest