March 2, 2017

Dustin Owens Application for Temporary Injunction and Exhibits

Daniel A. Horwitz

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

DUSTIN OWENS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. _____
	)	
METROPOLITAN NASHVILLE POLICE DEPARTMENT,	)	
	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS APPLICATION FOR TEMPORARY INJUNCTION

I. Introduction

This case concerns the ability of a citizen to express himself through a crass but comical bumper sticker. The First Amendment is our nation's blueprint for personal liberty, and it protects a wide variety of expression that some may consider unrefined, inappropriate, offensive, or tacky. Furthermore, bumper stickers offer citizens a uniquely effective way to express themselves. In fact, "for those citizens without wealth or power, a bumper sticker may be one of the few means available to convey a message to a public audience." *Baker v. Glover*, 776 F.Supp. 1511, 1515 (M.D. Ala. 2001).

The Plaintiff, Mr. Dustin Owens, is currently living under a compelled restraint and the threat of prosecution if he does not remove a bumper sticker from his truck that the Metropolitan Nashville Police Department has unlawfully determined to be obscene. Accordingly, he has appealed to this court for a temporary injunction that will remove his existing restraint pending a final adjudication of this action on the merits. Because all

four factors justifying a temporary injunction favor Mr. Owens, a temporary injunction should issue.

II. Factors Justifying Temporary Injunction

Pursuant to Tenn. R. Civ. P. 65.04(2), courts consider the following four factors when determining whether a temporary injunction should issue:

> (1) the threat of irreparable harm to the plaintiff if the injunction is not granted;
>
> (2) the balance between this harm and the injury that granting the injunction would inflict on defendant;
>
> (3) the probability that plaintiff will succeed on the merits; and
>
> (4) the public interest.

See Moody v. Hutchinson, 247 S.W.3d 187, 199-200 (Tenn. App. 2007).

In the instant case, all four factors militate in favor of granting the Plaintiff's application for a temporary injunction. A temporary injunction should issue accordingly.

1. The Plaintiff will suffer irreparable harm if the injunction is not granted.

This is a First Amendment case. Put simply: The Metropolitan Nashville Police Department has ordered Mr. Owens to censor himself or face legal sanction. As such, if Mr. Owens is correct that his bumper sticker (hereinafter, his "stick-figure cartoon") represents constitutionally protected speech or expression, then the "irreparable harm" factor of the temporary injunction inquiry is necessarily satisfied.[1] *See, e.g., Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes

[1] Given the similarities between the Federal Rules of Civil Procedure and the Tennessee Rules of Civil Procedure, "opinions of federal courts are persuasive authority in this area." *Bayberry Assocs. v. Jones*, 783 S.W.2d 553, 557 (Tenn. 1990).

irreparable injury.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). *See also Young v. Giles Cty. Bd. of Educ.*, 181 F. Supp. 3d 459, 465 (M.D. Tenn. 2015) ("Under case law applicable to free speech claims, the loss of First Amendment freedoms, for even minimal periods of time, is presumed to constitute irreparable harm.") (quotation omitted). As a result, this first factor of the temporary injunction inquiry favors Mr. Owens.

2. Granting a temporary injunction will not harm the Defendant.

Granting Mr. Owens a temporary injunction also will not harm the Defendant in any way. In fact, the Defendant has effectively acknowledged this reality by affording Mr. Owens a 45-day grace period in which to remove his sticker, *see* **Exhibit A**—a length of time that indicates persuasively that the MNPD is not seriously concerned that his stick-figure cartoon will cause car accidents. Further, "[n]o substantial harm can be shown in the enjoinment of an unconstitutional policy." *Chabad of S. Ohio v. City of Cincinnati*, 233 F. Supp. 2d 975, 987 (S.D. Ohio 2002), *aff'd sub nom. Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427 (6th Cir. 2004). Consequently, the second factor of the temporary injunction inquiry favors Mr. Owens as well.

3. The Plaintiff is highly likely to succeed on the merits of this action.

The third and most important factor to be considered—the Plaintiff's likelihood of succeeding on the merits of this action—also heavily favors granting Mr. Owens a temporary injunction. No reasonable factfinder is likely to find that Mr. Owens' stick-

figure cartoon satisfies the definition of a constitutional obscenity. In fact, as a matter of law, Mr. Owens' sticker *cannot* satisfy any of the three essential criteria for obscenity set forth by the United States Supreme Court in *Miller v. California*, 413 U.S. 15 (1973). Accordingly, Mr. Owens' application for a temporary injunction should be granted.

The U.S. Supreme Court has held that obscenity is among the narrow, unprotected categories of speech that is not entitled to First Amendment protection. *See Roth v. United States*, 354 U.S. 476 (1957); *Miller*, 413 U.S. 15. However, this unprotected category is expressly reserved for the hardest of hardcore pornography. *Miller*, 413 U.S. at 27 ("Under the holdings announced today, no one will be subject to prosecution . . . unless [their] materials depict or describe patently offensive 'hard core' sexual conduct"). For the reasons provided below, Mr. Owens' innocuous cartoon stick-figure sticker does not come anywhere close to satisfying this standard.

Under the framework established by *Miller*, an image may be considered obscene if the Government can establish all three of the following factors: that the speech being censored, when taken as a whole, [1] "appeals to the prurient interest [in sex], [2] is patently offensive in light of community standards, and [3] lacks serious literary, artistic, political, or scientific value." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 235 (2002) (citing *Miller*, 413 U.S. at 24). These factors are frequently—although not uniformly—considered questions of fact to be decided by a factfinder. *See Miller*, 413 U.S. at 24 (referencing "basic guidelines for the trier of fact"). *But see People v. Berger*, 521 P.2d 1244, 1245 (Colo. 1974) ("whether the materials are obscene, are questions of law in the first instance."); *State v. Grauf*, 11 Or. App. 114, 121 (1972) ("The question of whether a particular matter is obscene is an issue of constitutional law to be determined by an independent, De novo, judgment on the facts of the case.") (citing *Jacobellis v. Ohio*, 378

U.S. 184, 188 (1964)); *Ebert v. Maryland State Bd. of Censors*, 19 Md. App. 300, 316 ("We are directed by law to view the subject film, [] and we make our independent constitutional appraisal from the entire record whether the film is without the protection of the First Amendment because it is obscene.").

Crucially, however, the U.S. Supreme Court has also cautioned that—*as a matter of law*—"there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' within the meaning of the obscenity test set forth in the *Miller* cases." *Hamling v. United States*, 418 U.S. 87, 114 (1974). Consequently, courts are instructed to "conduct[] an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984). *See also United States v. Linetsky*, 533 F.2d 192, 201 (5th Cir. 1976) ("This court is required to make an 'independent constitutional judgment' on whether any of the materials alleged to be obscene are constitutionally protected."). In the instant case, no reasonable factfinder could find that Mr. Owens' stick-figure cartoon is constitutionally obscene. Additionally, the Defendant's claim that Mr. Owens' stick-figure cartoon is obscene also will not be able to pass muster under this court's judicially-mandated independent review. *Id.*

I. *Mr. Owens' Stick-Figure Cartoon Does Not Appeal to the Prurient Interest In Sex*

The first factor that the Government must prove to prevail on the merits of this action is that Mr. Owens' stick-figure cartoon "appeal[s] to the prurient interest in sex." *Miller*, 413 U.S. at 24. "Prurient interest" is specifically defined under Tennessee law to mean "a shameful or morbid interest in sex." Tenn. Code Ann. § 39-17-901. The Supreme

Court has also instructed that "[w]hatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, *such expression must be, in some significant way, erotic.*" *Cohen v. California*, 403 U.S. 15, 20 (1971) (emphasis added).

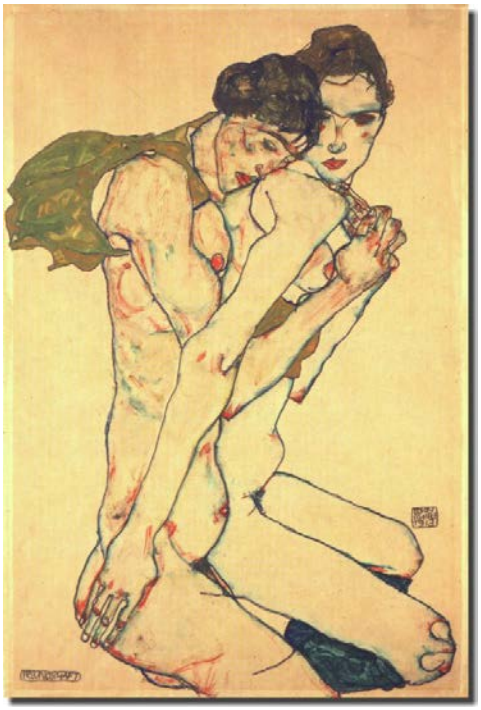
In the instant case, the Plaintiff respectfully submits that no reasonable fact-finder—whether a jury or this court—could find that Mr. Owens's stick-figure cartoon "appeal[s] to the prurient interest in sex." *Miller*, 413 U.S. at 24. Although lewd, Mr. Owens' sticker is not shameful. It also is not morbid. And it certainly is not "erotic." *See Cohen*, 403 U.S. at 20. Instead, the sticker is *humorous*—nothing more, and nothing less. As such, Mr. Owens is likely to prevail on the merits of his claim because the first factor of *Miller* cannot be established.

II. *Mr. Owens' Stick-Figure Cartoon Is Not "Patently Offensive."*

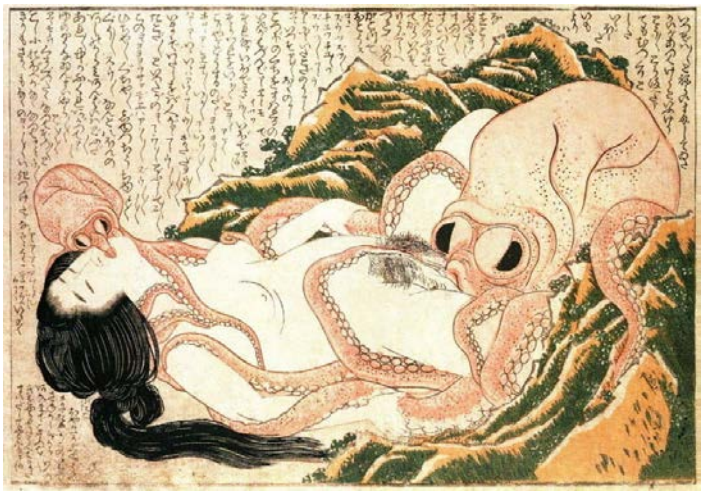
To prevail on the merits, the Government must also prove that Mr. Owens' stick-figure cartoon is "patently offensive." *Miller*, 413 U.S. at 24. Although the Supreme Court has never attempted to define the full universe of materials that may be considered "patently offensive," it has instructed that "[t]he kinds of conduct that a jury would be permitted to label as 'patently offensive' in a [] prosecution are the 'hard core' types of conduct suggested by the examples given in *Miller*." *Smith v. United States*, 431 U.S. 291, 301 (1977). For its part, *Miller*'s examples included: "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "representation[s] or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller*, 413 U.S. at 25. Mr. Owens' stick-figure cartoon does not rise to this standard.

Of note, even where "representations or descriptions of ultimate sexual acts" are concerned, mere depictions of sex may *not* be proscribed unless they are in some way "hard core." *See id.* A contrary rule would, of course, criminalize some of the most

celebrated works of art in history—many of which are considerably more detailed (and vulgar) than Mr. Owens' comparatively innocuous stick-figure cartoon. *See, e.g.*:

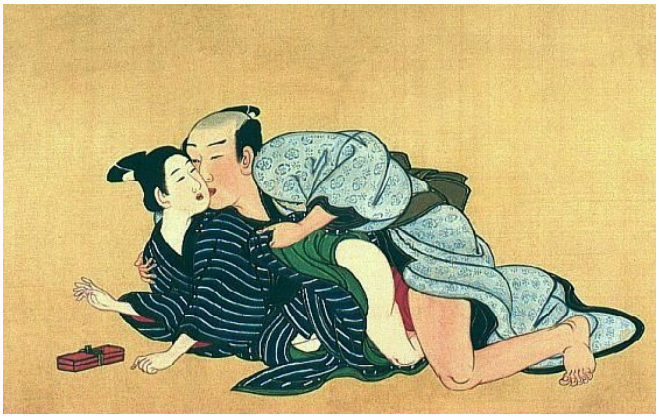


Egon Schiele's *Friendship*



Katsushika Hokusai's *The Dream of the Fisherman's Wife*

Michelangelo's *Leda and the Swan* (copy)



Miyagawa Isshō's *Spring Pastimes Series*

Compared with these works, Mr. Owens' stick-figure cartoon is tame.[2] It does not, for example, display genitalia or any vivid portrayal of an ultimate sex act. It certainly does not display bestiality. And, in fact, the only indication that the stick-figure cartoons depicted in Mr. Owens's bumper sticker are engaging in sex at all comes from the context offered from the description: "Making My Family." *See* **Exhibit B**. Consequently, the notion that Mr. Owens' stick-figure cartoon is even theoretically on par with "the 'hard core' types of conduct suggested by the examples given in *Miller*" is fantastical, and no reasonable fact-finder is likely to find otherwise. *Smith*, 431 U.S. at 301. Accordingly, Mr. Owens is likely to prevail on the merits of this action, because the second essential factor of *Miller* cannot be established, either.

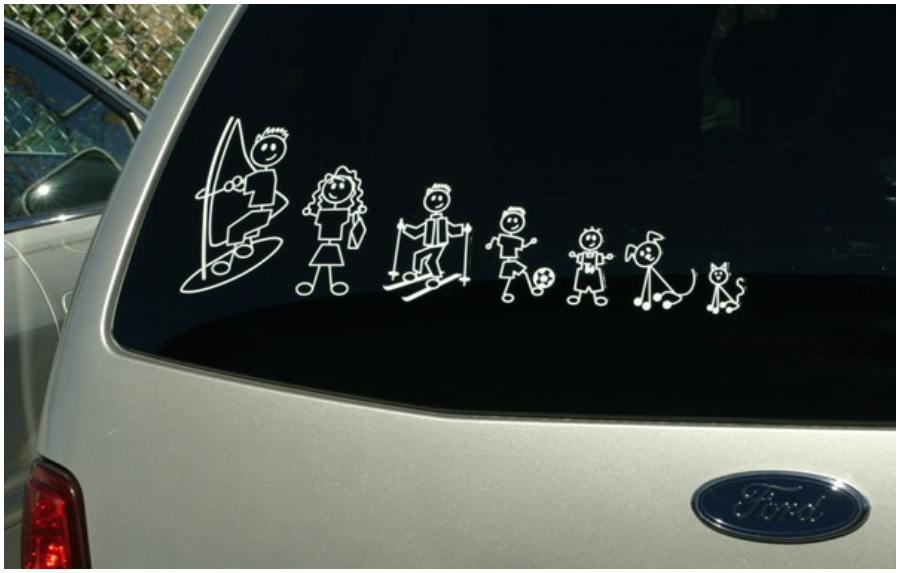
III. *Mr. Owens' Stick-Figure Cartoon Does Not Lack Serious Value*

Miller's third prong—"[l]iterary, artistic, political, or scientific value"—also heavily favors Mr. Owens. *Id.* Additionally, this factor is not evaluated "in terms of contemporary community standards." *Id. See also Pope v. Illinois,* 481 U.S. 497, 500 (1987) ("unlike prurient appeal and patent offensiveness, literary, artistic, political, or scientific value is not discussed in *Miller* in terms of contemporary community standards. This comment was not meant to point out an oversight in the *Miller* opinion, but to call attention to and approve a deliberate choice.") (internal citation and quotation marks omitted). Consequently, this factor "is a mixed question of law and fact . . . which [courts] may properly decide." *Com. v. Am. Booksellers Ass'n, Inc.*, 236 Va. 168, 176 (1988).

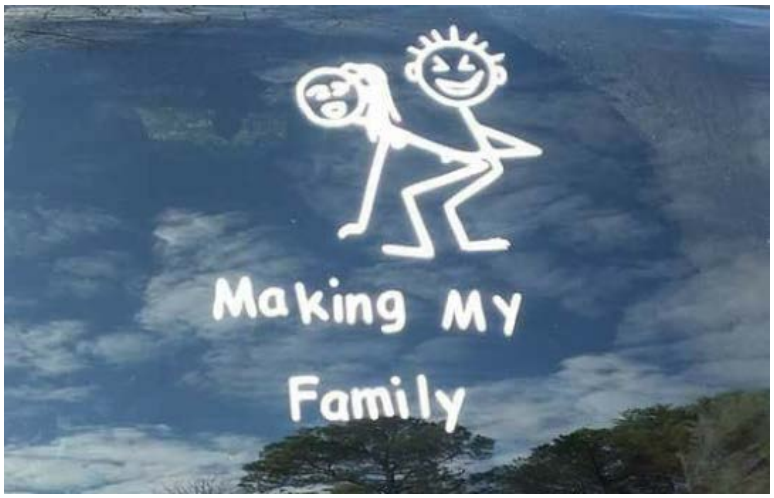
[2] Mr. Owens' sticker is also uncontroversially less offensive than, say, virtual child pornography—something the United States Supreme Court has held may not be outlawed. *See State v. Pickett*, 211 S.W.3d 696, 701 (Tenn. 2007) ("In *Ashcroft v. Free Speech Coalition*, the United States Supreme Court ruled that the provision of the Child Pornography Prevention Act of 1996 that prohibited any visual depiction that 'is, or appears to be, of a minor engaging in sexually explicit conduct' was unconstitutional.").

"[H]umor is an important form of social commentary." *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 553 (1985). Comedy also fits easily within the category of an "art form." *See, e.g., Robinson v. Viacom Int'l, Inc.*, No. 93 CIV. 2539 (RPP), 1995 WL 417076, at *2 (S.D.N.Y. July 13, 1995). And comedy concerning sex is, perhaps, the most popular subject of all. *See, e.g.*, Evan Real, *Amy Schumer's HBO Special: 5 Really Funny Office-Safe Jokes and 5 Really Funny NSFW Jokes*, ELLE (Oct. 18, 2015), http://www.elle.com/culture/movies-tv/a31236/amy-schumer-hbo-special-jokes/; Louis C.K., *Sex for Women* (Aug. 8, 2016), YOUTUBE, https://www.youtube.com/watch?v=NzXa5j1MvPI.

In the instant case, Mr. Owens' stick-figure cartoon has serious value given its humorous and parodic nature. *Cf. Baker*, 776 F. Supp. at 1515 ("[Plaintiff's] bumper sticker is also protected speech under the first amendment because it has serious literary and political value. Although surely not a likely candidate for a literary prize, Baker's bumper sticker has serious literary value as a parody of stickers such as, 'How's My Driving? Call 1–800–2 ADVISE.'") (internal citation omitted). "Family stickers" are popular and common among many drivers, and they traditionally resemble the following:



Mr. Owens' sticker humorously parodies these popular stickers as follows:



See Exhibit B.

Rather than portraying his family, it indicates instead that he is in the process of "making [his] family," and it displays two cartoon stick-figures engaged in that process. *Id*. Consequently—its crass nature notwithstanding— Mr. Owens' sticker is a humorous and highly effective parody of "family stickers," and it carries serious First Amendment value as a result. *Baker*, 776 F. Supp. at 1515.

As such, the third essential factor of *Miller* cannot be established, either.

4. The public interest will be advanced by granting an injunction.

The fourth factor of the temporary injunction inquiry also favors Mr. Owens. For one thing, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). *See also Young*, 2016 WL 887043 (M.D. Tenn. Feb. 18, 2016) ("Because Plaintiff has established a strong likelihood that Defendants' prohibition of speech violates the First Amendment, the public interest also favors the issuance of a preliminary injunction."). For another, when the First Amendment is at stake, it is not

only the speaker's interest that is implicated; the First Amendment similarly protects the right of the public to receive information. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) ("in *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972), we acknowledged that this Court has referred to a First Amendment right to 'receive information and ideas,' and that freedom of speech 'necessarily protects the right to receive.'"). *See also id.* (collecting cases).

Consequently, the public interest will be advanced by granting an injunction, and the fourth and final factor of the temporary injunction inquiry favors granting Mr. Owens' application as well.

CONCLUSION

For the foregoing reasons, all four factors of the temporary injunction inquiry favor Mr. Owens. Accordingly, Mr. Owens' application for a temporary injunction should be granted pending a final adjudication of this action on the merits.

Respectfully submitted,

By: _____

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Counsel for Plaintiff Dustin Owens

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2017, a copy of the foregoing was served via USPS certified mail, postage prepaid, and/or hand-delivered to the following:

Metro Nashville Police Department
c/o Metropolitan Department of Law
Metro Courthouse, Suite 108
P.O. Box 196300
Nashville, TN 37219-6300

Attorney General and Reporter for the State of Tennessee
Herbert Slatery III
Office of the Attorney General and Reporter
P.O. Box 20207
Nashville, TN 37202-0207

By: _____
Daniel A. Horwitz, Esq.

Exhibit A

RECORD STATE OF TENNESSEE
COUNTY OF DAVIDSON

In The Metropolitan General Sessions Court:

JUSTICE A.A. BIRCH BLDG
408 2ND AVE N
NASHVILLE, TN 37201

K-535142

SUMMONS

OF OFFENSES 1

The undersigned certifies to have just and reasonable grounds to believe, and does believe, that:

ON	FRI	10	FEB	2017	2:00
	DAY OF WEEK	DATE	MONTH	YEAR	A.M. P.M.

LAST NAME: OWENS
FIRST NAME: DUSTEN
MIDDLE INITIAL:

246 INDIAN LAKE ☐ NASHVILLE ☐ TN
APT VIOL

CITY HENDERSONVILLE ST TN ZIP CODE 37075

COMMERCIAL VEHICLE ☐ OVER 26,000 lbs. ☐ 16+ PASSENGER VEHICLE ☐ ACCIDENT ☐ HAZARDOUS MATERIAL LIC. CLASS E

OPERATOR LICENSE NUMBER 058017684310 CDL ☐ CDL REQ. ☐

OPERATOR LICENSE STATE F DATE OF BIRTH 04/11/1984 AGE 32 SEX M RACE W

VEHICLE DESCRIPTION: YEAR CHVY MAKE 2.1TR MODEL 4DR BODY TYPE RED COLOR

VEHICLE TAG NUMBER 3SQGHA TAG STATE F TAG YEAR 17

LIST OWNER OF CAR IF DIFFERENT THAN DRIVER

UPON A PUBLIC STREET OR HIGHWAY OR OTHER LOCATION NAMELY
BIGLEY HWY

AT / NEAR CLARKSVILLE Hwy

DID UNLAWFULLY COMMIT THE FOLLOWING OFFENSES IN VIOLATION OF THE METRO CODE.
ALL TCA OFFENSES HEREIN ARE DECLARED TO BE MUNICIPAL VIOLATIONS PURSUANT TO METRO CODE 12.8.160

A SPEED RESTRICTION_____ KPH MPH IN_____ KPH ZONE MPH ZONE
☐ MCL 12.20.10 ☐ MCL 12.20.20 ☐ MCL 12.20.30 ☐ MCL 12.20.70
RADAR ☐ PACED ☐ LASER ☐

B ☐	MCL 12.68.180 RECKLESS DRIVING	C ☐	MCL 12.68.170 CARELESS DRIVING	D ☐	MCL 12.24.40 RAN STOP SIGN	E ☐	MCL 12.12.110 VIOLATION OF TRAFFIC LANE RESTRICTION	G ☐	TCA 55-9-603 SEAT BELT LAW
J ☐	TCA 55-4-108 REGISTRATION CERTIFICATE NOT IN VEHICLE	K ☐	MCL 12.8.90 UNLAWFUL USE OF LICENSE PLATE	L ☐	TCA 55-3-102 DRIVING UNREGISTERED VEHICLE	M ☐	MCL 12.32.30 LIGHTS REQUIRED ON VEHICLE	N ☐	TCA 55-08-188 HOV
O ☐	TCA 55-8-132 YIELD EMRGENCY VEH/MOVE OVER	P ☐	MCL 12.32.50 MUFFLER LAW EXCESSIVE NOISE FUMES OR SMOKE	Q ☐	TCA 55-50-351 DRIVER'S LICENSE NOT ON PERSON	R ☐	TCA 55-50-333 DRIVER'S LICENSE CHANGE OF ADDRESS	W ☐	MCL 12.12.90 RAN RED SIGNAL LIGHT
S ☐	TCA 55-12-139 PROOF OF INSURANCE	T ☐	OBSCENE BUMPER STICKER						TCA/METRO CODE SECTION 55-8-181

CONDITIONS ☐ NORMAL ☐ DAYLIGHT ☐ SNOW/ICE ☐ RAINING ☐ DARKNESS ☐ WET

RELATED COMPLAINT NUMBER 17 0132392

PROSECUTOR'S SIGNATURE

EMPLOYEE AGENCY MNPD

OFFICER (PRINT) A. PARKER

OFFICER RANK DSGT

EMPLOYEE NUMBER 7 1 0 8 4 6 ASSIGNED DIVISION M

Compliance Date

Must respond within 45 days of issuance date.

For Office Use Only

Month	Date	Year

Upon the issuance of this citation you should receive a Davidson County Traffic Court Information Sheet explaining how to respond to this citation. If you did not receive one or have lost it, it is your responsibility to call (615) 862-5222 or visit http://circuitclerk.nashville.gov/traffic to obtain a copy.

I hereby acknowledge receipt of a copy of this citation. I also waive formal issuance and service of a warrant upon me. I understand that I must respond to this citation with a designated form of action within 45 days from the issuance date of this citation. Failure to do so will result in a Default Judgment causing suspension of driver's license and issuance of execution.

DEFENDANT'S SIGNATURE _____

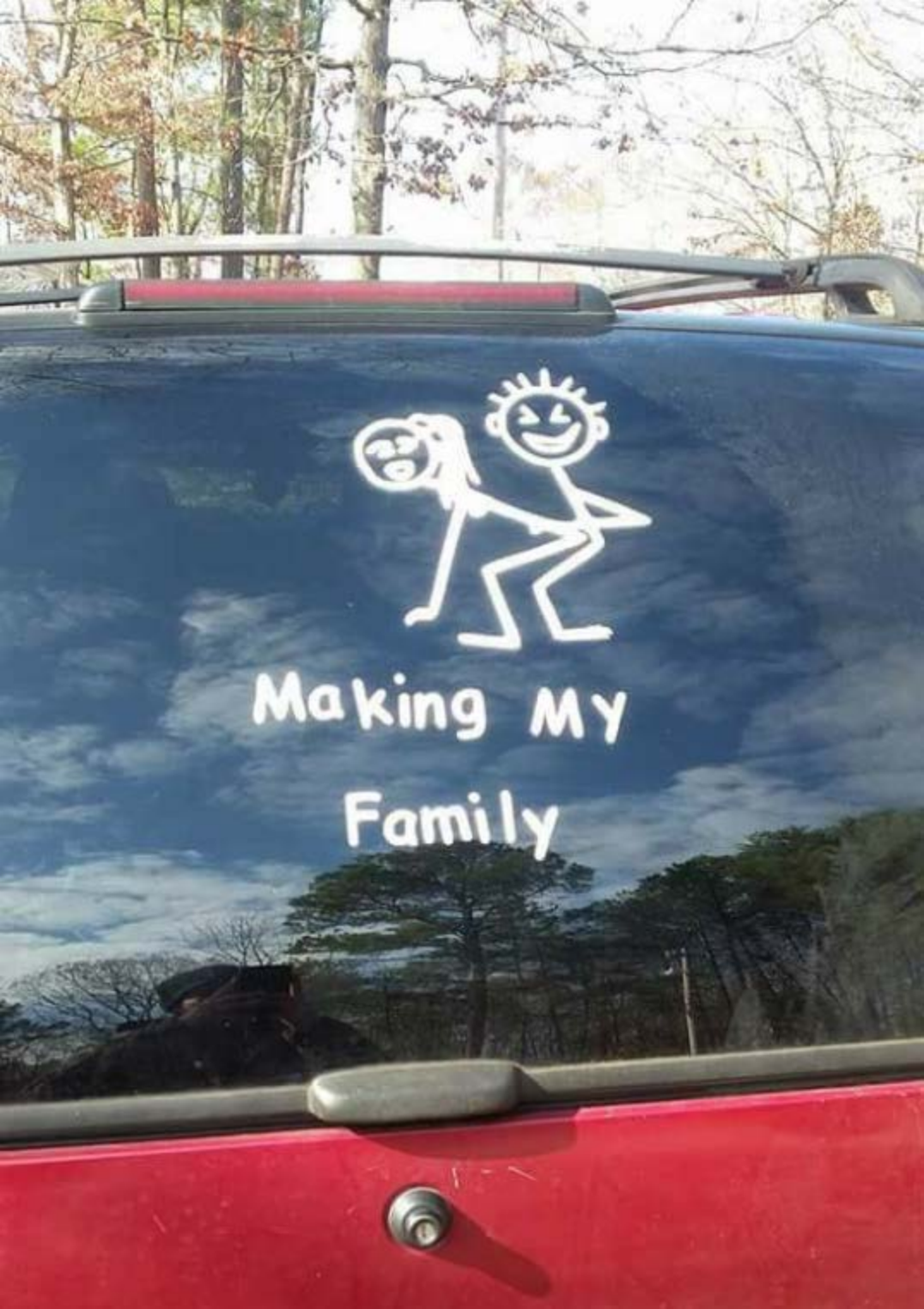
NOT AN ADMISSION OF GUILT

K535142

REV 07-01-2012

For ADA accommodations, contact 615-862-5199

Exhibit B


Making My
Family

Caselaw Attachment

776 F.Supp. 1511
United States District Court, M.D. Alabama, Northern Division.

Wayne BAKER, Plaintiff,
v.
Lamar GLOVER, et al., Defendants.

Civ. A. No. 87–T–948–N.
|
Oct. 3, 1991.

Truck driver filed civil rights action, challenging an attempt to apply Alabama's obscenity statute to a bumper sticker on his truck. The District Court, Myron H. Thompson, Chief Judge, held that: (1) the truck driver, who had been threatened with prosecution and with a fine for displaying a bumper sticker with the words "Eat Shit," had standing to challenge the constitutionality of Alabama's statute prohibiting obscene bumper stickers; (2) the words on the truck driver's bumper sticker did not appeal to a prurient interest and, thus, application of the statute violated the First Amendment; and (3) the bumper sticker had serious literary or political value as a protest against the "Big Brother" mentality promoted by other bumper stickers urging members of the public to report the indiscretions of truck drivers.

Judgment for plaintiff.

West Headnotes (8)

[1] Constitutional Law
Criminal Law

Truck driver who had been given warning ticket for displaying bumper sticker that contained language descriptive of excretory activities had standing to challenge Alabama's obscenity statute that prohibited such bumper stickers; truck driver faced real and substantial threat of prosecution and had been warned that he would be fined for violating statute if he refused to scratch offensive words from bumper sticker. Ala.Code 1975, § 13A–12–131; U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

[2] Constitutional Law
Lack of constitutional protection

Obscene speech is not protected by First Amendment and, thus, may be banned by government. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[3] Constitutional Law
Obscenity in General

Constitution strictly limits way in which government may define obscenity for purposes of proscribing such expression. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[4] Constitutional Law
Obscenity in General

Constitutional Law
Obscenity and lewdness

Obscenity
Obscene language

Words "Eat Shit" on bumper sticker did not appeal to prurient interest and, thus, were not obscene and, therefore, Alabama obscenity statute that prohibited bumper stickers depicting obscene language descriptive of sexual or excretory actions violated First and Fourteenth Amendments, as applied to bumper sticker. Ala.Code 1975, § 13A–12–131; U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

[5] Constitutional Law
Obscenity in General

Truck driver's bumper sticker containing words "Eat Shit" had serious political value as parody of and protest against "Big Brother" mentality promoted by other bumper stickers that urged members of public to report indiscretions of truck drivers and, therefore, bumper sticker was protected

speech under First Amendment; language represented seven-digit number on parodied bumper sticker and humorously conveyed truck driver's strong feelings about such telephone numbers. Ala.Code 1975, § 13A–12–131; U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

[6] **Constitutional Law**
Obscenity in General
Constitutional Law
Obscenity and lewdness
Obscenity
Obscene language

Words "Eat Shit" on truck driver's bumper sticker did not appeal to prurient interest of minors, and bumper sticker had serious literary and political value as expressing truck driver's opinion of other bumper stickers that urged public to report indiscretions of truck drivers and, therefore, application of Alabama's obscenity statute to truck driver violated First and Fourteenth Amendments, even if less stringent standard was to be used in assessing whether material was obscene as to minors. Ala.Code 1975, § 13A–12–131; U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

[7] **Constitutional Law**
"Fighting words"
Constitutional Law
Obscenity in General
Constitutional Law
Obscenity and lewdness

Words "Eat Shit" on truck driver's bumper sticker were not "fighting words" and, therefore, application of Alabama obscenity statute to bumper sticker violated First and Fourteenth Amendments; words did not by their very utterance inflict injury or tend to incite immediate breach of peace. Ala.Code 1975, § 13A–12–131; U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

[8] **Automobiles**
Constitutional and statutory provisions
Constitutional Law
Obscenity in General
Obscenity
Obscene language

Alabama obscenity statute that prohibited bumper stickers depicting obscene language descriptive of sexual or excretory actions could not be upheld, over First Amendment challenge, as "traffic" regulation, absent any indication that statute itself or its application to truck driver's bumper sticker had been aimed at traffic regulation, rather than at profane language. Ala.Code 1975, § 13A–12–131; U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

Attorneys and Law Firms

***1512** Edward Still, Birmingham, Ala., Neil Bradley, ACLU Foundation, Atlanta, Ga., for plaintiff.

Don Siegelman, Alabama Atty. Gen., Stephen N. Dodd, Asst. Atty. Gen., Montgomery, Ala., for defendants.

MEMORANDUM OPINION

MYRON H. THOMPSON, Chief Judge.

Plaintiff Wayne Baker has brought this lawsuit claiming that the application of one of the State of Alabama's obscenity statutes, ***1513** § 13A–12–131 of the 1975 Code of Alabama, as amended, to a bumper sticker on his truck violates his right to freedom of expression protected by the first and fourteenth amendments to the United States Constitution as enforced through 42 U.S.C.A. § 1983. [1] He seeks only declaratory relief. The defendants are a commander of the Alabama State Patrol, who stopped Baker and warned him that his bumper sticker violated the obscenity law, and the State Attorney General. Baker has properly invoked the jurisdiction of the court under

28 U.S.C.A. § 1331 and § 1343. After closely reviewing the law and evidence presented, the court concludes that, to the extent the new statute prohibits the display of Baker's bumper sticker, it violates his right to freedom of expression.

I. BACKGROUND

The facts of this case are brief and straightforward. On September 1, 1987, the Alabama Department of Public Safety adopted a policy according to which officers would immediately begin issuing "warning tickets" for violations of the state's newly enacted obscenity statute, § 13A–12–131, and would start enforcing the law on October 12, 1987. This statute provides that: "It shall be unlawful for any person to display in public any bumper sticker, sign or writing which depicts obscene language descriptive of sexual or excretory activities." [2]

Baker is a truck driver from Tuscaloosa, Alabama. Aware that motorists have been encouraged to report the indiscretions of truck drivers through bumper stickers that say, for example, "How's My Driving? Call 1–800–2–ADVISE," and eager to protest this development, Baker purchased a bumper sticker from a novelty shop in Panama City, Florida, which reads: "How's My Driving? Call 1–800–EAT SHIT!," and placed it on the back of his pickup truck.

Lamar Glover is the commander of the Alabama Department of Public Safety's Dothan post. In September 1987, Glover stopped Baker on Highway 231, outside of Dothan, and warned him that the bumper sticker on his truck violated § 13A–12–131. Glover threatened Baker with a fine for violating this statute unless Baker removed the words "eat shit" from his bumper sticker. Glover also told Baker that bumper stickers containing the words "crap" or "doo-doo" would violate the new statute. Baker agreed to scratch out the offending language.

Baker later brought this lawsuit charging that application of the new obscenity law to his bumper sticker violated his right to freedom of expression under the first and fourteenth amendments as enforced through 42 U.S.C.A. § 1983. The Alabama Department of Public Safety directed state troopers not to enforce the statute while this suit was pending.

II. DISCUSSION

The defendants offer a slew of justifications for the obscenity statute and its application to Baker's bumper sticker. They argue that the bumper sticker is not constitutionally protected speech because (1) it is obscene as to adults, (2) it is obscene as to children, (3) its message constitutes "fighting words," and (4) it is likely to distract motorists and as a result interfere with highway safety. The defendants also contend that Baker lacks standing to challenge the constitutionality of § 13A–12–131 because he has not been and will not likely be prosecuted under the new law. After close scrutiny, the court finds each of these arguments in defense of the obscenity statute ***1514** to be without merit and concludes that, to the extent it applies to Baker's bumper sticker, § 13A–12–131 violates his right to freedom of speech guaranteed by the first and fourteenth amendments to the United States Constitution.

A.

[1] As a threshold matter, the court is not persuaded by defendants' contention that Baker lacks standing to challenge the constitutionality of the statute as applied to his bumper sticker. Federal courts have not hesitated to adjudicate pre-enforcement claims based on credible threats of future criminal prosecution. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.* 484 U.S. 383, 392–93, 108 S.Ct. 636, 642, 98 L.Ed.2d 782 (1988); *City of Houston v. Hill,* 482 U.S. 451, 459 n. 7, 107 S.Ct. 2502, 2508 n. 7, 96 L.Ed.2d 398 (1987). In this case, the possibility that Baker may be prosecuted for displaying his bumper sticker is real and substantial. Indeed, Glover told Baker he would be fined for violating the statute if he refused to scratch the offending words off his sticker. Moreover, state officials were prepared to begin enforcing § 13A–12–131 and have suspended such enforcement only because this lawsuit is pending.

B.

[2] **[3]** This lawsuit concerns only words or speech; the "only 'conduct' which the State sought to punish is the fact of communication." *Cohen v. California,* 403 U.S. 15, 18, 91 S.Ct. 1780, 1784, 29 L.Ed.2d 284 (1971). Nevertheless, it is firmly established that obscene speech is not protected

by the first amendment and thus may be banned by government. *Sable Communications of California, Inc. v. F.C.C.,* 492 U.S. 115, 124, 109 S.Ct. 2829, 2835, 106 L.Ed.2d 93 (1989). It is also similarly well accepted, however, that the Constitution strictly limits the way in which government may define obscenity for the purposes of proscribing such expression. In the keystone case in this area, *Miller v. California,* the Supreme Court declared that prohibitions of this sort must be "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973). *Accord Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 501, 105 S.Ct. 2794, 2800, 86 L.Ed.2d 394 (1985). As the court will explain below, because Baker's bumper sticker could not reasonably be understood to appeal to the prurient interest in sex and because it has without question serious literary, artistic, and political value, it does not satisfy either the first or third prong of the *Miller* test and thus constitutes constitutionally protected expression beyond the reach of government prohibition.

In another case involving profane speech, *Cohen v. California,* the Supreme Court declared unequivocally that "Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic." 403 U.S. at 20, 91 S.Ct. at 1785. There, Paul Robert Cohen challenged his state conviction for wearing, in the corridors of a municipal court where children were present, a jacket bearing the words "Fuck the Draft." Cohen wore the jacket to express the depth of his feelings against the Vietnam War and the draft. In overturning the conviction because the words were not in any significant way erotic, the Supreme Court further wrote that "It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with [plaintiff's] crudely defaced jacket." *Id.* Although *Cohen* was decided prior to *Miller,* its holding that the isolated use of profanity is not obscene was reaffirmed in cases subsequent to *Miller.* For example, in *Hess v. Indiana,* in finding that the words "We'll take the fucking street later" could not be punished as obscene, the Court wrote that "After *Cohen* ... such a contention with regard to the language at issue would not be tenable". 414 U.S. 105, 107, 94 S.Ct. 326, 328, 38 L.Ed.2d 303 (1973) (per curiam). Similarly in *F.C.C. v. Pacifica* ***1515** *Foundation,* in arguing before the Supreme Court that a 12–minute monologue entitled "Filthy Words" by satiric humorist George Carlin was "patently offensive" and thus subject to limited broadcast regulation, the Federal Communications Commission acknowledged that the monologue could not be considered obscene. 438 U.S. 726, 731, 98 S.Ct. 3026, 3031, 57 L.Ed.2d 1073 (1978). Indeed, citing *Hess,* the Court observed that "Some uses of even the most offensive words are unquestionably protected." *Id.* at 746, 98 S.Ct. at 3039. Baker's bumper sticker, with its one dirty word, is clearly no more erotic than Cohen's jacket or Carlin's monologue.

[4] The defendants take pains to demonstrate that the phrase "Eat Shit" could possibly appeal to the prurient interests of certain sexual deviants. In support of this view, they have presented extensive testimony on the subjects of "coprophilia" (specific fixation upon the products of bodily excretion), "coprophagy" (erotic interest in consuming fecal excrement), and "coprolalia" (the uttering of obscenities in order to achieve sexual gratification). The defendants are correct that material appealing to the "prurient interest" may also include that "whose predominate appeal is to 'a shameful or morbid interest in ... excretion,' " *Brockett,* 472 U.S. at 498, 105 S.Ct. at 2799, *quoting Roth v. United States,* 354 U.S. 476, 487 n. 20, 77 S.Ct. 1304, 1310 n. 20, 1 L.Ed.2d 1498 (1957). Nevertheless, it is well established that the prurient appeal inquiry requires a fact-finder to assess a work "in terms of the sexual interests of its intended and probable recipient group." *Mishkin v. New York,* 383 U.S. 502, 509, 86 S.Ct. 958, 964, 16 L.Ed.2d 56 (1966). The court is unpersuaded that a facetious message employing a single profane word could be viewed as carrying such an abnormal appeal. Moreover, it is clear that Baker did not intend to excite sexual deviants through his bumper sticker nor were a significant proportion of those exposed to the sticker likely to be persons suffering from such abnormalities.

[5] Baker's bumper sticker is also protected speech under the first amendment because it has serious literary and political value. *See Miller,* 413 U.S. at 24, 93 S.Ct. at 2615. Although surely not a likely candidate for a literary prize, Baker's bumper sticker has serious literary value as a parody of stickers such as, "How's My Driving? Call 1–800–2 ADVISE." It and other similar bumper stickers can be compared in many respects to riddles, puns, and

proverbs in that they are very short, usually a line or two, and concise in their message. As the Supreme Court has observed, "one man's vulgarity is another's lyric." *Cohen,* 403 U.S. at 25, 91 S.Ct. at 1788. Baker's sticker also has serious political value as a protest against the "Big Brother" mentality promoted by such other bumper stickers that urge the public to report the indiscretions of truck drivers.

It is also important to make some other related observations. First, for those citizens without wealth or power, a bumper sticker may be one of the few means available to convey a message to a public audience. *See Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 812 n. 30, 104 S.Ct. 2118, 2133 n. 30, 80 L.Ed.2d 772 (1984) ("the Court has shown special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry"). Furthermore, in this case, Baker could truly communicate his message satirizing other bumper stickers *only* through a bumper sticker and with the precise language chosen. For his message to have its intended sharp punch, the medium for the parody and its object not only had to be the same but the number of characters in the parody and its object had to be the same. Moreover, as with Cohen's jacket, the objectionable language was itself essential to the sticker's message. "Much linguistic expression ... conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force." *Cohen,* 403 U.S. at 26, 91 S.Ct. at 1788. Here, in short, the words "Eat Shit" cleverly performed a dual role: they not only represented the seven-digit number in ***1516** the parodied bumper sticker, they also humorously conveyed Baker's strong feelings about such numbers.

C.

[6] The defendants further argue that the sticker is obscene as to minors and therefore unprotected by the first amendment. Relying on *Ginsberg v. New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), the defendants contend that material to which minors are exposed may be judged to be obscene under a modified *Miller* test, based on what appeals, offends, and is of no serious value to minors. They then further point to *Pacifica Foundation* to support their contention that § 13A–12–131 is sufficiently narrowly tailored not to burden unnecessarily the first-amendment rights of adults.

Admittedly, in *American Booksellers v. Webb,* 919 F.2d 1493, 1503 & n. 18 (1990), the Eleventh Circuit Court of Appeals indicated that *Miller* modified *Ginsberg* in just such a manner.[3] Nevertheless, there is still the requirement that the work appeal to the prurient interest in sex, albeit the interest of minors. As the Supreme Court explained in *Erznoznik v. City of Jacksonville,* in upholding a challenge to a city ordinance prohibiting drive-in theater owners, whose screens are visible from a public street or place, from showing films containing nudity,

> under any test of obscenity as to minors not all nudity would be proscribed. Rather, to be obscene 'such expression must be, in some significant way, erotic.' 422 U.S. 205, 213 n. 10, 95 S.Ct. 2268, 2275 n. 10, 45 L.Ed.2d 125 (1975), *quoting Cohen,* 403 U.S. at 20, 91 S.Ct. at 1785. There is no evidence that the phrase "Eat Shit" appeals to the prurient interest of minors any more than adults. Moreover, even under a standard modified to account for children, the bumper sticker would still have serious literary and political value for the reason given previously.[4]

D.

[7] Defendants contend, alternatively, that the words "Eat Shit" on Baker's bumper sticker are "fighting words," *see Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), and therefore may be criminalized without offending the constitutional guarantee of freedom of speech. This argument also is without merit. To the extent that there are any true fighting words left, the court is of the opinion that the phrase "Eat Shit" does not fall within this category.[5] Such words do not "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572, 62 S.Ct. at 769. For better or worse, society has become quite tolerant of profane speech. Nor did the objectionable language at issue in this case constitute fighting words in the ***1517** context in which Baker used it on his bumper sticker. "No individual actually or likely to be present could reasonably have regarded the words ... as a direct personal insult." *Cohen,* 403 U.S. at 20, 91 S.Ct. at 1786.

See also Pacifica Foundation, 438 U.S. at 756, 98 S.Ct. at 3044 (Powell, J., concurring). Accordingly, this card in the house constructed by defendants to support the application of § 13A–12–131 to Baker's bumper sticker must also fall.

E.

[8] Finally, defendants seek to justify § 13A–12–131 as a valid "traffic" regulation. They contend that the statute may constitutionally be applied to prohibit Baker's and other "explicit and eye-catching" bumper stickers which "have a tendency to attract, hold, and/or otherwise divert the attention of motorists," and thus interfere with "safe, responsible driving." However, nothing in the record indicates that either the law itself or its application to Baker's bumper sticker was aimed at traffic regulation, rather than simply profane language. Moreover, defendants have presented no logical or factual support for the proposition that indecent bumper stickers are more likely to distract motorists than other bumper stickers or indeed other objects visible along the state's thoroughfares. *See Erznoznik v. City of Jacksonville,* 422 U.S. at 214–15, 95 S.Ct. at 2275–76 (rejecting similar argument concerning drive-in movies visible from public streets). [6]

III. CONCLUSION

Before closing the court would note the limited nature of its holding today. Section 13A–12–131 is expressly limited in its terminology and application to "*obscene* language descriptive of sexual or excretory activities" (emphasis added); the law does not address "indecent" or "profane" language which might be harmful to children. The court's holding, therefore, is limited to the specific conclusion that Baker's bumper sticker cannot be considered obscene and thus falling within the statute's ban, without running afoul of the first amendment. This court is therefore not confronted with a much different and more difficult issue of how far the government may go in regulating offensive or sexually explicit but non-obscene speech to which minors are exposed. The law is somewhat unsettled in this area. For example, in *Sable Communications,* the Supreme Court struck down a total ban on indecent commercial telephone communications even though the ban was designed to protect children. The Court observed that, although the state may properly serve its legitimate interests in "shielding minors from the influence of literature that is not obscene by adult standards," it may do so only "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." 492 U.S. at 126, 109 S.Ct. at 2836. In contrast, in *Pacifica Foundation,* the court upheld a ban by the Federal Communications Commission on an indecent but not obscene broadcast. The Court, however, noted that the ban was not an absolute prohibition on broadcast of the language but rather sought to channel the language to times of the day when children most likely would not be hearing it. 438 U.S. at 733, 98 S.Ct. at 3032. *See also* L. Tribe, American Constitutional Law § 12–18 at 938–42 (2d ed. 1988). Whether Baker's bumper sticker could be constitutionally banned by another state statute which, in order to protect minors, sought specifically to regulate or ban vehicular stickers that are indecent or profane but not obscene is an issue the court does not reach. *But see Cunningham v. State,* 260 Ga. 827, 400 S.E.2d 916 (1991) (finding a Georgia statute which banned profane language on bumper stickers to be unconstitutional).

Similarly, this court has not been asked to decide whether § 13A–12–131 is facially unconstitutional. Although in his initial ***1518** complaint Baker challenged the statute on its face, he subsequently limited his lawsuit to a claim that the law is unconstitutional as applied to his bumper sticker. Therefore, the court does not reach whether § 13A–12–131 could be enforced to ban other bumper stickers with different language. *But see id.* (same).

An appropriate judgment will be entered in accordance with this opinion.

JUDGMENT

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court:

(1) That judgment be and it is hereby entered in favor of plaintiff Wayne Baker and against defendants Lamar Glover and the Attorney General of the State of Alabama; and

(2) That it is DECLARED that the application of § 13A–12–131 of the 1975 Code of Alabama, as amended, to plaintiff Baker's bumper sticker which reads "How's My Driving? Call 1–800–EAT SHIT!" violates plaintiff Baker's right to freedom of expression protected by the first and fourteenth amendments to the United States Constitution as enforced through 42 U.S.C.A. § 1983.

It is further ORDERED that all costs of these proceedings be and they are hereby taxed against the defendants, for which execution may issue.

All Citations

776 F.Supp. 1511, 19 Media L. Rep. 1984

Footnotes

1 The first amendment guarantee of freedom of speech is protected from impairment by the states by the due process clause of the fourteenth amendment. *See, e.g., Gitlow v. New York,* 268 U.S. 652, 666, 45 S.Ct. 625, 630, 69 L.Ed. 1138 (1925).

2 The law is titled, "Public display of obscene sticker, sign, etc." The remainder of the statute states that "Any person convicted of a violation of this section shall be guilty of a Class C misdemeanor and shall be punished as prescribed by law." At the time the law was passed, the 1975 Alabama Code already contained several other provisions that criminalize the public display of obscene materials. *See* 1975 Ala.Code §§ 13A–12–151 and 13A–12–171. These provisions were replaced by a new "Anti–Obscenity Enforcement Act" in 1989. *See* 1975 Ala.Code §§ 13A–12–200.1 through 13A–12–200.10.

3 The court has assumed that § 13A–12–131 was written, in fact, to apply a modified *Miller* test. There is, however, nothing at all in the statute to support this assumption. Section 13A–12–131 differs dramatically from, for example, the Georgia statute upheld in *American Booksellers v. Webb.* That statute provides, in fine detail, for a modified test under the rubric "harmful to minors," as follows:

> (A) Taken as a whole, predominantly appeals to the prurient, shameful, or morbid interest of minors;
>
> (B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
>
> (C) Is, when taken as a whole, lacking in serious literary, artistic, political, or scientific value for minors.

919 F.2d at 1513. Alabama's new Anti–Obscenity Enforcement Act uses similar language, again under the rubric "harmful to minors." 1975 Ala.Code § 13A–12–200.1(16). *See* note 2, *supra.*

4 The Eleventh Circuit has made clear that "if any reasonable minor, including a seventeen-year-old, would find serious value, the material is not harmful to minors," that is, is not obscene as to minors. *American Booksellers v. Webb,* 919 F.2d at 1503–04. Therefore, "if a work is found to have serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole." *Id. quoting Commonwealth v. American Booksellers Ass'n,* 236 Va. 168, 372 S.E.2d 618, 624 (1988).

5 *See* L. Tribe, American Constitutional Law, § 12–10 at 850 (2d ed. 1988) (fighting words doctrine "no longer favored by the court").

6 Moreover, the court would add in passing that the *manner* in which Officer Glover applied the obscenity statute raises a constitutional issue. Glover's threat to prosecute Baker unless he scratched off the offending words might be viewed as an impermissible "prior restraint." *See Council for Periodical Distributors Association v. Evans,* 642 F.Supp. 552 (M.D.Ala.1986), *aff'd in relevant part,* 827 F.2d 1483 (11th Cir.1987).