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United States Court of Appeals,
Second Circuit.

Robert BERY, *et al.*, Plaintiffs-Appellants,
v.

CITY OF NEW YORK

Argued April 26, 1996.
Decided Oct. 10, 1996.

[ROBERT L. CARTER](#), District Judge:

Appellants *Robert Bery et al.* (94 Civ. 4253) and *Robert Lederman et al.* (94 Civ. 7216), in separate actions below, sought by motions for a preliminary injunction to enjoin enforcement of the General Vendors Law, [§ 20-452](#) *et seq.* of the Administrative Code of the City of New York (“General Vendors Law”), which bars visual artists from exhibiting, selling or offering their work for sale in public places in New York City without first obtaining a general vendors license. Appellees City of New York and various municipal bodies and officials charged with administration and enforcement of the General Vendors Law (“the City”) opposed the motions. The district court denied the motions; both sets of appellants appeal.

Background

Appellants are individual artists engaged in painting, photography and sculpture and an artists' advocacy organization, Artists for Creative Expression on the Sidewalks of New York. The individual artists have been arrested, threatened with arrest or harassed by law enforcement officials for attempting to display and sell their creations in public spaces in the City without a general vendors license. Some have had their art work confiscated and damaged. At least one asserts a desire to sell and display her art on the sidewalks of New York but has not done so for fear

of arrest and destruction of her work.

The General Vendors Law contains regulatory provisions concerning the sale or offering for sale of non-food goods and services in public spaces in the City of New York. Pursuant to § 20-452(b) of the Administrative Code of the City of New York (“Administrative Code”), a person who “hawks, peddles, sells, leases or offers to sell or lease, at retail, [non-food] goods or services ... in a public space” is a general vendor. Public space is defined as “[a]ll publicly owned property between the property lines on a street as such property lines are shown on the City Record including ... a park, plaza, roadway, shoulder, tree space, sidewalk or parking space between such property lines [as well as] publicly owned or leased land, buildings, piers, wharfs, stadiums and terminals.” Administrative Code § 20-452(d).

At issue in the present case is § 20-453 of the General Vendors Law, a provision which initially required a license for all general vendors who sought to sell non-food goods or services in public spaces in the City. In 1982, Local Law 33 was enacted amending § 20-453 to exempt from the licensing requirement vendors of newspapers, books and other written matter. L.L. 33/1982. In enacting the amendment, the City Council described the new provision as consonant with the “principles of free speech and freedom of the press.” *Id.* at § 1. In 1979, § 20-459(a) of the Administrative Code was amended by Local Law 50 to limit the total number of licenses in effect at any given time to the number of licenses in effect on September 1, 1979. L.L. 50/1979. The number at that time was 853. However, that limitation rests on a slippery slope, since any veteran who qualifies for a vending license must be issued one. [New York State General Business Law § 32 \(McKinney 1994\)](#). As of the present, 340 such licenses over and above the 853 cut-off number have been issued to veterans, making a total of 1,193 general vendors licenses in effect.

Violators of the licensing requirement are guilty of a

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misdemeanor punishable by fine and/or imprisonment and civil penalties. ... In addition, police officers are authorized to seize the items being sold and the seized items are subject to forfeiture.

[The] Administrative Code ... restrict the placement, location and size of vending displays and prohibit vending where an authorized city employee has given notice that exigent circumstances require the vendor to move. These regulations are applicable to all general vendors, including vendors of exclusively written matter. Vending, except for written matter, in a park is barred without written authorization from the Department of Parks and Recreation, Administrative Code § 20-465(j); it is also banned from certain commercial zoning districts and in a delineated section of midtown Manhattan.

District Court's Determination

The district court denied appellants' motions for preliminary injunctions, dealing with both motions in a joint decision issued in amended form on October 26, 1995. See [Bery v. City of New York, 906 F.Supp. 163 \(S.D.N.Y.1995\)](#) (Cedarbaum, J.). The court ruled that the General Vendors Law was a content-neutral municipal ordinance of general application which violated neither the First nor the Fourteenth Amendment, although its incidental effect was to restrict the sale of art on the sidewalks of New York...

Stating that “[t]he precise nature of First Amendment protection for painting and sculpture with no verbal elements has not been addressed by the federal courts,” the district court likened appellants' “fine art” to “applied or decorative art” and found that it rated only limited constitutional protection, in the absence of evidence of government censorship. The court found neither censorship nor animus towards artists as a motivation behind the enactment of the ordinance by the City Council. It thus deemed the ordinance content-neutral and subjected it to a more lenient level of scrutiny than would have been required had it been content-based. *Id.* at 168.

Applying the standard enunciated in [United States v. O'Brien, 391 U.S. 367, 376-77, 88 S.Ct. 1673, 1678-79, 20 L.Ed.2d 672 \(1968\)](#), the court found the provision furthered a public interest unrelated to the sup-

pression of free speech that would be achieved less effectively absent the regulation. *Id.* The prohibition on the sale of art on the streets without a general vendors license, the court found, was appropriately designed to deal with the problem of street congestion. *Id.* The court did not address the question of whether alternative channels of expression remained open to appellants.

The court reasoned that words expressing “political or religious views are much closer to the heartland of First Amendment protection of ‘speech’ than the apolitical paintings in these cases.” *Id.* at 169. Based on this premise, the court found the City's exemption of the sellers of written matter from the licensing requirement a rational determination consonant with the requisites of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 170. Thus, the court denied appellants' motions for a preliminary injunction on both First Amendment and Equal Protection grounds. *Id.*

Standards

[1][2] This court reviews the district court's denial of appellants' preliminary injunction motions with an abuse of discretion standard. ... In the present case, since appellants seek vindication of rights protected under the First Amendment, we are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court....

[3][4] In order to justify the award of a preliminary injunction, the moving party must first demonstrate that it is likely to suffer irreparable harm in the absence of the requested relief. ... Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction.... By the very nature of their allegations, then, appellants have met the first prong of the test.

[5] Ordinarily, the movant then has two options: it must either demonstrate a likelihood of success on the merits or it must raise “sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.” [Sperry Int'l Trade, Inc.](#), However, in a case in

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which “the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme,” the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard.

Discussion

I.

Initially, we note that the district court's view of the reach of the First Amendment is more restricted than the jurisprudence warrants. The First Amendment shields more than political speech and verbal expression; its protections extend to entertainment, film, theater, music, without regard to words, peaceful marches to express grievances to governmental authorities, sit-ins by blacks to protest racial discrimination, the wearing of black arm bands to evidence disapproval of our involvement in Vietnam, the refusal to salute the flag as part of a regularized school activity, and most recently, parades with or without banners or written messages. “[T]he Constitution looks beyond written or spoken words as mediums of expression.” *Hurley*. If the First Amendment reached only “expressions conveying a ‘particularized message,’ ” its “protection would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.”

The First Amendment has surely been valued as essential to the preservation of a political democracy in this country The First Amendment's fundamental purpose, however, is to protect all forms of peaceful expression in all of its myriad manifestations. *Abood v. Detroit Board of Education*, 431 U.S. 209, 231, 97 S.Ct. 1782, 1797, 52 L.Ed.2d 261 (1977) (“[i]t is no doubt true that a central purpose of the First Amendment ‘was to protect the free discussion of governmental affairs.’ ” But our cases have never suggested that expression about philosophical, social, artistic, economic, literary or ethical matters ... is not entitled to full First Amendment protection”).

[6] The district court viewed the First Amendment's primary function as safeguarding the free flow of political and religious views, and hence felt sanguine about the ordinance's interference with appellants'

“wish to sell their apolitical paintings.” The City apparently looks upon visual art as mere “merchandise” lacking in communicative concepts or ideas. Both the court and the City demonstrate an unduly restricted view of the First Amendment and of visual art itself. Such myopic vision not only overlooks case law central to First Amendment jurisprudence but fundamentally misperceives the essence of visual communication and artistic expression. Visual 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. Indeed, written language is far more constricting because of its many variants-English, Japanese, Arabic, Hebrew, Wolof, Guarani, etc.-among and within each group and because some within each language group are illiterate and cannot comprehend their own written language. The ideas and concepts embodied in visual art have the power to transcend these language limitations and reach beyond a particular language group to both the educated and the illiterate. As the Supreme Court has reminded us, visual images are “a primitive but effective way of communicating ideas ... a short cut from mind to mind.” ... One cannot look at Winslow Homer's paintings on the Civil War without seeing, in his depictions of the boredom and hardship of the individual soldier, expressions of anti-war sentiments, the idea that war is not heroic.

Furthermore, written and visual expression do not always allow for neat separation: words may form part of a work of art, and images may convey messages and stories. ... Visual artwork is as much an embodiment of the artist's expression as is a written text, and the two cannot always be readily distinguished.

[7] The City argues that appellants' “expression” allegedly impinged by the Regulation is not in fact their art, but their peddling of the art. It argues that the sale of art is conduct, and in order to be constitutionally protected, the sale of protected material must be “inseparably intertwined with a ‘particularized message.’ ” The City further argues that appellants are free to display their artwork publicly without a license, they simply cannot sell it.

These arguments must fail. The sale of protected ma-

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terials is also protected. In [United States v. National Treasury Employees Union](#), 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995), the United States Supreme Court found that a ban on honoraria for government employees “imposes the kind of burden that abridges speech under the First Amendment,” in part because “the denial of compensation for lower-paid, nonpolicymaking employees will inevitably diminish their expressive output” and will “impose[] a significant burden on the public's right to read and hear what the employees would otherwise have written and said.” *Id.* As in the present case, without the money, the plaintiffs would not have engaged in the protected expressive activity.

Furthermore, the street marketing is in fact a part of the message of appellants' art. As they note in their submissions to the court, they believe that art should be available to the public. Anyone, not just the wealthy, should be able to view it and to buy it. Artists are part of the “real” world; they struggle to make a living and interact with their environments. The sale of art in public places conveys these messages.

The district court seems to have equated the visual expression involved in these cases with the crafts of the jeweler, the potter and the silversmith who seek to sell their work. [Bery](#), 906 F.Supp. at 167. While these objects may at times have expressive content, paintings, photographs, prints and sculptures, such as those appellants seek to display and sell in public areas of the City, always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection. Courts must determine what constitutes expression within the ambit of the First Amendment and what does not. This surely will prove difficult at times, but that difficulty does not warrant placing all visual expression in limbo outside the reach of the First Amendment's protective arm. ...

II.

Having determined that appellants' artwork is entitled to full First Amendment protection, we turn now to an application of the appropriate constitutional test. In examining the constitutionality of a regulation that impinges on First Amendment activity, courts will apply a strict scrutiny analysis when the regulation

discriminates on the basis of content, and a more lenient analysis to content-neutral regulations.

The district court labelled the ordinance content-neutral, since it raised no concerns over censorship. It is not clear that this ordinance is content-neutral, however; it distinguishes between written and visual expression in a manner that effectively bans one while subjecting the other to a more limited form of regulation. The ordinance's effective bar on the sale of artwork in public places raises concerns that an entire medium of expression is being lost. We need not decide that issue, however, since the ordinance must fall even under the less restrictive yardstick the court applied.

[8] A content-neutral regulation may restrict the time, place, and manner of protected speech, provided it is “narrowly tailored to serve a significant governmental interest” and “leave[s] open ample alternative channels for communication.” The City certainly has a significant interest in keeping its public spaces safe and free of congestion. The license requirement as it relates to appellants, however, which effectively bars them from displaying or selling their art on the streets, is too sweeping to pass constitutional muster. The district court's failure to properly analyze the questions of narrow tailoring and alternative channels was an abuse of discretion that led to an incorrect result.

The ordinance is a *de facto* bar preventing visual artists from exhibiting and selling their art in public areas in New York. The total number of licenses outstanding at any given time is a low 853. Those fortunate enough to possess one of these permits may automatically renew it annually which, of course, means that late-comers like appellants have little hope of securing a license in the foreseeable future. In addition to this all-but-impenetrable barrier, a 500 to 5000 person waiting list makes appellants' prospects of securing a license apparently nonexistent, a fact conceded at oral argument.

The City may enforce narrowly designed restrictions as to where appellants may exhibit their works in order to keep the sidewalks free of congestion and to ensure free and safe public passage on the streets, but it cannot bar an entire category of expression to ac-

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comply with this accepted objective when more narrowly drawn regulations will suffice. The City points to nothing on this record concerning its need to ensure street safety and lack of congestion that would justify the imposition of the instant prohibitive interdiction barring the display and sale of visual art on the City streets.

This is not to say that the display of large, cumbersome works that would block public traverse on the streets may not be subjected to discrete regulation as to time, place and location or indeed that both visual and written expression may not be so restricted by regulations addressed to particular areas of the City where public congestion might create physical hazards and public chaos. ...

The ordinance as it stands, however, cannot be considered merely a regulation designed for crowd management and control, or to prevent congestion or to keep the streets clear to allow unimpeded passage of the public over the City's thoroughfares. There exist specific sections of the Administrative Code which directly regulate time, place, manner and location of vending that already achieve these ends without such a drastic effect. Furthermore, the City's licensing exceptions for veterans and vendors of written material call into question the City's argument that the regulation is narrowly tailored. The City does not maintain control over the absolute number of vendors, since the exceptions are unlimited; the number 853 does not in and of itself control congestion. The City's control over congestion is largely maintained through the time, place and manner restrictions on vending that facilitate the flow of traffic, ease crowding and improve safety.

[9] We turn now to a consideration of whether alternative channels of communication exist for appellants' protected expression. Appellants argue that no such alternatives exist. They contend that licenses are virtually impossible to obtain, and no other forum exists for the display of art by appellants, since museum and gallery space in New York City is drastically limited.

The City states that alternatives exist; appellants may sell their artwork from their homes or seek permission to display it in restaurants and street fairs and the

like. However, appellants are entitled to a *public* forum for their expressive activities. Displaying art on the street has a different expressive purpose than gallery or museum shows; it reaches people who might not choose to go into a gallery or museum or who might feel excluded or alienated from these forums. The public display and sale of artwork is a form of communication between the artist and the public not possible in the enclosed, separated spaces of galleries and museums.

Furthermore, to tell appellants that they are free to sell their work in galleries is no remedy for them. They might not be at a point in their careers in which they are interested in reaching the public that attends exhibits at art galleries-if, indeed, they could get their works accepted for showing. Appellants are interested in attracting and communicating with the man or woman on the street who may never have been to a gallery and indeed who might never have thought before of possessing a piece of art until induced to do so on seeing appellants' works. The sidewalks of the City must be available for appellants to reach their public audience. The City has thus failed to meet the requirement of demonstrating alternative channels for appellants' expression.

On the basis of this record before us, the City's requirement that appellants be licensed in order to sell their artwork in public spaces constitutes an unconstitutional infringement of their First Amendment rights. The district court abused its discretion in denying the preliminary injunction.

[10] Finally, we note that the district court was similarly incorrect in its rejection of appellants' argument under the Equal Protection Clause of the Fourteenth Amendment. The requirement that appellants' art cannot be sold or distributed in public areas without a general vendors license, while written material may be sold and distributed without a license, must fall for the same reasons outlined above. Since the ordinance does impermissibly impinge on a fundamental right, the district court incorrectly dismissed the equal protection argument under a rational basis test.

Accordingly, the judgment of the district court is reversed.