No. VU-SUPP 2012

In the Supreme Court of the United States

MAYOR BUCK MERRYWEATHER, in his official capacity; THE CITY OF MAGNOLIA HILLS; AND THE MAGNOLIA HILLS MEDICAL BOARD,

PETITIONERS,

v.

NORMAN MALONE,

RESPONDENT.

On Writ of Certiorari
to the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONERS

Team Letter S

STATEMENT OF ISSUES

The issues presented to this honorable Court are as follows:

1. The First Amendment protects pure speech and certain conduct, if the conduct is sufficiently imbued with elements of communication. The tattooing process involves the use of sharp needles to inject ink under human flesh to create a permanent image. Is this particular use of needles pure speech or conduct that is sufficiently expressive to necessitate First Amendment protection?

2. Municipalities have a legitimate interest in preserving the health and safety of their citizens. In response to an increase in blood-borne diseases, the city of Magnolia Hills enacted an ordinance restricting tattooing to medical professionals or individuals with a special permit. Does the First Amendment preclude a city from enacting preventative health and safety measures in the wake of an epidemic simply because they affect the tattooing process?

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STATEMENT OF JURISDICTION

The Court of Appeals for the Thirteenth Circuit filed its opinion on July 29, 2011. Petitioner timely filed a petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1) and granted the petition for writ of certiorari on May 15, 2012.

STATEMENT OF THE CASE

This case involves Respondent Norman Malone's challenge, under 42 U.S.C. § 1983, of an ordinance enacted by Petitioner, the City of Magnolia Hills, restricting the act of tattooing to medical professionals. Malone, a tattooist who is not a medical professional, argues that the act of tattooing is artistic expression protected by the First Amendment, and that the City's regulation violates the First Amendment's Free Speech Clause.

The District Court concluded that the regulation does not violate the First Amendment, as the act of tattooing is not pure speech, but rather conduct that is not sufficiently communicative to come within First Amendment protection. Malone appealed. The Court of Appeals reversed, concluding that the act of tattooing is, in fact, pure speech, within the scope of First Amendment Protection. The Court of Appeals thus concluded that City's regulation of tattooing is unconstitutional, as it was not a reasonable time, place, or manner restriction on protected speech.

This Court granted the City's petition for writ of certiorari on May 15, 2011 to consider the following questions:

1. Whether the Free Speech Clause of the First Amendment protects the act of tattooing, and, if so,
2. Whether a city ordinance restricting tattooing to medical professionals or individuals with a special permit violates the Free Speech Clause of the First Amendment.

STATEMENT OF FACTS

I. STATEWIDE HEPATITIS B AND C EPIDIEMIC

In 2007, cities in the state of Oaklandia experienced a drastic increase in incidences of the blood-borne diseases Hepatitis B and C. *Malone v. Merryweather*, ___ F. Supp. 3d ___ , 5 (D.Oak. 2010). The outbreak was so severe that Oaklandia officials declared a statewide epidemic. *Id*. Hepatitis B and C are blood-borne diseases, which can be transmitted through shared needles and contaminated ink. *Id.* The State of Oaklandia has not initiated any efforts to prevent further spread of the diseases, leaving cities to implement their own prevention regulations. *Id.* Several cities, including Magnolia Hills (the "City") did just that. In order to prevent the spread of blood-borne diseases, the Magnolia Hills City Council ("City Council") enacted several health-related regulations, including the Magnolia Hills Prevention of Epidemic Disease Spreading Ordinance (the "Ordinance"). *Id.*

II. MAGNOLIA HILLS PREVENTION OF DISEASE SPREADING ORDINANCE

The Ordinance deals specifically with safety regulations regarding the act of tattooing. The Ordinance identifies the practice of medicine as, *inter alia*, "holding oneself out to the public as being engaged in . . . the performance of any kind of surgical operation upon a human being, including tattooing, piercing, or any other type of body modification, in which human tissue is cut, burned, or vaporized . . . or the penetration of the skin or body orifice by any means." *Id.* at 6. The Ordinance limits the practice of medicine to those "hold[ing] a medical license recognized by the American Board of Medical Specialties." *Id.*

The Ordinance does provide exceptions for tattoo artists who do not themselves hold a medical license. Those wishing to engage in the act of tattooing who do not meet this statutory definition of "medical practitioner" may seek a special permit from the Magnolia Hills Medical

Board ("Medical Board"). *Id.* The Medical Board may grant permits to applicants "who demonstrate[] the ability to uphold the health and safety standards of a medical practice, including proof of hospital privileges or a medical professional on staff, and show[] cause as to why a medical license has not been obtained." *Id.* While there are currently no tattoo shops in Magnolia Hills (*id.* at 5), neither the Ordinance nor Magnolia Hills bans tattoo parlors or the application of tattoos. There are also no Magnolia Hills regulations governing tattooing in a private setting. Other cities within a 50-mile radius of Magnolia Hills have not yet reacted to the epidemic. *Id*. at 7.

The health and safety of Magnolia Hills residents was the City's sole motivation for implementing the Ordinance. During the City Council debate on whether to enact the Ordinance, Mayor Buck Merryweather emphasized his concern for safety. In professing his support for the Ordinance, Mayor Merryweather made a general reference to "dangerous and antisocial activities," but he clarified that he did not want people engaging in certain activities in his town "without the proper medical training," "with no regard for the safety of their consumers and the general public," and who ignore public health and welfare "in the name of turning a quick dollar." *Id.* at 5.

III. THE COMMENCEMENT OF THIS LITIGATION

Norman Malone is a professional tattooist wishing to open a tattoo parlor in Magnolia Hills. Malone received his training during a three-year apprenticeship in Okinawa, Japan under Horihide, a famous Japanese classical tattooist. *Id.* at 3. Since 1983, Malone has operated a shop, Kofun Tattoos, in Hawkweed Valley, Oaklandia, located twenty miles from Magnolia Hills. *Id.* Malone creates tattoos both freehand and by tracing a stencil. *Id.* While Malone reserves the right to select "the style and colors" of the tattoos he applies, his customers

ultimately provide their own input "on the placement, design, and size of the tattoo." *Id.* at 4. Malone is known for his tattoos of Japanese koi fish, which began tattooing in order to experiment with color. *Id.* at 4. While the koi holds many different symbolic meanings in traditional Japanese culture, Malone "ascribes no specific meaning to the koi" and focuses on the image for "purely aesthetic" reasons. *Id.* at 4.

Malone's desire to open a tattoo parlor in Magnolia Hills stems, in part, from the current decline in business at his shop in Hawkheed Valley. *Id.* at 4. He attributes the downturn to the to the establishment of two tattoo shops in Hawkheed Valley, coincidentally, by two of his former apprentices *Id.* Both former apprentices "create tattoos . . . stylistically similar to Malone's" and have customers who request "exact replicas" of Malone's signature koi tattoos. *Id.* Malone believes that this "increased availability of his signature work" has contributed to a decline in his business, and he sought to open a new shop in Magnolia Hills. *Id.* at 4-5.

Malone does not meet the Ordinance's definition of a medical practitioner. He does not hold a medical license, and, on October 2, 2009, he sought a special permit from the Medical Board to open his studio. *Id*. at 6. Under the Ordinance, the Medical Board may grant these special permits to an applicant "who demonstrates the ability to uphold the health and safety standards of a medical practice, including proof of hospital privileges or a medical professional on staff, and shows cause as to why a medical license has not been obtained." *Id*. Malone was unable to demonstrate why he had not obtained a medical license. *Id*. Further, he does not have access privileges at a hospital, and he does not even have a medical professional on staff. *Id.* Because Malone was unable to show that he had taken the measures that the City deemed necessary to promote safe tattooing practices, the Medical Board, on October 5, 2009, denied his petition for a special permit. *Id*.

On October 26, 2009, Malone appealed the Medical Board's decision. *Id*. at 7. He argued that his safety record is "excellent" because no known transmissions of blood-borne diseases have been traced to Kofun Tattoos. *Id.* He noted that he does not reuse needles, which he makes himself for each tattoo. *Id.* at 7. He also argued that his safety training, which he obtained overseas from another tattoo artists, and not through a medical or health-related institution, is sufficient to substitute for the medical licensing standards set in the Ordinance. *Id*. at 3, 7. On November 26, 2009, the Medical Board denied Malone's appeal, again citing his failure to meet the requisite safety standards. *Id*. at 7.

SUMMARY OF THE ARGUMENT

The issue before this Court is whether the First Amendment protects the act of tattooing and, if so, whether an ordinance restricting that act to medical professionals violates the First Amendment. This Court should reverse the decision of the Court of Appeals, and hold that tattooing is neither pure speech nor expressive conduct, and is thus not subject to First Amendment protection. Because the regulation is rationally related to the City's legitimate interest in promoting the health and safety of its citizens, this Court should uphold the Ordinance.

As a threshold matter, the First Amendment does not protect the *process* of tattooing, which must be separated from the product of the process, the tattoo itself. First, the technical process of using needles to insert dye into human flesh is not pure speech. Second, this process is not sufficiently imbued with the elements of communication because, in creating a tattoo, Malone does not intend to convey a particularized message.

The Ordinance does not violate the Free Speech Clause of the First Amendment. Because tattooing is not subject to First Amendment protection, the City's Ordinance must be upheld. It is rationally related to the City's legitimate interest in promoting health and safety and preventing the spread of blood-borne disease. Should this Court conclude that the First Amendment does protect the act of tattooing, the Ordinance should still be upheld. First, the Ordinance is a reasonable time, place, or manner restriction on the act of tattooing. Second, the regulation passes the four-factor test articulated by this Court in *O'Brien.*

ARGUMENT

The City of Magnolia Hills, in enacting its Prevention of Epidemic Disease Spreading Ordinance to prevent the spread of blood-transmitted diseases, did not violate the First Amendment by virtue of its regulation of the tattooing process. First, the technical process of inserting needles and dye into human flesh is not speech entitled to the highest level of constitutional protection, nor is this application process expressive conduct; injecting dye into skin pigments is not "sufficiently imbued with elements of communication." *Spence v. Washingont*, 418 U.S. 405, 409 (1974). There is a clear line of demarcation between the final product of the process, the tattoo, and the application procedure. Accordingly, regardless of the artistic aspects of the tattoo, the First Amendment does not protect tattoo application.

Second, the City has a legitimate interest in preserving public health and safety, and its regulation of the act of tattooing is rationally related to this interest. Because the First Amendment does not protect the technical process of tattoo application, the regulation of tattooing in Magnolia Hills is constitutional. Even if the First Amendment provided protection to tattoo application, the Ordinance would remain constitutional because it passes the test provided by this Court in *United States v. O'Brien*, 391 U.S. 367, 376 (1968) and the Ordinance is a reasonable time, place, and manner restriction.

I. THE FIRST AMENDMENT DOES NOT PROTECT THE TATTOOING PROCESS.

As a threshold matter, the First Amendment does not protect the tattooing process. The Free Speech Clause of the First Amendment protects pure speech and expressive conduct. The tattooing process is neither, and is thus not subject to First Amendment protection.

While this Court has not yet addressed whether the tattooing process is expressive conduct or pure speech protected by the First Amendment, most courts that have addressed this

issue have concluded that tattooing process is neither. *See Yurkew v. Sinclair*, 495 F. Supp. 1248, 1253 (D. Minn. 1980). *See also Hold Fast Tattoo, LLC v. City of N. Chicago*, 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008) (finding that tattooing contains no intent to convey a particularized message); *Indiana ex rel. Med. Licensing Bd. of Indiana v. Brady*, 492 N.E.2d 34, 39 (Ind. Ct. App. 1986) (acknowledging that "all courts presented with this issue have found that tattooing is neither speech nor even symbolic speech"); *New York v. O'Sullivan*, 409 N.Y.S.2d 332, 333 (N.Y. App. Div. 1978) (finding that the act of tattooing is not "speech or symbolic speech"); *State v. White*, 560 S.E.2d 420, 423 (S.C. 2002) (holding that "the act of tattooing falls on the unprotected side of the [First Amendment] line"); *Blue Horseshoe Tattoo V, Ltd. v. City of Norfolk*, 72 Va. Cir. 388, 390 (Va. Cir. Ct. 2007) (holding that tattoo application is not sufficiently communicative to warrant First Amendment protection). *Cf. Commonwealth v. Meuse*, 9877CR2644, 1999 WL 1203793, at *3-4 (Mass. Super. Nov. 29, 1999) (determining that tattooing was protected, but without addressing the *communicative* nature of the tattooing procedure). *But see Anderson v. City of Hermosa Beach*, 621 F. 3d 1051, 1062 (9th Cir. 2010) (holding that tattoos and the tattooing process are purely expressive activity subject to First Amendment protection).

A. The tattooing process, or the implementation of needles to inject ink through the layers of a person's skin, is conduct, not pure speech.

The First Amendment does not provide protection for the tattooing process. The First Amendment prohibits laws "abridging the freedom of speech." U.S. CONST. amend. I. This protection obviously applies to the printed or spoken word, or "pure speech." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). The process of applying a tattoo is not printed or spoken word, and is thus not pure speech.

1. Tattoos are inherently forms of art and self-expression, which do not automatically warrant First Amendment protection.

While tattooing itself may have artistic qualities, the First Amendment does not automatically protect as pure speech that which is artistic in nature. *See, e.g., City of Newport, Ky. v. Iacobucci*, 479 U.S. 92, 95 (1986) (finding that regulatory authority conferred to the states includes the power to ban nude dancing as part of a liquor license control program, even though nude dancing is artistic in nature); *New York v. Ferber*, 458 U.S. 747, 761 (1981) (upholding regulation banning distribution of materials depicting juveniles engaging in sexual activities even though it restricted works that contain serious artistic value); *White v. City of Sparks*, 341 F. Supp. 2d 1129, 1138 (D. Nev. 2004) (acknowledging that "[o]nly the Second Circuit has gone so far as to award certain visual art—specifically paintings, photographs, prints and sculptures—the full and unquestioned protection of the First Amendment"). Further, unlike film, for example, "the practice of tattooing has not been shown to be a significant medium for the communication of ideas, nor as it been established that tattooing, as a medium, may affect public attitudes or behavior." *Yurkew*, 495 F. Supp. at 1255 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (internal quotation marks omitted)).

Moreover, it is not the province of the courts to determine what does, and does not, constitute "art." In its opinion below, the Thirteenth Circuit cited the concerns of Justice Oliver Wendell Holmes, Jr., who believed that evaluating art is a "dangerous undertaking for persons trained only in the law." *Malone v. Merryweather*, ___ F.3d ___ , 37 (13th Cir. 2011), quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)). However, in determining for itself that the act of tattooing is an art form, the Thirteenth Circuit has engaged in the very undertaking of its professed fears. A tattoo wearer chooses to have an indelible image engraved onto his skin—undeniably doing something that distinguishes his skin from that of other people,

through the name of a lover, the date of a family member's death, or an image to which he feels especially attached. But in deciding that the type of action producing this image is art carrying the weight of First Amendment protection, the Thirteenth Circuit has mistakenly distinguished the act of tattooing in particular from many other actions that have the "kernel of expression [present] in almost every activity a person undertakes." *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). "[S]uch a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Id.* Determining that certain activities or displays are sufficiently artistic or expressive is not the province of the courts. *See Mastrovincenzo v. City of New York*, 435 F. 3d 78, 82 (2d Cir. 2006) (declining "to participate in colloquia on such interesting and lofty measures as the definition of art . . . and whether a urinal can be a sculpture.").

Now, other body modification procedures are to today's society what tattooing was years ago. Like tattooing, these actions also involve surgical procedures. One such procedure is tongue splitting, also known as tongue bifurcation—a procedure outlawed in Texas and limited to performance by licensed doctors and dentists in states such as Delaware, Illinois, and New York.[1] Another procedure with increasing appeal is subdermal implantation, sometimes called pocketing. This procedure creates a raised area on the skin by inserting an object, typically made of silicone or Teflon, in a seemingly endless variety of shapes: "from *Star Trek* ridges and small horns, to little hearts and stars scattered across the chest." Quinn Norton, *Body Artists Customize Your Flesh*, WIRED (Mar. 8, 2006), http://www.wired.com/culture/lifestyle/news/2006/03/70322. Tattooists puncture human skin just as a nurse or doctor would in a different circumstance; similarly, body modification artists open body cavities and implant objects.

[1] *See* Tex. Health & Safety Code Ann. § 146.0126 (West 2003); Del. Code Ann. 11, § 1114A (West 2012); 720 Ill. Comp. Stat. Ann. 5/10.2 (West 2011); N.Y. Pub. Health Law § 470 (McKinney 2004).

Even if all art is worthy of First Amendment protection, the question of what constitutes art is wholly subjective. "One man's vulgarity is another man's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971). Some viewers may find appreciable artistic qualities in tattoos. *See Anderson*, 621 F.3d at 1061 (taking "judicial notice of the skill, artistry, and care that modern tattooists have demonstrated"). Others may find them in split tongues or subdermal implants. Judges, however, should not be the arbiters of what is art and what is not. "[C]ourts are ill-equipped to determine such illusory and imponderable questions, and the question of whether certain conduct comes within the protection of the First Amendment should not invariably depend on whether the final product can by some stretch of the imagination be considered an art form." *Yurkew*, 495 F. Supp. at 1254.

Simply because tattooing, tongue bifurcation, pocketing, and other forms of body modification may be artistically motivated, the First Amendment should not provide them blanket protection. Altering the body in any way certainly carries with it some artistic qualities, but as discussed above, artistic characteristics do not transform an activity into pure speech. The Court should not task itself with the responsibility of determining a practice is not surgical "enough" to be regulated as a medical procedure, or alternatively, that it carries with it artistic qualities that the Court deems sufficient for overriding medical interests.

Many actions with expressive characteristics have gained mainstream appeal. The Thirteenth Circuit erred in providing such popularity as support for its determination that the tattooing process is artistic expression worthy of First Amendment protection. The general public's attitude toward an activity should not influence this determination. *See Marbury v. Madison*, 5 U.S. 137, 151-52 (1803) (highlighting the constitutional requirement of independent judges); The Federalist No. 78, at 489 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888)

(noting that the role of the judiciary is too great for popular opinion to play a role). In fact, a core First Amendment concern is the protection of expression that is *un*popular. *See Snyder v. Phelps*, 131 S.Ct. 1207, 1220 (2011) (upholding the constitutionality of Westboro Baptist Church's controversial practice of protesting the funerals of fallen soldiers, while acknowledging that "many Americans" might believe that Westboro "is morally flawed" and its actions "certainly hurtful"). Accordingly, popular attitude toward tattoos must have no bearing on the analysis of this Court.

Tattoos are a form of self-expression, and self-expression does not automatically receive First Amendment protection. "The First Amendment does not support vague and attenuated notions of expression." *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 390 (6th Cir. 2005). Further, lower courts have specifically concluded that tattoos themselves are simply forms of self-expression, and are thus not sufficiently communicative to warrant First Amendment protection. *See Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1307 n. 4 (8th Cir. 1997) (holding that student's tattoo does not warrant First Amendment protection because it was displayed for purposes of mere self-expression); *Riggs v. City of Fort Worth*, 229 F. Supp. 2d 572, 580-81 (N.D. Tex. 2002) (noting that tattoos are not protected expression under the First Amendment). Mere expressions of individuality, or "self-expression" do not trigger First Amendment protection. *See Stephenson*, 110 F.3d at 1307 n. 4.

Some forms of self-expression can warrant First Amendment protection. In certain circumstances, dress or jewelry can clearly stand for religious affiliation, cultural heritage, or political support. *See, e.g., Bear v. Fleming*, 714 F. Supp. 2d 972, 984 (D.S.D. 2010) (holding that a Native American student could wear Lakota warrior dress in lieu of graduation gown because doing so was clearly an outward expression of his heritage). However, changes in

appearance or clothing that simply provide a certain style or look for the wearer and express his or her individuality do not warrant First Amendment protection. *Blau*, 401 F.3d at 386. *See also Bar-Navon v. Brevard Cnty. Sch. Bd.*, 290 F. App'x 273, 275-76 (11th Cir. 2008) (noting that piercings located on tongue, lip, navel, nasal septum and chest were possibly an "expression of . . . individuality," "non-conformity," a "wild side," and an "openness to new ideas," but general statements of individuality do not implicate First Amendment protection).

As the Circuit Court noted below, "[t]he variety of reasons a person may choose to get a tattoo are . . . diverse." *Malone*, ___ F.3d at 26. While one might choose to display a tattoo to signify an association with a group or religion or to memorialize a lost loved one, one might equally display a tattoo for mere decorative or aesthetic purposes. Regardless of one's reason for getting a tattoo, tattoos are simply forms of self-expression, which do not automatically trigger First Amendment protection. *See Stephenson*, 110 F.3d at 1307 n. 4.

2. Even if tattoos themselves are protected by the First Amendment as pure speech, the technical procedure that produces them is distinguishable from its result and therefore should not receive similar First Amendment protection.

Regardless of whether a tattoo itself constitutes pure speech, this Court must recognize that the process of applying a tattoo must be separated from the speech itself. The Thirteenth Circuit mistakenly contended that analysis of First Amendment activity prevents this separation. *Malone*, ___ F.3d at 33. Petitioner does not dispute the Thirteenth Circuit's assertion that the tattoo cannot be created without the tattooing process. *Id*. But even if tattoos constitute pure speech, the First Amendment does not automatically protect the *mode* through which otherwise protected speech is conveyed simply because the *content* of the speech is protected. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 393-94 (1992).

In *Kovacs v. Cooper*, Charles Kovacs played music and spoke through an amplifier attached to a truck. 336 U.S. 77, 78 (1949) (plurality opinion). He subsequently was convicted of a city ordinance that banned on city streets the use of sound amplifiers and other instruments that emitted "loud and raucous" noises. *Id.* at 79. The plurality noted that the ordinance did not restrict the "communication of ideas," but rather the mode through which the speaker chose to project those ideas: "through a loud speaker and a raucous tone." *Id*. at 87. The sound truck is not "in and of itself" protected by the First Amendment, and, like the tattooing process, may assist in conveying a message, but is "one step removed" from the potentially expressive conduct. *See Hold Fast*, 580 F. Supp. 2d at 660. The mode through which expression is transmitted can be regulated regardless of the First Amendment protection provided to the result. *See R.A.V.*, 505 U.S. at 393-94 (noting that fighting words are excluded from First Amendment protection, not because of their content, but because the *mode* of expressing the protected content is "particularly intolerable"); *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989) (upholding New York City's guidelines regarding sound amplification systems used to convey protected speech at a public band shell). Similarly, if tattoos themselves are protected speech, it does not automatically follow that the mode through which that speech is conveyed is also protected. The tattooing process, like a sound truck or the choice of using fighting words to convey a protected message, is merely the mode through which the speech in question is conveyed, and is thus "one step removed" from the protected speech. *Hold Fast*, 580 F. Supp. 2d at 660. These modes through which speech is conveyed are not always subject to the same protections as the speech itself.

Accordingly, the tattooing process is not afforded the same protection as the tattoo itself. Therefore, contrary to the analysis of the Thirteenth Circuit, permitting a rule regulating

tattooing is not comparable to "handcuffing an author." *Malone*, ___ F.3d at 34. Justice Thurgood Marshall asserted in his dissent in *California v. LaRue* that it "follows, ineluctably" that if movies, plays, and dance enjoy constitutional protection, their component parts are protected as well. 409 U.S. 109, 130 (1972). However, these components—a given scene in a movie or play, a single plié in a dance piece—are indisputably expressive. It is the preparation for those art forms that is more comparable to the application of the tattoo: a dancer stretching in preparation to go on stage is not a constitutionally protected act, nor are the casting decisions of the film director.

The process of creating protected speech is capable of bifurcation from the speech itself: that is, determining a point where the non-expressive preparation ends and the expressive activity/conduct begins. For example, when Gregory Johnson's lit match came into contact with the American flag he was holding, his expression began. *See generally Texas v. Johnson*, 491 U.S. 397 (1989). Even if tattoos are a form of pure speech, it does not follow that the mode through which that speech is conveyed (the application of the tattoo) is afforded the same protection. If the display of a tattoo is at all constitutionally protected, that protection would come into play at the tattoo's completion: when the final product is completed and any expression contained therein is wholly present.

B. Tattooing is conduct, not pure speech, and is not sufficiently communicative to warrant First Amendment protection as "expressive conduct."

Tattooing is conduct rather than pure speech, and does not receive First Amendment protection because it is not sufficiently communicative. While the First Amendment protects written and spoken word as pure speech, it also protects conduct if the conduct is "sufficiently imbued with the elements of communication." *Spence v. Washington*, 418 U.S. 405, 409 (1974). Indeed, this Court has rejected "the view that an apparently limitless variety of conduct can be

labeled 'speech' whenever a person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Conduct must satisfy the two-prong test articulated by this Court in *Spence* to trigger First Amendment protection: (1) the person engaging in the conduct intends thereby to express a "particularized message," and (2) the "likelihood is great that the message w[ill] be understood by those who view[] it." *Id*. at 410-11. Malone does not intend to convey any particularized message when he engages in the conduct of tattooing. Further, the likelihood is not great that, if there is an intended message, those who view it would understand it. Accordingly, the tattooing process is not sufficiently communicative to warrant First Amendment protection.

At the outset, it is important to note that the Thirteenth Circuit has disconcertingly chosen to erase four decades of First Amendment jurisprudence in replacing the *Spence* test with an evaluation of arbitrary characteristics of conduct. Among them are the quality of the subject matter's aesthetic appeal, belief in the message conveyed by the image, and the use of traditional methods in the image's creation. *Malone*, ___ F.3d at 31. Based on this hodgepodge of characteristics, one could find that Michelle Obama's vegetable garden is First Amendment-protected because it is well-manicured, she hopes to encourage healthy eating, and used traditional planting methods—or that an orthodontist has similar First Amendment interests in the teeth of his patients. The Thirteenth Circuit has ignored the *Stanglin* Court's admonition against finding a "kernel" of expression in virtually all conduct, seemingly fashioning a flimsy rule so that tattooing can somehow fall under the ambit of First Amendment protection. *See Stanglin*, 490 U.S. at 24.

1. The tattooing process is not expressive conduct because Malone does not intend to convey a particularized message.

The actual process of using needles to inject dye into a person's skin fails the first prong of the *Spence* test because Malone does not intend to convey a particularized message. Malone's tattoos fall into two categories: (1) those designed, at least in part, by his clients, and (2) brightly colored koi fish to which, Malone admits, he "ascribes no specific meaning." *Malone*, ___ F. Supp. 3d at 4. Accordingly, Malone's conduct of tattooing is not sufficiently communicative to warrant First Amendment protection because he does not intend to convey a particularized message through the application of either type of tattoo .

The tattooist, through his tattooing process, does not intend to create a particularized message. Noting that the nature of a tattoo artist is to tailor a unique design based on a customer's wishes and input, the court in *Hold Fast* concluded that "the act of tattooing is one step removed from actual expressive conduct," or the wearing of the tattoo. 580 F. Supp. 2d at 660. In *Hold Fast*, the city denied a tattooist's request for a permit to open a tattoo parlor, because it was "not the kind of business" the city council wanted in the area. *Id*. at 658. The tattooist challenged this denial as a violation of his right to free speech under the First Amendment. *Id*. The district court determined that the act of tattooing is not expressive conduct because the person engaging in the activity, the tattooist, has no intent to create a particularized message. *Id.* at 660. Rather, it is the customer who intends to convey a message through the *display* of the tattoo. *Id*. Because the person applying the tattoo does not have the intent to convey a particularized message, this process "fails the first prong of the test for First Amendment protection." *Id.*

Of course, there are choices, in color and style of tattoo, involved at various steps of the tattooing process. These choices, much like cosmetic decisions of personal appearance, such as

clothing or hair style, do not receive the First Amendment protection provided to clearly expressive acts because there is no intent to convey any particular message. *See, e.g. Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (concluding it is constitutionally permissible for a police force to regulate the hair length of its officers). *See also Richards v. Thurston*, 424 F.2d 1281, 1283 (1st Cir. 1970) (finding hair length, while containing some element of expression, insufficiently communicative for First Amendment protection)); *but see A.A. ex rel. Bettenbaugh v. Needville Ind. Sch. Dist.*, 701 F. Supp. 2d 863 (S.D. Tex. 2009) (concluding that as an exception to school code, a Native American student was allowed to wear hair in braids because the braids conveyed a particularized message about his heritage and religion).

The tattoos that Malone applies fall into one of two categories: (1) designs selected by the customers themselves, which do not contain Malone's message, or (2) tattoos of koi, to which he admittedly "ascribes no specific meaning." *Malone*, ___ F. Supp. 3d at 4. Malone thus does not intend to create a particularized message through his tattooing process. His customers provide the "input on the placement, design, and size of the tattoo." *Id*. Malone's involvement, other than injecting the ink into his customers' skin, is limited simply to "style and colors." *Id*. Any message intended to be conveyed by one of these tattoos is solely that of the customer, and not the tattooist. In addition to the designs selected by his customers, Malone is also known for his tattoos of koi, which he does "for purely aesthetic reasons." *Id*. He admits that he does not ascribe any particular meaning to these tattoos. *Id.* Because Malone has no intent to convey a particularized message when he engages in the tattooing process, this conduct does not trigger First Amendment protection under the first prong of the *Spence* test.

2. If Malone does intend to convey a message through tattooing, the likelihood is not great that those viewing the message will understand it.

Even if a tattooist does intend to convey a particular message when engaging in the tattooing process, there is not a great likelihood that people who view this message will understand it. This conduct thus fails the second prong of the *Spence* test. Accordingly, the tattooing process is not sufficiently communicative to warrant First Amendment protection.

Context plays a key role in determining the likelihood that observers would understand the message intended to be conveyed. *See Spence*, 418 U.S. at 410 (explaining that "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol."). "Context is all." *Anderson*, 621 F.3d at 1068 (Noonan, J., concurring). *See also Texas v. Johnson*, 491 U.S. 397 (1989) (holding that the burning of American flag is protected because the act was part of an anti-Reagan and anti-Dallas corporation demonstration timed to take place in the context of Dallas's hosting of the Republican National Convention); *Spence*, 418 U.S. at 405 (holding as sufficiently communicative a young man's affixing a peace symbol onto an American flag, because it coincided with the violent incidents in Cambodia and at Kent State).

Both lower courts in this case addressed the work of Jackson Pollock in comparison to an individual splattering paint in frustration. "As the District Court correctly observes, there are individuals who splatter paint and there is Jackson Pollack." *Malone*, ___ F.3d at 39 (Hopewell, J., dissenting). Examination of conduct in its broader context reveals whether the First Amendment protects the conduct. A man may rip papers at his desk out of ambiguous frustration, and a man may also tear his jury summons at the courthouse steps. Based on context, similar activities can be perceived as setting forth a particularized message, or not doing so at all.

The tattooing process lacks any context that would contribute to an understanding of any meaning the tattooist intends to convey. The court in *State v. White* noted that the technical process of using needles to inject dye into human skin does not convey any obvious message in the way that, for example, burning a flag in protest, would. 348 S.C. at 538. In *Yurkew,* as here: "[t]here has been no showing that the normal observer or even the recipient would regard the process of injecting dye into a person's skin through the use of needles as communicative." 495 F. Supp. at 1255, n. 7.

Perhaps the only portion of Malone's tattooing that provides some platform for a message is his decision to tattoo his initials next to every image he applies. However, this does not convey any message about the design it is inscribed next to, and it simply indicates that Malone is the person responsible for applying the tattoo. Second, there is not a great likelihood that the viewer would understand the message. It is probable, but highly unlikely, that an observer might recognize "N.M." as the initials of Norman Malone—but this minimal likelihood is not sufficient to grant First Amendment protection to Malone's tattooing procedure.

II. THE CITY'S REGULATION OF TATTOOING DOES NOT VIOLATE THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

The Magnolia Hills Prevention of Disease Spreading Ordinance, which regulates the tattooing procedure, does not violate the Free Speech Clause of the First Amendment. Tattooing is conduct, not speech, and is not sufficiently communicative to warrant First Amendment protection. Because the Ordinance is not subject to First Amendment protection, this Court must uphold it because it is rationally related to the City's legitimate interest in preserving public health and safety. Should this Court conclude that tattooing is protected by the First Amendment, either as pure speech or expressive conduct, the Ordinance still withstands the heightened scrutiny to which regulations of protected activities are subject, and must be upheld.

A. The City's regulation of tattooing does not violate the First Amendment because tattooing is not subject to First Amendment protection and the regulation is rationally related to the City's legitimate interest in preserving public health.

The City's regulation of the act of tattooing does not violate the Free Speech Clause of the First Amendment. The tattooing process is not subject to First Amendment protection. Because the First Amendment does not protect tattooing, the regulation is constitutionally sound because it is rationally related to a legitimate government interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). This Court must uphold the Ordinance as constitutional.

Because the First Amendment does not protect tattooing, this Court must consider simply whether the ordinance is rationally related to a legitimate government interest. *Id*. The legitimacy of the City's need to enact the Ordinance is apparent. "Despite the increased instances of blood-borne diseases like Hepatitis B and C in Oaklandia, the State took no steps to increase regulation regarding sterilization and sanitation standards for tattooists. Instead, the State expressly determined that local governments are better suited to regulate the industry." *Malone*, ___ F.3d at 42 (Hopewell, J., dissenting). The City did just that, enacting the Ordinance to further to its legitimate interest in preserving the health and safety of its citizens. "Because the process involves puncturing the skin repeatedly, tattooing carries risks of infection and transmission of disease if done with unsterile equipment or in unsanitary conditions." *Coleman v. City of Mesa*, 284 P.3d 863, 867 (Ariz. 2012).

This Court must presume that the Ordinance is valid. Under rational basis review, legislative enactments carry a "strong presumption of validity." *Bah v. City of Atlanta*, 103 F. 3d 964, 967 (8th Cir. 1997) (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993)). "A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns,* 508 U.S. at 315. *See*

also Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) (noting that statutes should be upheld if "it might be thought that the particular legislative measure was a rational way to correct a problem"). It is thus not the province of this Court to determine whether the risk of blood-borne disease transmission was sufficient to enact the Ordinance, or whether this Ordinance was the best way for the City to curb the spread of such diseases. Rather, it is enough that blood-borne diseases threatened City residents, and that City leaders believed that the new regulations were a rational way to stop the potential problem. *Id*. at 488.

For a statute to withstand rational basis review, this Court must be able to infer that a legislature could have had a rational reason for enacting the statute. "[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true" by the legislature. *Vance v. Bradley*, 440 U.S. 93, 111 (1979). Malone cannot argue that the facts supporting the legislature's decision could not reasonably be conceived to be true. It is undisputed that cities in Oaklandia faced a drastic increase in the transmission of blood-borne illnesses and that needles, such as those used in the tattooing process, may transmit these illnesses. *Malone*, __F. Supp. 3d at 5. This Court must conclude that the facts on which the Ordinance is based could reasonably be conceived to be true, and that the City had a rational reason for enacting the Ordinance.

The City's interest is overwhelmingly clear: it wished to protect the health of its citizens. *See Yurkew*, 495 F. Supp. at 1256 (noting that the risk of harm to public health caused by tattooing is "a real one"). The City was concerned about the hygienic use of needles, which transmit blood-borne illnesses. Lower courts have cited "obtaining a tattoo or body piercing" as a major risk factor for Hepatitis C. *Outlaw v. Ridley-Turner,* 54 F. App'x 229, 232 n. 1 (7th Cir. 2002). The risk of the transmission of Hepatitis is high enough that the Food and Drug

Administration warns that blood donation sites will not accept blood from donors who have had a tattoo applied in the last twelve months if it was applied in a state that does not regulate tattooing facilities, or if the tattooing was not performed under sterile conditions. *Am I Eligible to Donate Blood?*, U.S. Food & Drug Admin. (Jan. 8, 2013), http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm048368.htm#AmIEligibletoDonateBlood.

Further, City leaders felt that restricting this potentially hazardous conduct to licensed medical professionals was the most effective means of preventing the spread of blood-borne illnesses. This Court can easily conclude that "the particular legislative measure was a rational way to correct a problem." *Lee Optical*, 348 U.S. at 488. Accordingly, the City's regulations are rationally related to furthering a legitimate interest.

Malone cannot argue that the Ordinance imposes regulations that are overly restrictive and unduly burdensome. While obtaining a medical license, or hiring an employee with a medical license, may cost a tattooist additional time or resources, rational basis review does not require the City adopt the least restrictive means of furthering its interest. *Cash Inn of Dade, Inc. v. Metro. Dade Cnty.*, 938 F. 2d 1239, 1243 (11th Cir. 1991) (citing *Hughes v. Alexandra Scrap Corp.*, 426 U.S. 794, 813-14 (1976)). While the additional the Ordinance's additional regulations may be more restrictive for tattooists, City leaders believed these requirements would accomplish their desired end. As this Court has noted, "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).

Malone cannot assert that Magnolia Hills enacted the Ordinance to implement a de facto ban on tattooing within the city. This Court does not require a legislature to "articulate its reasons for enacting a statute," and it is thus "irrelevant" whether a *conceived* reason for enacting a statute is the *actual* reason that motivated the legislature. *Beach Commc'ns,* 508 U.S. at 315.

Malone may cite Mayor Merryweather's comments regarding "dangerous and antisocial activities" during discussion about the Ordinance as evidence that the City had motives other than promoting health and safety. *Malone*, __F. Supp. at 5. The comments of one City official, however, are not to be interpreted as the motivations of the City itself in enacting the Ordinance. "What motivates one legislator to make a speech about a statute is not necessarily what motivates . . . others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *O'Brien*, 391 U.S. at 384.

Magnolia Hills has a legitimate interest in preserving the health of its citizens, and the Ordinance is a rational means of furthering that interest. The City came to the conclusion, based on undisputed facts, that restricting the act of tattooing to those holding a medical license was the best way of preventing the spread of blood-borne illnesses. Because of the specialized training medical professionals receive, and the risks posed by improper sterilization, this Court must conclude that the City legislative measure was a rational way to correct a problem.

B. Even if the tattooing process is subject to First Amendment protection, the City's Ordinance remains valid under heightened scrutiny.

If tattooing is in fact subject to First Amendment protection, the City's Ordinance remains valid. This Court has made clear that it will not invalidate a statute simply because it regulates a First Amendment-protected activity. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62 (1976). Further, even if there is a sufficiently important government interest, a government may incidentally limit certain protected activities. *See O'Brien*, 391 U.S. at 376-77.

If tattooing is subject to First Amendment protection, either as pure speech or expressive conduct, the Ordinance still withstands the heightened scrutiny to which protected speech and conduct are subject. If tattooing is expressive conduct, this Court must uphold the Ordinance because it withstands the four-factor test this Court adopted in *O'Brien*. 391 U.S. at 377. If

tattooing is pure speech subject to full First Amendment protection, the regulation remains constitutional because it is a reasonable "time, place, or manner" restriction. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Ordinance meets both of these tests.

O'Brien analysis for expressive conduct

While certain conduct may be sufficiently communicative to warrant First Amendment protection, important government interests may justify limiting that conduct. The government typically has a "freer hand" to restrict conduct expressive conduct than it does to restrict pure speech. *Johnson*, 491 U.S. at 406. This Court has noted, **"**when speech and nonspeech elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376-77. The *O'Brien* Court articulated a four-part test for considering a government's authority to regulate expressive conduct: (1) the regulation must fall within the constitutional power of the Government; (2) the regulation must further an important or substantial government interest; (3) the Government interest must be unrelated to the suppression of free expression; and (4) incidental restrictions on First Amendment freedoms must be no greater than necessary to further the Government interest. *Id.* at 377.

Applying this test, the Ordinance is justified despite incidental limitations on otherwise protected conduct. First, the City has the constitutional power to regulate health and safety through its police power. "Public safety" and "public health" are "some of the more conspicuous examples of the traditional application of police power to municipal affairs." *Berman v. Parker*, 348 U.S. 26, 32 (1954). Second, the government interest is clearly substantial: in the wake of an epidemic, Magnolia Hills passed the Ordinance in order to reduce occurrences of Hepatitis B and Hepatitis C. *Malone*, ___ F. Supp. at 5.

Third, the City had no interest in the suppression of expression when it passed the Ordinance. The Ordinance is not directed at any communicative nature of the conduct, but at the health risks that conduct imposes. "The content-neutrality requirement is met if the involved ordinance is aimed to control secondary effects resulting from the protected expression, rather than the expression itself." *Colacurcio v. City of Kent*, 163 F.3d 545, 551 (9th Cir. 1998) (internal quotations omitted). The Ordinance is aimed to control the secondary effects of the tattooing process, not the tattoos themselves, and is thus content-neutral.

Finally, any incidental restrictions on First Amendment freedoms are no greater than necessary to further the City's interest in preserving public health. In addressing this fourth factor of the *O'Brien* test, courts look to whether the restriction in question leaves "ample capacity" for the person engaging in the conduct to express his message. *White River Amusement Pub, Inc. v. Town of Hartford*, 412 F. Supp. 2d 416, 422 (D. Vt. 2005) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 301 (2000)). In *White River*, the court concluded that a town's ban on public nudity passed the fourth *O'Brien* factor, because a ban on nudity left ample capacity for dancer to covey an "erotic message," even if the dance can no longer dance in the nude. *White River*, 412 F. Supp. 2d at 422 (quoting *Pap's A.M.*, 529 U.S. at 301) (finding, however, that the ban failed the second *O'Brien* factor). Similarly, the Magnolia Hills Ordinance leaves ample capacity for Malone to engage in his expressive conduct. The Ordinance does not ban tattooing. It simply requires tattooists to either obtain a medical license, or to have a medical professional on staff. *Malone*, ___ F. Supp. 3d at 6.

The City has the constitutional power to regulate business practices, and the regulation furthers the City's substantial interest in preserving the health and safety of its citizens. Further, this interest is completely unrelated to any suppression of free expression, and any incidental

restriction on Malone's First Amendment freedoms is no greater than is essential for the furtherance of the City's interest in preserving health and safety. The City's regulation of tattooing thus does not violate Malone's First Amendment right to engage in expressive conduct.

Time, place, manner analysis for pure speech

If tattooing is pure speech, as the Circuit Court held, this Court must still uphold the Ordinance because it is a reasonable time, place, and manner restriction. Under this analysis, cities may restrict speech that is otherwise protected as pure speech if the regulation (1) is content-neutral; (2) is narrowly tailored to further a significant government interest; and (3) leaves open alternative channels of communication. *Clark,* 468 U.S. at 293. This Court addresses the time, place, and manner analysis in the same way it addresses the four-factor *O'Brien* test. *Id.* at 298. ("[T]he four-factor standard of *United States v. O'Brien*, for validating a regulation of expressive conduct . . . is little, if any, different from the standard applied to time, place, or manner restrictions.") The Ordinance withstands the time, place, and manner analysis for the many of the same reasons it withstands the *O'Brien* analysis, as outlined above.

The Magnolia Hills Ordinance is content-neutral. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[W]e have upheld reasonable time, place, or manner restrictions, but only if they are justified without reference to the content of the regulated speech.")). The Ordinance is directed without reference to the content of the tattoos, but on the manner in which they are applied. The City enacted the Ordinance because of the outbreak of blood-borne illnesses in Oaklandia and because these diseases are transmitted through needles that penetrate through layers of skin.

The City has a significant interest in preserving public health, and the Ordinance is narrowly tailored to further that interest. "Public health is a compelling government interest..."

Buchwald v. Univ. of New Mexico Sch. of Med., 159 F. 3d 487, 498 (10th Cir. 1998). Further, the Ordinance is narrowly tailored to furthering this interest. It applies only to tattooists who have not received the minimum level of training that the City deemed necessary. While it may be a rather restrictive requirement, this Court has "emphasized on more than one occasion [that] when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of the statutory goal." *Hill v. Colorado*, 530 U.S. 703, 726 (2000).

Finally, the Ordinance leaves open alternative channels of communication for Malone and other tattooists. When a regulation of speech continues to permit that speech or message in some form, the regulation is valid. *See Ward,* 491 U.S. at 791 (upholding New York City's guidelines regarding sound amplification systems used to convey protected speech at a public band shell because the guidelines did not prevent the message from being conveyed). If, conversely, a regulation completely prohibits a particular medium for expressing ideas, leaving no adequate substitute, the regulation violates free speech rights. In *City of Ladue v. Gilleo*, a city effectively banned all residential signs, for the purpose of "minimizing . . . visual clutter." 512 U.S. 43, 55 (1994). This Court noted that the display of residential signs "carries a message quite distinct from placing the sign someplace else, or conveying the same text or picture by other means," such as through handbills, telephone calls, or bumper stickers. *Id*. at 56. This Court further noted that residential signs serve a very specific purpose: to identify the speaker, to address neighbors, and to do so cheaply and conveniently. *Id*. at 57. The city's ban on residential signs was not a valid time, place, or manner restriction because it foreclosed a means of communication that could not be achieved through comparable alternative channels. *Id.* at 56.

The Magnolia Hills Ordinance does not ban an entire medium of expression, as did Ladue's ban on residential signs. Magnolia Hills still permits tattooists to operate within the City. While the City has implemented a more stringent restriction than what Malone would prefer, he is not precluded from tattooing in Magnolia Hills. Instead, the City has simply prescribed further requirements for tattooists because of legitimate health concerns. *See LaRue*, 409 U.S. at 118 ("[T]he critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in certain establishments.")

In *Hill v. Colorado*, this Court addressed an ordinance that addressed health concerns and First Amendment interests. The state of Colorado enacted a statute that prohibited "knowingly approach[ing]" others standing in a person's eight foot-radius, within 100 feet of the entrance to any health care facility in order to pass leaflets, display a sign, or engage in protest, education, or counseling with the other person. 530 U.S. at 707. The regulation made it more difficult to engage in these activities of protest, but it did not wholly ban them. *Id.* at 723. The statute was found to be content-neutral because it applied uniformly to protesters, without regard to their message; it was narrowly tailored because it only regulated "display of signs, leafletting, and oral speech," and the eight-foot zone was not a significant limitation upon the speakers' efforts. *Id.* at 730. The Court cited the emotional welfare of patients as being a significant government interest. While certain demonstrators may have needed to adjust their protesting methods, this was not too stringent restriction upon speech. *Id.* at 731.

Similarly, the Magnolia Hills Ordinance may impose some new challenges upon Malone and other tattooists wishing to establish parlors there, if they are required to employ a medical professional. However, the statute has been applied uniformly and has been limited to the regulation of those who wish to puncture skin with syringes and otherwise penetrate the body

with surgical instruments. The welfare interest is significant and more tangible than that at stake in *Hill*: people may have different emotional reactions to certain methods of expression; the City's focus here was on the physical risks of certain procedures. Tattooists may need to adjust their methods to satisfy the more rigorous sanitary restrictions, but the Ordinance does not prevent them from engaging in their desired conduct.

Malone may argue that the City's regulations are too restrictive, and that an ordinance regulating sanitation procedures would be equally effective to further the City's interest in preventing the spread of blood-borne illnesses. This Court has held, however, that a reasonable time, place, and manner restriction need not be the least restrictive means for furthering a government interest. *Ward*, 491 U.S. at 498. Further, while the City does not doubt that Malone has his own procedures for sterilizing his equipment, the fact that tattoo artists are concerned with sanitary conditions and that tattooing has seen an increase in popularity and acceptance in recent years should not cloud the issue. Magnolia Hills felt that regulating city-wide who can apply tattoos would further its significant interest in preserving public health and safety more effectively than mere regulations on sanitization procedures.

This City's regulation is a reasonable one; the Ordinance regulates the health and safety of its citizens. The City is not attempting to create a tattoo-free population, nor is it against any message that one may wish to convey through indelibly inked skin. The goals of the City Council were unrelated to the content of any potentially protected speech. As in *R.A.V.*, the City Council wants to control the secondary effects of the alleged expression. 505 U.S. at 389. The Ordinance prevents Malone only from tattooing without a medical professional on staff, not from tattooing all together. The City's regulation of the tattooing process is a reasonable time, place, and manner restriction and thus should be upheld.

CONCLUSION

This Court must reverse the decision of the Thirteenth Circuit. The First Amendment does not protect the act of tattooing because tattooing is conduct, and not pure speech. Further, this conduct is not protected as expressive conduct because it is not sufficiently imbued with the elements of expression to warrant First Amendment Protection.

The City's Ordinance regulating the tattooing process does not violate the Free Speech Clause of the First Amendment. The First Amendment does not protect tattooing, and the Ordinance is rationally related to the City's legitimate interest in preserving public health and safety. Even if the First Amendment does protect tattooing, the Ordinance remains valid because the regulations it imposes are reasonable time, place, manner restrictions, and withstand the four-factor *O'Brien* test for the regulation of expressive conduct.