



**PACIFIC LEGAL  
FOUNDATION**

May 31, 2019

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Via email: CHFSregs@ky.gov

Re: Proposed Regulatory Changes To 902 KAR 45:065

Pacific Legal Foundation submits this comment in response to the Kentucky Cabinet for Health and Family Services' proposed regulation to 902 KAR 45:065 (tattoo regulation). PLF is one of the nation's preeminent public interest law firms litigating in defense of the freedom of expression. PLF writes to express concerns regarding the First Amendment implications of the proposed changes.

Tattooing and tattoo artistry are protected expression under the First Amendment. Tattoos are a deeply personal and enduring form of speech. Tattooing over scars can be a particularly poignant act. The tattoo regulation needlessly interferes with this form of expression, and the proposed regulation cannot survive any of the types of constitutional scrutiny applicable to protected expression. A far less restrictive alternative is already contained in the proposed rule, which allows tattooing over other skin conditions with "written clearance by a medical physician licensed by the Kentucky Board of Medical Licensure."<sup>1</sup> Rather than banning tattooing over scars outright, the regulation should be amended to include scars in the list of conditions that require medical clearance.

**1) Tattoos and Tattoo Artistry Are Protected by the First Amendment**

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." This guarantee is incorporated against state and local governments through the Fourteenth Amendment. Words are the paradigmatic example of pure speech, but "the Constitution looks beyond written or spoken words as mediums of

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<sup>1</sup> 902 KAR 45:065 § 7(2), <https://apps.legislature.ky.gov/law/kar/902/045/065.pdf>.

expression.”<sup>2</sup> Accordingly, the Supreme Court has protected a variety of types of expression including t-shirts, parades, paintings, and musical performances.<sup>3</sup>

While the Supreme Court itself has never addressed tattooing, courts across the United States have concluded that tattoos and tattoo artistry are expression protected by the First Amendment. Tattoos are almost universally recognized as “pure First Amendment speech.”<sup>4</sup> Tattoos are an ancient form of expression which have historically held artistic, religious, spiritual, and political connotations.<sup>5</sup> Tattoos are “one of the oldest forms of human expression.”<sup>6</sup> While tattoos are painted onto the human body rather than parchment or canvas, they are nevertheless a highly expressive medium that receives the full protection of the First Amendment. And the permanency of a tattoo can convey a message that no other form or medium can.<sup>7</sup>

The practice of tattooing is also a form of pure expression because it is an artistic process that creates protected expression. As the Ninth Circuit emphasized when it recognized that tattooing was a Constitutionally protected form of expression, “neither the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded.”<sup>8</sup> Simply put, without tattooing there could be no tattoo. So “it would be

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<sup>2</sup> *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

<sup>3</sup> *Hurley*, 515 U.S. at 569 (recognizing “[t]he protected expression that inheres in a parade”); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“Music . . . is protected under the First Amendment”); *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) (“[M]otion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.”).

<sup>4</sup> *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) (“There appears to be little dispute that the tattoo itself is pure First Amendment ‘speech.’”). *See also Com. v. Meuse*, No. 9877CR2644, 1999 WL 1203793 at \*3 (Mass. Super. Nov. 29, 1999) (“Tattooing cannot be said to be other than one of the many kinds of expression so steadfastly protected by our Federal and State Constitutions.”); *Coleman v. City of Mesa*, 284 P.3d 863, 869 (Ariz. 2012) (“a tattoo itself is pure speech”).

<sup>5</sup> *Anderson*, 621 F.3d at 1060 (discussing the history of tattooing).

<sup>6</sup> *Id.* at 1066.

<sup>7</sup> *Id.* at 1066–67.

<sup>8</sup> *Id.* at 1061.

irrational to conclude that the act of tattooing is any less protected than the tattoos themselves.”<sup>9</sup> The Supreme Court adopted the same reasoning in a similar context when it found that a tax on ink and paper “burdens rights protected by the First Amendment.”<sup>10</sup>

Even if tattoo artistry is considered separate from the tattoos that it produces, it makes no legal difference. Tattooing is still expressive conduct protected by the First Amendment. Tattooing requires a great degree of “skill, artistry, and care.”<sup>11</sup> Just like other artists, tattoo artists can participate in a Tattoo Certificate Program or serve in an apprenticeship to refine their craft.<sup>12</sup> Tattoo artists develop a portfolio with unique designs, and proficient tattoo artists can be widely renowned for their specialized art work.<sup>13</sup> Exhibits about tattooing and tattoo artists have been featured by museums such as the Smithsonian Center for Folklife and Cultural Heritage,<sup>14</sup> and the Natural History Museum of Los Angeles.<sup>15</sup> Tattooing is an expressive medium for the artist as well as a form of expression for the client.<sup>16</sup>

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<sup>9</sup> *Jucha v. City of N. Chicago*, 63 F. Supp. 3d 820, 828 (N.D. Ill. 2014).

<sup>10</sup> *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 582 (1983); see also *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (“The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”); *Coleman*, 284 P.3d at 870 (“[T]he art of writing is no less protected than the book it produces; nor is painting less an act of free speech than the painting that results.”)

<sup>11</sup> *Anderson*, 621 F.3d at 1061.

<sup>12</sup> See e.g., Master Tattoo Institute, <https://www.mastertattooinstitute.com/>.

<sup>13</sup> See Kevin “Jack” Allaire, How Can you Distinguish a Good Tattoo Artist from a Bad One?, Slate (Feb. 22, 2015), <https://slate.com/human-interest/2015/02/tattoos-how-to-tell-a-good-tattoo-artist-from-a-bad-one.html>.

<sup>14</sup> The Art of Tattooing (2012), <https://folklife.si.edu/online-exhibitions/the-art-of-tattooing/smithsonian>.

<sup>15</sup> Natural History Museum’s “Tattoo” Exhibit Details L.A.’s Traditional and Chicano Tattoo Histories (Nov. 16, 2017), <https://www.laweekly.com/arts/the-natural-history-museums-exhibit-tattoo-details-las-traditional-and-chicano-tattoo-histories-8865019>.

<sup>16</sup> Even tattoo artists who largely sell derivative designs and do not create custom works of self-expression are protected by the First Amendment. The Supreme Court has explained that “First Amendment protection [does not] require a speaker to generate, as an original matter, each item featured in the communication.” *Hurley*, 515 U.S. at 570. Moreover, the proposed tattooing regulation makes no distinctions between such derivative tattoo art and original tattoo art. Indeed,

Finally, the fact that a tattoo artist is commissioned or sells his service to paint a tattoo is irrelevant. Artists are entitled to profit from their talents without losing First Amendment protections. Certainly, the First Amendment would protect “Michelangelo’s painting of the Sistine Chapel” even though it was painted on commission.<sup>17</sup> And “[i]t is well settled that a speaker’s rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.”<sup>18</sup>

## 2) The Proposed Regulation Targets a Particularly Expressive Form of Speech

The proposed tattoo regulation completely prohibits a form of tattooing that has a unique and irreplaceable expressive power: the covering up of scars. Scars can represent a constant reminder of past trauma, shame, or personal inadequacy. For instance, scars are frequently associated with self-harm, suicide attempts, or abusive relationships. Tattooing over a scar can help individuals heal from past trauma by turning something shameful and painful into a source of beauty and strength. In fact, some tattoo artists specialize in covering up scars because of the positive impact it can have on trauma survivors.<sup>19</sup> As one such tattoo artist described, this is a process that allows people to “reclaim[] their body, reclaim[] a part of themselves that [was] lost.”<sup>20</sup> These tattoos are often a “celebration that they’ve survived” and a “memento for them of how strong they have been through some sort of adversity.” These kinds of emotionally restorative tattoos are therefore “a uniquely valuable or important mode of communication.”<sup>21</sup>

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it would be impossible to distinguish between these different types of tattoos without engaging in blatant content or viewpoint discrimination, an evil that the First Amendment prohibits. *See Coleman*, 284 P.3d at 360 (rejecting a case-by-case approach because it “would be difficult to administer and insufficiently protective of free speech rights”).

<sup>17</sup> *Anderson*, 621 F.3d at 1062.

<sup>18</sup> *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988); *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) (“Speech is not unprotected merely because it is uttered by professionals.”).

<sup>19</sup> Mirianna La Grasta, How this Tattoo Artist is helping people by covering scars, *Business Insider* (May 19, 2019), <https://www.businessinsider.com/tattoo-artist-is-helping-people-by-covering-scars-england-art-2019-5>.

<sup>20</sup> *Id.*

<sup>21</sup> *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984).

### 3) The Proposed Regulation Cannot Survive Constitutional Scrutiny

The proposed tattoo regulation is unlawful in two respects: it is content-based and it is a total ban. First of all, the ban on scar cover ups is a content-based restriction on speech and is therefore “presumptively unconstitutional.”<sup>22</sup> Simply put, as discussed above, no other tattoo or form of speech will convey the same message of strength, resilience, and hope as a tattoo over a scar can. Under recent Supreme Court and Sixth Circuit precedent, any “regulatory scheme [that] require[s] [the government] to ‘examine’ the content of [speech] to determine which ordinance to apply” is subject to the most intense scrutiny known in Constitutional Law.<sup>23</sup> Such laws will almost always be struck down as unconstitutional.<sup>24</sup> The proposed regulation fits into this constitutionally odious category because it would allow a tattoo to be inked over other irregular skin features such as rashes, pimples, open lesions, moles, or sunburns—but not scars. An enforcing authority would therefore need to look at the specific content of a tattoo to determine whether it was permitted or forbidden.

Second, because the regulation completely shuts the door on an irreplaceable form of expression, a trauma survivor’s “ability to communicate effectively is threatened.”<sup>25</sup> Accordingly, the regulation fails to “leave open ample alternative channels for communication” as the First Amendment requires.<sup>26</sup> While an individual may get a tattoo elsewhere on the body, any other tattoo would not convey the same message. Nor would tattooing over another part of the body without a scar have the same expressive meaning to the tattoo artist who offers these tattoos as an expression of solidarity with survivors of trauma or disease.

When a regulation burdens or bans a form of expression, it can only be justified if it serves a vital or compelling interest and if that interest cannot be achieved in a manner that does not burden individual expression.<sup>27</sup> No one disputes that the State of Kentucky

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<sup>22</sup> *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015).

<sup>23</sup> *Wagner v. City of Garfield Heights*, 675 F. App'x 599, 604 (6th Cir. 2017) (citing *Reed*, 135 S. Ct. at 2228, and *Brown v. Town of Cary*, 706 F.3d 294, 302 (4th Cir. 2013)).

<sup>24</sup> *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016) (“[I]t is the rare case in which a speech restriction withstands strict scrutiny.” (internal quotation marks omitted)).

<sup>25</sup> *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990).

<sup>26</sup> *Ward*, 491 U.S. at 791.

<sup>27</sup> *Id.*

has an important or even a compelling interest in preserving the health and safety of those receiving tattoos. However, the State can achieve this goal in a far less restrictive fashion than an outright ban on tattooing over scars. Indeed, the proposed rule already provides a way for clients to get tattoos despite a variety of other skin conditions that raise similar health and safety concerns such as rashes, moles, or lesions. In such circumstances, a patient must obtain written clearance by a licensed medical professional.<sup>28</sup> This sensible outlet for speech allows doctors, patients, and tattoo artists to work together to ensure that an individual is able to get a tattoo without suffering negative health consequences. In contrast to an outright ban, the medical clearance requirement does not target a type of expression, and only limits as much speech as necessary to achieve the state's health and safety interest.

CHFS can continue to protect health and safety while avoiding a costly and wholly unnecessary First Amendment battle by making a minor change to its proposed regulation. To that end, Pacific Legal Foundation urges the Cabinet to adopt the following change:

### **Proposed Change**

Section 10. Standard Operating Procedures for Tattooing. (1) Tattooing shall not be applied on skin which has a rash, pimples, evidence of infection, open lesions, mole, sunburn, scarring, or manifests any evidence of unhealthy conditions without written clearance by a medical physician licensed by the Kentucky Board of Medical Licensure. ~~(2) Tattooing of scarred skin is prohibited.~~

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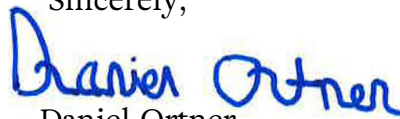
<sup>28</sup> 902 KAR 45:065 § 7(2).

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## Conclusion

The proposed tattoo regulation violates the First Amendment rights of tattoo artists and those seeking to tattoo over scars as a form of personal expression. The proposed tweak will preserve the health and safety of Kentucky residents while protecting the right to freedom of expression. Thank you for taking the time to consider our views as you consider the proposed tattoo regulation. If you have any questions regarding this analysis, please feel free to contact me at (916) 503-9030 or [DOrtner@pacificlegal.org](mailto:DOrtner@pacificlegal.org).

Sincerely,



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