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Criminal Court of New York, City of New York: People v. Larsen

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**CRIMINAL COURT OF NEW YORK
CITY OF NEW YORK**

People v. Larsen¹
(decided July 30, 2010)

Defendants Thomas Larsen and Edward Wardle were charged with “displaying and offering for sale condoms on the street without a general vendor license”² in violation of section 20-453 of New York’s Administrative Code.³ The defendants filed a motion to dismiss,⁴ claiming that their First Amendment right to unencumbered political speech⁵ was violated by this New York statute because the condom wrappers included printed political messages⁶ that constituted a “written matter” exception to the statute.⁷ The Criminal Court of the City of New York held that the statute was a valid restriction on speech and thus respected the First Amendment.⁸

At two separate locations in Manhattan, defendants Larsen and Wardle were selling condoms labeled as either “Obama Condoms” or “Palin Condoms.”⁹ Neither defendant possessed a license from the NYC Department of Consumer Affairs to sell such

¹ 906 N.Y.S.2d 709 (Crim. Ct. 2010).

² *Id.* at 710.

³ N.Y. CITY COMP. CODES R. & REGS. tit. 20, § 20-453 (2009) (stating that it is “unlawful for any individual to act as a general vendor without having first obtained a license . . . except that it shall be lawful for a general vendor who hawks, peddles, sells or offers to sell, at retail, only newspapers, periodicals, books, pamphlets or other similar written matter”).

⁴ *Larsen*, 906 N.Y.S.2d at 710 n.1 (noting that defendants filed separate motions, but they were consolidated because they addressed the same issues).

⁵ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”). *See also* N.Y. CONST. art. I, § 8 (“Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”).

⁶ *Larsen*, 906 N.Y.S.2d at 710.

⁷ *Id.*

⁸ *Id.* at 718.

⁹ *Id.* at 710.

merchandise.¹⁰ The “Obama Condoms” had an image of the now forty-fourth President of the United States on one side of the wrapper with the heading “HOPE IS NOT A FORM OF PROTECTION.”¹¹ On the other side of the wrapper, a message explained that this product served as “a call to action” for Obama “that hope is not enough and responsibility is needed.”¹² The message was also meant to promote responsible sexual behavior.¹³ A second Obama Condom read “THE ULTIMATE STIMULUS PACKAGE,” which sought “to get people laid, not laid off.”¹⁴ This particular message was intended to “call attention to the severity of [the United States] economic state.”¹⁵ The Palin Condoms included an image of the former Vice-Presidential candidate at the forefront of an Alaskan-like setting and a heading that read “WHEN ABORTION IS NOT AN OPTION,” with a footnote that read “As Thin As Her Resume.”¹⁶ The other side of the wrapper stated that this message sought to “take[] aim at both [Sarah Palin] and the Republican Party’s stance on a woman’s right to choose” because without the option of abortion, “condoms become of the utmost importance.”¹⁷ The condoms were the product of Practice Safe Policy (“PSP”), and the court took judicial notice that PSP’s company goal was to divert the consumer’s attention from “minor concerns like the war, the economy or healthcare and instead focus on the truly important issue of the day: Practicing Safe Policy in the bedroom.”¹⁸ Due to the political nature of these messages, the defendants argued that such speech was protected by the First Amendment and could not subject them to criminal liability under section 20-453 of the New York City Administrative Code.¹⁹

The Criminal Court of the City of New York denied the defendants’ motion to dismiss, holding that the condoms represented a form of commercial speech that was not subject to the same First Amendment protections as political speech, and therefore did not

¹⁰ *Id.*

¹¹ *Larsen*, 906 N.Y.S.2d at 710.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Larsen*, 906 N.Y.S.2d at 710.

¹⁷ *Id.*

¹⁸ *Id.* at 710-11.

¹⁹ *Id.* at 711.

exclude the defendants' acts from criminal liability.²⁰ The court explored the relevant Supreme Court jurisprudence on First Amendment protections and the federal court applications of such precedent to address: (1) whether the condom wrappers constituted an "other written matter" First Amendment exception to the statute and (2) whether the condoms warranted First Amendment protections as a form of commercial speech.²¹ First, the court held that the condom wrappers were not contemplated in the "other written matter" exception because the defendants were engaging in commercial speech that was " 'primarily concerned with providing information about the characteristics and costs of goods and services,' " ²² and such speech was not "fully protected speech."²³ The court synthesized relevant United States Supreme Court and federal court precedent to promulgate categories that distinguished between forms of expression that would or would not be protected by the First Amendment.²⁴ Specifically, it set out to determine whether the condom wrappers were forms of expressing a meaningful ideology or belief system that was protected by the First Amendment, or whether the condom's message served such a purely commercial purpose where the First Amendment protections would not apply.²⁵ However, the absence of congruent Supreme Court commercial speech principles has led to inconsistent jurisprudence in the field.²⁶

The court acknowledged that items like literature, periodicals, and pieces of art have all been recognized as vehicles for expressive speech that should be protected by the First Amendment.²⁷ However, it affirmatively held that not all printed material was subject to the protections of the First Amendment, otherwise that exception would swallow up the rule.²⁸ The sale of goods with political messages may

²⁰ See *id.* at 717-18.

²¹ See *Larsen*, 906 N.Y.S.2d at 717-18.

²² *Id.* at 716-18 (quoting *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)).

²³ *Id.* at 717.

²⁴ *Id.* at 711-13.

²⁵ *Id.* at 717.

²⁶ See Note, *Making Sense of Hybrid Speech: A New Model For Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2857 (2005) [hereinafter Note, *Making Sense of Hybrid Speech*].

²⁷ *Larsen*, 906 N.Y.S.2d at 715 (quoting *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996)).

²⁸ *Id.* at 718.

warrant First Amendment protections when the merchandise is “intertwined with ‘informative and perhaps persuasive speech’ seeking support for particular causes.”²⁹ However, if the speech’s sole purpose is to “attract attention to a commercial enterprise,” then it may not be constitutionally protected speech.³⁰ The court held that simply because the product’s marketing campaign tied the condoms to current political events, the primary purpose was to make a profit rather than express an idea or belief.³¹ The condom wrappers had a “dominant non-expressive purpose” that rendered them outside the scope of First Amendment protection.³²

Subsequently, the court explored whether the commercial speech that the condom wrappers expressed was in the narrow class of such speech that warranted constitutional protection.³³ The Court of Appeals for the Second Circuit previously held that section 20-453 was a “content-neutral regulation,” meaning that it did not favor one form of expression over another in its regulation.³⁴ In order for such a regulation to remain constitutional, it must be “reasonable, narrowly tailored to serve[] a significant government interest, and leave open ample alternative channels for communication.”³⁵ The statute was held to be reasonable and narrowly tailored because it did not target particular speech, but subjected all forms of speech to the regulation.³⁶ Also, there were significant government interests in the statute such as: “(1) keeping the public streets free of congestion for the convenience and safety of its citizens; (2) maintaining the ‘tax base and economic viability of the City;’ and (3) preventing the sale of ‘stolen, defective or counterfeit merchandise.’”³⁷ Lastly, the statute did not prohibit alternative means of communicating the speech because the defendants were able to distribute the condoms for free, or sell the products to retailers who are able to sell the

²⁹ *Id.* at 716 (quoting *Vill. of Schaumburg*, 444 U.S. at 633).

³⁰ *Id.* at 716-17.

³¹ *Id.* at 717.

³² *Larsen*, 906 N.Y.S.2d at 717.

³³ *Id.*

³⁴ *Id.* at 718 (quoting *Mastrovincenzo v. City of New York*, 435 F.3d 78, 99 (2d Cir. 2006)).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Larsen*, 906 N.Y.S.2d at 718 (quoting *Mastrovincenzo*, 435 F.3d at 99).

condoms to the general public in compliance with the statute.³⁸ Section 20-453 only limits where the vendor can sell without a license and where he can sell to make a profit.³⁹ Because the condom wrappers did not constitute “other written matter,” but rather constituted commercial speech that was not protected by the First Amendment, the court denied the defendants’ motion to dismiss.⁴⁰

The First Amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech.”⁴¹ This amendment was a conscious effort by the Framers “to protect the free discussion of governmental affairs.”⁴² The intention behind the amendment was to create “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”⁴³ because speech regarding matters of public concern “is the essence of self-government.”⁴⁴ Because of the importance of such speech, it “occupies ‘the highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.”⁴⁵ This protection is not solely for “written or spoken words, but also [shields] ‘pictures, films, paintings, drawings, and engravings.’”⁴⁶ It can have the profound effect of protecting both the noblest causes⁴⁷ and the most repugnant.⁴⁸

However, content-based restrictions on certain forms of speech, such as in the areas of securities regulation, evidence law, and contract law have remained scantily touched by this

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ U.S. CONST. amend. I.

⁴² *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

⁴³ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

⁴⁴ *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

⁴⁵ *Connick v. Meyers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

⁴⁶ *Larsen*, 906 N.Y.S.2d at 711 (quoting *Kaplan v. California*, 413 U.S. 115, 119 (1973)).

⁴⁷ *NAACP*, 458 U.S. at 926-28 (holding that nonviolent protests against racially discriminatory practices warrant First Amendment protection).

⁴⁸ *Snyder v. Phelps*, No. 09-751, 2011 WL 709517, at *10-11 (U.S. Mar. 2, 2011) (holding that a protest of a marine’s funeral using graphically homophobic signage is protected speech under the First Amendment because it was considered commentary on social concerns); *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (holding that a Ku Klux Klan leader’s advocacy against rights for minorities is a protected form of political expression under the First Amendment).

amendment.⁴⁹ To justify restricting speech, a government actor or entity “must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”⁵⁰ In *Chaplinsky v. New Hampshire*,⁵¹ the Court enumerated “well-defined and narrowly limited classes of speech” that were not intended to warrant constitutional protections because they were “no essential part of any exposition of ideas.”⁵² Examples of unprotected forms of speech were “the lewd and obscene, the profane, the libelous, and the insulting.”⁵³ One month later, the Court created the category of commercial speech, which was intended to be another form of speech not contemplated to be protected by the First Amendment.⁵⁴ In *Valentine v. Chrestensen*,⁵⁵ Justice Owen Roberts opined that “the Constitution imposes no such restraint on government as respects purely commercial advertising.”⁵⁶ This restraint, however, cannot be found anywhere in the Constitution and even members of the majority decision expressed regret over this hasty decision.⁵⁷ This opinion conveyed a brash, but intuitive idea that commercial speech did not fall within the intended First Amendment protections.⁵⁸

More than thirty years later, the Court relented that there must be some forms of constitutionally protected commercial speech.⁵⁹ In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁶⁰ the constitutionality of a Virginia statute that

⁴⁹ Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Saliency*, 117 HARV. L. REV. 1765, 1768 (2004).

⁵⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

⁵¹ 315 U.S. 568 (1942).

⁵² *Id.* at 571-72.

⁵³ *Id.* at 572.

⁵⁴ *Valentine v. Chrestensen*, 316 U.S. 52, 52 (1942).

⁵⁵ *Id.*

⁵⁶ *Id.* at 54.

⁵⁷ *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring) (describing the *Chrestensen* decision as “casual, almost offhand” and unable to “survive[] reflection”).

⁵⁸ Note, *Dissent, Corporate Cartels, and the Commercial Speech Doctrine*, 120 HARV. L. REV. 1892, 1892 (2007) (noting that “‘few of us would march our sons and daughters off to war to preserve the citizen’s right’ to watch Super Bowl commercials”) (quoting *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 70 (1976)).

⁵⁹ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

⁶⁰ *Id.*

prohibited pharmacists from advertising drug prices was at issue.⁶¹ The Court invalidated the statute because the government could not “completely suppress the dissemination of concededly truthful information about entirely lawful activity.”⁶² Speech that solely pertains to a commercial transaction is not “so removed from any exposition of ideas” that it may escape the protections of the First Amendment.⁶³ The Court was careful to assert that it did “not hold that [commercial speech] can never be regulated in any way,”⁶⁴ making clear that “false or misleading” speech regarding commercial transactions may not be protected,⁶⁵ as well as speech regarding illegal commercial transactions.⁶⁶

Soon after the *Virginia Citizens* decision, a multi-prong analysis to determine whether particular commercial speech should be protected by the First Amendment was created by the Court.⁶⁷ In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,⁶⁸ the constitutionality of a statute that prohibited utility companies from advocating electricity use in advertisements was at issue.⁶⁹ The Court created a four-factor test to determine if the commercial speech should be protected:

For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁷⁰

The Court invalidated the statute because it was overly burdensome on the utility companies and there were reasonable

⁶¹ *Id.* at 749-50.

⁶² *Id.* at 773.

⁶³ *Id.* at 762 (quoting *Chaplinsky*, 315 U.S. at 572).

⁶⁴ *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

⁶⁵ *Id.* at 771-72.

⁶⁶ *Id.* at 772.

⁶⁷ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 557 (1980).

⁶⁸ *Id.*

⁶⁹ *Id.* at 566.

⁷⁰ *Id.*

alternatives to the severity of outright prohibition on advertisement, thus failing the fourth prong.⁷¹ However, the fourth prong “need not be the absolute least restrictive means to achieve desired end[s]; rather, restrictions require only a reasonable fit between government’s ends and the means chosen to accomplish those ends.”⁷² Despite this holding, the tension between “an individual’s right to free speech and the state’s power to regulate” is still prevalent in both federal and state courts⁷³ and some scholars still insist that commercial speech should fall outside the protections of the First Amendment.⁷⁴ Conversely, scholars with a different viewpoint argue that distinguishing commercial speech from other forms has no basis in the Constitution, and therefore should not be done.⁷⁵ Adding to the confusion was the Court’s failure to adhere to the *Central Hudson* holding as the sole manner to determine whether commercial speech warranted Constitutional protection.⁷⁶ Recently, Justices have progressively begun to narrow the difference between commercial and pure speech.⁷⁷

The Second Circuit has dealt head-on with the constitutionality of section 20-453, but has reached inconsistent results.⁷⁸ In *United States v. Bery*,⁷⁹ various groups of artists dealing in paintings, photography, and sculpting sought an injunction against New York City from enforcing the section 20-453 requirement that a

⁷¹ *Id.* at 570-71.

⁷² *Larsen*, 906 N.Y.S.2d at 713 (“What our decisions require is a fit between the legislature’s ends and the means chosen to accomplish those ends – a fit that is not necessarily perfect, but reasonable.” (quoting *Bd. of Tr. v. Fox*, 492 U.S. 469, 480 (1989))).

⁷³ Note, *Making Sense of Hybrid Speech*, *supra* note 26, at 2845.

⁷⁴ *See id.* at 2845-46; Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 488 (1985) (arguing that there is “reason to exclude commercial advertising from the protection of the first amendment”).

⁷⁵ Note, *Making Sense of Hybrid Speech*, *supra* note 26, at 2845-46.

⁷⁶ David F. McGowan, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 383 (1990) (noting that courts are left to “guess at the proper way to categorize speech in any given case” as a result of the United States Supreme Court’s inability to definitively determine commercial speech protections).

⁷⁷ *See, e.g., Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring) (“I do not see a philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech.”).

⁷⁸ *See United States v. Bery*, 97 F.3d 689 (2d Cir. 1996); *United States v. Mastrovincenzo*, 435 F.3d 78 (2d Cir. 2006).

⁷⁹ 97 F.3d 689.

license is required to sell their goods on the street.⁸⁰ The city argued that the regulation did not act as a censorship mechanism, but rather was a quality assurance mechanism that kept the streets free from unscrupulous merchant congestions.⁸¹ Moreover, it was not limiting the artists' ability to express themselves, but simply regulating the channels by which the artists could sell that self-expression.⁸² The court disagreed, granted the injunction, and held that First Amendment rights are not waived simply when speech is sold.⁸³ Great deference was given to the plaintiffs' argument that "the street marketing is in fact part of the message of [the artists'] art" and section 20-453 unconstitutionally impinges on that right of expression.⁸⁴ Lastly, the court provided a framework in which such speech restrictions may be valid: "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 'leaves open ample alternative channels for communication.'" ⁸⁵ Subsequently, New York City "consented to the *Bery* injunction and . . . stipulated that it would no longer enforce § 20-453" against the unlicensed sale of paintings, photographs, and sculptures on the street.⁸⁶

Ten years later, the Second Circuit again dealt with the constitutionality of section 20-453 as vendors of clothing with "graffiti designs" sought First Amendment protection in *United States v. Mastrovincenzo*.⁸⁷ This court broke with the opinion in *Bery* and found that the regulation was "content-neutral" because it "'serves purposes unrelated to the content of [the regulated] expression.'" ⁸⁸ Such purposes are "(1) keeping the public streets free of congestion for the convenience and safety of its citizens, (2) maintaining the 'tax base and economic viability of the City,' and (3) preventing the sale of 'stolen, defective or counterfeit

⁸⁰ *Id.* at 691.

⁸¹ *Id.* at 697.

⁸² *Id.* at 695.

⁸³ *Id.* at 695-99 (citing *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n.5 (1988)).

⁸⁴ *Bery*, 97 F.3d at 696.

⁸⁵ *Id.* at 697 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

⁸⁶ *Mastrovincenzo*, 435 F.3d at 82.

⁸⁷ *Id.* at 81.

⁸⁸ *Id.* at 99 (quoting *Hobbs v. Cnty. of Westchester*, 397 F.3d 133, 150 (2d Cir. 2005)).

merchandise[.]’⁸⁹ This resolved the question of content-neutrality left open by the court in *Bery* as it pertains to section 20-453.⁹⁰ Because the regulation was a reasonable and narrowly tailored statute that served several significant government interests, and provided other opportunities for the vendors to distribute their expressions, the statute was held to be constitutional.⁹¹

New York State courts have displayed a similar disjointedness as their federal counterparts. One year before the Supreme Court’s decision in *Virginia Citizens*, the New York Court of Appeals was faced with a substantially similar fact pattern, but held that a statute that prohibited pharmacists from advertising sale prices of drugs was constitutional.⁹² In *Urowsky v. Board of Regents*,⁹³ this kind of advertising was not afforded First Amendment protections by the court because the regulation only regulated the “manner in which commercial advertising could be distributed.”⁹⁴ In the majority opinion, the court recognized the dissonance left in the wake by the *Chrestensen* decision, but stood firm in the belief that commercial speech had less protections than “pure” speech.⁹⁵

Subsequent to the aforementioned United States Supreme Court decisions that interpreted the commercial speech doctrine, New York State courts attempted to formulate rules therewith. In *People v. Professional Truck Leasing Systems, Inc.*,⁹⁶ a city ordinance that prohibited “operating a vehicle for the purpose of advertising business other than its own” was upheld as constitutional.⁹⁷ In reaching the decision, the court applied the four-factor test set forth in *Central Hudson* to determine “the validity of government restrictions on commercial speech.”⁹⁸ The court relied heavily on the opinion in *People v. Target Advertising Inc.*,⁹⁹ which dealt with the exact statute

⁸⁹ *Id.*

⁹⁰ *Id.* at 99 n.16.

⁹¹ *Mastrovincenzo*, 435 F.3d at 100.

⁹² *Urowsky v. Bd. of Regents of Univ. of New York*, 342 N.E.2d 583, 586 (N.Y. 1975).

⁹³ *Id.* at 583.

⁹⁴ *Id.* at 587.

⁹⁵ *Id.*

⁹⁶ 713 N.Y.S.2d 651 (Crim. Ct. 2000).

⁹⁷ *Id.* at 652, 656.

⁹⁸ *Id.* at 655.

⁹⁹ 708 N.Y.S.2d 597 (Crim. Ct. 2000).

in controversy here.¹⁰⁰

First, the statute met the first prong of the test because it did “not purport to ban only advertising that concerns unlawful activity or is misleading.”¹⁰¹ The second factor was met because the statute was promoting a substantial government interest as it sought to “promote traffic safety and alleviate traffic congestion.”¹⁰² The third factor of directly advancing a governmental interest was satisfied because it “lessens the amount of potential traffic on the City streets.”¹⁰³ Finally, the fourth factor ensuring that the statute was not more extensive than necessary was satisfied because “ ‘the ban here is narrowly tailored to remove a class of vehicles from the street . . . [which] fulfills the City’s purpose of reducing the overall number of vehicles congesting the City’s streets.’ ”¹⁰⁴ Because all of the *Central Hudson* factors were satisfied, the court upheld the constitutionality of the law.¹⁰⁵ *Central Hudson* has played a critical role in the New York courts’ jurisprudence regarding the classification of certain brands of speech as commercial speech.¹⁰⁶

In final consideration, the First Amendment provides “Congress shall make no law . . . abridging the freedom of speech.”¹⁰⁷ The principle underlying that protection was “to protect the free discussion of governmental affairs.”¹⁰⁸ Initially, the Court did not intend for commercial speech to fall within this protection.¹⁰⁹ However, the Court gradually tinkered with this commercial speech doctrine and created principles that allow such speech to be protected,¹¹⁰ but this philosophy has morphed so frequently that

¹⁰⁰ *Id.* at 598.

¹⁰¹ *Prof'l Truck Leasing Sys., Inc.*, 713 N.Y.S.2d at 656.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* (quoting *Target Adver. Inc.*, 708 N.Y.S.2d at 605).

¹⁰⁵ *Id.*

¹⁰⁶ *See* *New York v. Learning Annex, Inc.*, 589 N.Y.S.2d 28, 28-29 (App. Div. 1st Dep’t 1992) (holding that a regulation that prevented magazines distribution via sidewalk bins was unconstitutional because the government interest was not significant); *Galaxy Rental Serv. v. State*, 452 N.Y.S.2d 921, 925 (App. Div. 4th Dep’t 1982) (holding that a statute prohibiting advertising specific apartments for sale was unconstitutionally restrictive as there were less restrictive means available to accomplish the statute’s goal).

¹⁰⁷ U.S. CONST. amend. I.

¹⁰⁸ *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

¹⁰⁹ *Chrestensen*, 316 U.S. at 54.

¹¹⁰ *Va. State Bd. of Pharmacy*, 425 U.S. at 771-72; *Central Hudson*, 477 U.S. at 566.

lower courts struggle to keep up with the pace.¹¹¹ “Doctrinal incoherence results from this theoretical underdevelopment. Without a coherent underlying rationale as to why commercial speech should receive less First Amendment protection, courts struggle to determine both which speech should be considered commercial and what standard the government must meet in order to regulate it.”¹¹² This “doctrinal incoherence” makes it extremely difficult to determine from the outset of an action whether one form of speech will be deemed commercial “[u]nless a case has facts very much like those of a prior case.”¹¹³

In response to this set of incongruent precedents by the United States Supreme Court, the lower courts have demonstrated a propensity to favor governmental regulation over the rights of commercial speech. Although the *Bery* decision greatly expanded protections for different vehicles of commercial speech,¹¹⁴ the Second Circuit seemingly put its foot down in the *Mastrovincenzo* decision by limiting certain forms of commercial speech, such as graffiti designed t-shirts.¹¹⁵ *Mastrovincenzo* shifted the burden to the party seeking free speech protections in commercial transactions to show that the goods possess a dominant self-expressive purpose, because if the good has “a dominant non-expressive purpose” it will not likely garner First Amendment protections.¹¹⁶ Once established, the Second Circuit shifts the burden to the government entity to show that the regulation over such a commercial good is reasonable, narrowly tailored to a government interest, and does not leave the vendor without alternative avenues of dispensing the self-expressive good.¹¹⁷

New York courts have also been victims of the lack of certainty by the United States Supreme Court as to what precise test determines constitutional protections. In *Larsen*, the court primarily relied on Second Circuit precedent in *Bery* and *Mastrovincenzo* to

¹¹¹ Note, *Dissent, Corporate Cartels, and the Commercial Speech Doctrine*, *supra* note 58, at 1893.

¹¹² *Id.* at 1897.

¹¹³ Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 631 (1990).

¹¹⁴ *Bery*, 97 F.3d at 696.

¹¹⁵ *Mastrovincenzo*, 435 F.3d at 81.

¹¹⁶ *Id.* at 95.

¹¹⁷ *Id.* at 100.

hold that the First Amendment was not intended to protect the speech printed on novelty condoms simply because the speech related to current events.¹¹⁸ The court held that the statute was a “content-neutral” regulation that is “narrowly tailored and leaves the [d]efendants with ample alternative channels of communication.”¹¹⁹ In fact, the court expresses a sense of frustration with the lack of definitive precedent by the higher courts over a determinative standard for commercial speech protection.¹²⁰ “[C]ommon sense dictates that topical novelty products, notwithstanding their expressive packaging, are not inherently similar to books, newspapers and pamphlets. To hold otherwise would render the written matter exception meaningless.”¹²¹

In reaching similar outcomes to *Larsen*, the courts in *Professional Truck Leasing Systems, Inc.*¹²² and *Target Advertising Inc.*¹²³ relied mainly on the United States Supreme Court holding in *Central Hudson*, which is one of the few precedents that set forth criteria in determining whether certain commercial speech warrants First Amendment protections.¹²⁴ Both courts were faced with the constitutionality of an ordinance that prohibited the use of a vehicle to act as an advertisement for any business but the business that owned the vehicle.¹²⁵ The four-factor test that was applied is more thorough than the Second Circuit’s lesser standard. Whereas the Second Circuit standard requires commercial speech regulation to be reasonable, narrowly-tailored to serve a significant, and provide for alternative means of expression,¹²⁶ the *Central Hudson* standard further insists that the speech pertain to lawful activity, that the speech is not misleading, and *directly* advance the substantial government interest.¹²⁷ The latter test is the more prudent one to apply as it imposes a heavier burden on commercial speech regulation.

¹¹⁸ *Larsen*, 906 N.Y.S.2d at 718-19.

¹¹⁹ *Id.* at 718.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Prof'l Truck Leasing Sys., Inc.*, 713 N.Y.S.2d at 656.

¹²³ *Target Adver. Inc.*, 708 N.Y.S.2d at 604.

¹²⁴ *Cent. Hudson*, 477 U.S. at 566.

¹²⁵ *Prof'l Truck Leasing Sys., Inc.*, 713 N.Y.S.2d at 652-53.

¹²⁶ *Bery*, 97 F.3d at 697.

¹²⁷ *Cent. Hudson*, 447 U.S. at 566.

Commercial speech may be more incentivized to produce inaccurate or untruthful statements to the public because the goal is always to make a profit.¹²⁸ Regulations over such speech are crucial “for listeners trying to find truth, wisdom, or other insight”¹²⁹ in order to prevent predatory commercial practices from trying to take advantage of such listeners.¹³⁰ Furthermore, this stricter standard inhibits overbearing governmental regulation on speech as a principle.¹³¹ Finally, there are “many types of nonpolitical speech [that] receive protection greater than that afforded commercial speech” and it is thus illogical to single out commercial speech.¹³² Scholars have argued that the limitations placed upon commercial speech, in particular by the United States Supreme Court, is an effort to convey “that the constitutional function of communication is to inform an audience of citizens about matters pertinent to democratic decision making.”¹³³ As evidenced by the New York courts’ application of a different analysis, there is a substantial need for a uniform system to determine the outright constitutional protections of commercial speech.¹³⁴ The courts should reflect a congruency in commercial speech review and the burden is on the United States Supreme Court to produce one.¹³⁵

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¹²⁸ Note, *Dissent, Corporate Cartels, and the Commercial Speech Doctrine*, *supra* note 58, at 1895.

¹²⁹ C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1163 n.8 (2004).

¹³⁰ Note, *Dissent, Corporate Cartels, and the Commercial Speech Doctrine*, *supra* note 58, at 1896.

¹³¹ *Id.*

¹³² *Id.* See Kozinski & Banner, *supra* note 113, at 633 (“The Framers never expressed an interest in protecting literature either, but the idea that the first amendment protects artistic expression is not on that attracts much opposition.” (citing *Roth v. United States*, 354 U.S. 476 (1957))).

¹³³ Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5 (2000).

¹³⁴ Note, *Dissent, Corporate Cartels, and the Commercial Speech Doctrine*, *supra* note 58, at 1899.

¹³⁵ Note, *Making Sense of Hybrid Speech*, *supra* note 26, at 2857 (“[T]he [Supreme] Court’s diverging analysis of hybrid [political and commercial] speech in recent years threatens . . . the traditional boundaries between protected and unprotected speech.”).

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