

---

# FREE SPEECH AND ELECTION LAW

## THE RUN FOR THE ROSES MEETS THE FIRST AMENDMENT: AN OVERVIEW OF *DESORMEAUX V. KENTUCKY RACING COMMISSION*

By WILLIAM P. BARNETTE\*

---

In addition to an upset winner and nationwide sensation in Funny Cide,<sup>1</sup> the 2003 Kentucky Derby produced a great deal of controversy. While the cheating allegations against, and subsequent exoneration of, winning jockey Jose Santos are well known,<sup>2</sup> less so is another issue which may have significant ramifications for the future of horse racing. During the running of the Derby, Santos and thirteen of his fellow riders wore patches on their pants promoting the Jockeys' Guild.<sup>3</sup> The patches, which measured 3 by 5 inches, were determined by the Churchill Downs' stewards to violate a regulation which prohibits jockeys from wearing during a race anything "not in keeping with the traditions of the turf."<sup>4</sup> The stewards therefore fined each rider who wore the patch \$500.<sup>5</sup> Following an unsuccessful appeal to the Kentucky Racing Commission (the "Commission"),<sup>6</sup> the jockeys have filed suit in Kentucky state court seeking to have the fines overturned.<sup>7</sup> The suit raises a number of interesting First Amendment issues, which will be discussed below.

### I. Background

The wearing of advertising or other promotional items by jockeys "has been a hot-button issue for years in a number of racing jurisdictions throughout North America."<sup>8</sup> Regulations on jockey attire vary from state to state, but generally "racetracks and government regulators have been able to control advertising rights despite the collective protestations of jockeys."<sup>9</sup> Not entirely, however. For example, in the 2003 Belmont Stakes, "some jockeys wore patches advertising Wrangler and Budweiser," reportedly angering Visa, the sponsor of the Triple Crown.<sup>10</sup>

By its terms, the regulation under which the jockeys were fined, 810 KRA 1:009, § 14, prohibits commercial speech, *i.e.*, it bans any "advertising, promotional, or cartoon symbols or wording" which is "not in keeping with the traditions of the turf."<sup>11</sup> The Commission determined that the jockeys' purpose in wearing the Guild patch was "to promote their organization and gain more members."<sup>12</sup> The Commission, however, deemed this purpose to be commercial, rather than political, finding that the patch "is an advertising and promotional symbol."<sup>13</sup> Further, because the traditional attire of a "jockey does not include advertising

or promotional symbols," the Commission concluded that wearing the patch violated the regulation.<sup>14</sup> In addition, the Commission reasoned that wearing the patch "could be a distraction to the eye and effect the concentration of the stewards in the performance of their duties."<sup>15</sup> Whether the Commission found the patch in fact to be a distraction is unclear, particularly given its later statement that "allow[ing] the patch in this case *could* lead down the slippery slope where the jockeys would resemble NASCAR drivers and therefore hinder the stewards in the performance of their duties."<sup>16</sup>

In contrast to the Commission's characterization, the *Desormeaux* plaintiffs explicitly disavow any commercial intent in wearing the patch, and instead allege that the emblem merely "identified the jockeys as members of their labor union . . . ."<sup>17</sup> Further, the jockeys allege that the purpose of "wearing the patch was to promote their labor union, to increase membership in the union and to bring to the attention of the public the unconscionable plight of disabled jockeys."<sup>18</sup> Thus, the jockeys assert, *inter alia*, that being fined for wearing the patch violated their First Amendment rights.<sup>19</sup>

Under the Supreme Court's interpretation of the First Amendment, different standards govern different types of speech. Thus, the proper characterization of the jockeys' wearing the patch—*i.e.*, whether this amounts to commercial speech or so-called "pure speech"—is of critical importance in determining the validity of the regulation as applied by the Commission.<sup>20</sup> Because a state "cannot foreclose the exercise of constitutional rights by mere labels,"<sup>21</sup> the Commission's terming the patch an "advertising or promotional symbol," that consequently is subject to regulation, will likely not be dispositive. Rather, as will be discussed, there is a compelling argument that wearing the patch constitutes "pure speech," which is entitled to full First Amendment protection. On the broader question, however, of whether true commercial speech can be prohibited in these circumstances, the Commission has good arguments in support of the regulation.

## II. Core First Amendment Speech: Strict Scrutiny

While the First Amendment's free speech guarantee is recognized as a fundamental right,<sup>22</sup> it is equally well recognized that this right is not "absolute at all times and under all circumstances."<sup>23</sup> Thus, there are "certain well-defined" classes of speech which may be prohibited consistent with the First Amendment.<sup>24</sup> On this low end of the constitutional spectrum are things like "fighting words," which have no protection under the First Amendment.<sup>25</sup>

Conversely, discussion of public issues—so-called "political speech"—is afforded the broadest protection by the First Amendment.<sup>26</sup> In *Pickering v. Board of Education*, the Supreme Court characterized the "public interest in having free and unhindered debate on matters of public importance" as the First Amendment's "core value."<sup>27</sup> Restrictions on such speech are subject to the most stringent form of review, strict scrutiny.<sup>28</sup>

Communications which attempt to persuade or dissuade the joining of labor unions are considered core speech protected by the First Amendment.<sup>29</sup> To illustrate, in *Thomas v. Collins* the defendant was cited for contempt for violating a restraining order prohibiting him from soliciting members for certain unions without first obtaining an organizer's card.<sup>30</sup> In reversing the conviction, the Supreme Court noted that the right "to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected" free speech.<sup>31</sup> Thus, the Court concluded that the defendant's First Amendment rights had been violated.<sup>32</sup>

Similarly, in *Thornhill v. Alabama* the Supreme Court recognized that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."<sup>33</sup> The Court further termed "[f]ree discussion concerning the conditions in industry and the causes of labor disputes" to be "indispensable."<sup>34</sup> Accordingly, the Court found unconstitutional a law which forbade publicizing the facts of a labor dispute in the vicinity of the scene of the dispute, and reversed the defendant's conviction for picketing outside a business involved in a strike.<sup>35</sup>

While the First Amendment explicitly refers to "speech," it is well established that expressive conduct is also protected.<sup>36</sup> For example, in *Tinker v. Des Moines Independent Community School District* a group of high school students wore black arm bands to school in protest of Vietnam.<sup>37</sup> They were then

suspended from school.<sup>38</sup> In reversing the dismissal of the students' subsequent suit against the school officials, the Supreme Court reasoned that wearing the armbands "was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."<sup>39</sup>

Recently, in *Newsom v. Albemarle County School Board*, the Fourth Circuit, reviewing the denial of a preliminary injunction, held there was a strong likelihood of success on a First Amendment claim against a school dress code which prohibited messages on clothing related to weapons.<sup>40</sup> Applying the *Tinker* standard,<sup>41</sup> the court concluded the dress code could "be understood as reaching lawful, nonviolent, and nonthreatening symbols of not only popular, but important organizations and ideals."<sup>42</sup> Because the code excluded a "broad range and scope of symbols, images, and political messages that are entirely legitimate and even laudatory," the court held the injunction should have been granted.<sup>43</sup>

In *Desormeaux*, the plaintiffs allege they wore the Guild patch to promote their union, increase its membership, and bring attention to the issue of disabled jockeys.<sup>44</sup> This should be considered protected speech under *Thomas* and *Thornhill*, in that the jockeys allegedly were promoting their union and raising awareness of the dangerousness of their working conditions.<sup>45</sup> Further, under the reasoning of *Tinker* and *Newsom*, wearing the patch can be considered a form of expressive conduct protected by the First Amendment.<sup>46</sup>

Indeed, in a similar case, *In re Reynolds*, the California Supreme Court held that an inmate's First Amendment rights were violated when he was denied permission to wear a prisoner's union button while incarcerated.<sup>47</sup> Under this rationale, the *Desormeaux* plaintiffs appear to have a valid "as applied" First Amendment challenge to the regulation at issue. Whether that regulation should be struck on overbreadth grounds, however, is another issue, initially requiring analysis of the commercial speech doctrine.

## III. Commercial Speech: Intermediate Standard

Traditionally, the First Amendment has given life to the "principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence."<sup>48</sup> A regulation that "stifles speech on account of its message"—i.e., its content—"contravenes this essential right."<sup>49</sup> Such restrictions "pose the inherent risk that the Government seeks not to advance a legitimate regulatory

goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”<sup>50</sup> In other words, through content-based restrictions the “Government may effectively drive certain ideas or viewpoints from the marketplace.”<sup>51</sup> To prevent an outcome so obviously contrary to the First Amendment, the Supreme Court has “consistently applied strict scrutiny to content-based regulations of speech.”<sup>52</sup>

Determining whether a particular regulation is content-based is “not always a simple task.”<sup>53</sup> The general rule, however, is that “laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content-based.”<sup>54</sup> Singling out commercial speech for prohibition while leaving other forms of speech untouched—which the regulation at issue in *Desormeaux* does—arguably amounts to a content-based restriction, which ordinarily would be subject to strict scrutiny.<sup>55</sup> Restrictions on commercial speech, however, are not measured against strict scrutiny.<sup>56</sup>

On the contrary, commercial speech has a checkered history under Supreme Court precedents. In an early case, *Valentine v. Chrestensen*, the Supreme Court held that the First Amendment provided no “restraint on government as respects purely commercial advertising.”<sup>57</sup> Reversing course, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* the Court held that simply because an advertiser’s “interest is a purely economic one . . . hardly disqualifies him from protection under the First Amendment.”<sup>58</sup> Rather, recognizing that society has a “strong interest in the free flow of commercial information,” the Court struck down regulations prohibiting the advertising of prescription drug information.<sup>59</sup>

Later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Supreme Court settled on an intermediate standard for determining whether commercial speech is protected by the First Amendment.<sup>60</sup> Under this standard, a court examines: (1) whether the speech concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is not more extensive than necessary to serve that interest.<sup>61</sup> In *Board of Trustees v. Fox*, the Supreme Court clarified that the last *Central Hudson* factor requires only a “reasonable fit” between the regulation and the interest, rather than the least restrictive means available.<sup>62</sup>

In upholding the *Desormeaux* plaintiffs’ fines, the Commission identified two interests furthered by the prohibition on jockey advertising: (1) upholding the “traditions of the turf,” and, relatedly; (2) protecting the ability of the stewards to perform their duties, i.e., ensuring the integrity and safety of the sport. The latter interest, in particular, would seem to be “substantial” within the meaning of *Central Hudson*.<sup>63</sup> Whether the advertising ban “directly advances” that interest, and whether there is a “reasonable fit” between the ban and the interest, are potential battlegrounds.<sup>64</sup>

Specifically, on the issue of “reasonable fit,” there is a question as to whether all advertising or promotional symbols, regardless of size, have the ability to interfere with the stewards’ performance.<sup>65</sup> The Commission, of course, concluded that even the 3 by 5 inch Guild patch, much less larger symbols, “could be a distraction to the eye and effect the concentration of the stewards in the performance of their duties.”<sup>66</sup> The reasonableness of this determination will be significant in determining whether the ban satisfies the *Central Hudson* standard. But in any event, given the lesser value placed on commercial speech and the substantial state interest promoted by the advertising ban, the Commission has at least a colorable argument that the ban is constitutional.<sup>67</sup>

#### IV. Public Employer Analysis

Another possible avenue of defense for the Commission is to argue that it should be considered a public employer for purposes of analyzing the regulation. In *Pickering*, the Supreme Court recognized the need to strike “a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>68</sup> Under the public employer doctrine, when an employee’s “expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community,” government regulation “should enjoy wide latitude.”<sup>69</sup> Moreover, even when an employee’s speech arguably addresses matters of public concern, the expression can still be regulated if it “threatens to interfere with government operations.”<sup>70</sup>

In a recent case, *Perez v. Hoblock*, the court relied on the public employer doctrine to uphold a state racing board’s fine of a horse owner.<sup>71</sup> The board fined the owner \$3,000 following his “profanity-laced verbal and physical outburst” at a meeting he requested with stewards for the Saratoga racetrack.<sup>72</sup> The regu-

lation under which the owner was fined permitted such a penalty for “any action detrimental to the best interests of racing.”<sup>73</sup> The owner filed suit challenging this provision on First Amendment grounds; the court found the public employer doctrine applicable because the owner was “a licensee in an industry closely regulated by defendants.”<sup>74</sup>

Rejecting his claim, the court looked to the first *Pickering* factor and noted that the owner was fined for disrupting the meeting with the stewards, not for “commenting on a matter of public concern.”<sup>75</sup> In addition, the court recognized that the disruption of the meeting prevented the stewards from performing their duties—hearing and considering the owner’s alleged grievance.<sup>76</sup> Thus, the court reasoned that whatever value the owner’s speech possessed was outweighed by its interference with efficient government operations.<sup>77</sup> Accordingly, the court concluded his “disruptive and threatening behavior need not be” protected by the First Amendment.<sup>78</sup>

Similarly, in *Leroy v. Illinois Racing Board*, the Seventh Circuit rejected a horse owner’s First Amendment challenge to sanctions levied by the state racing board.<sup>79</sup> As in *Perez*, the owner was fined for making threats and using profanity, in violation of a regulation which prohibited “improper language” or “improper conduct” towards members of the board.<sup>80</sup> In response to the owner’s argument that the regulation was vague and overbroad, the court conceded that “addressed to the general public for the conduct of daily affairs, [the rule] would be seriously deficient.”<sup>81</sup> Addressed solely to licensees, however, and governing only their relations with the board, the court considered the regulatory scheme to have “much in common with civil service laws, which despite their many vague terms were sustained” by the Supreme Court.<sup>82</sup> The court therefore held the regulation did not violate the First Amendment.<sup>83</sup>

The *Desormeaux* plaintiffs are licensees in the same regulated industry as the owners in *Perez* and *Leroy*. Thus, the Commission may attempt to argue that under the public employer doctrine the jockey advertising ban is proper. Key to such an argument would be: (1) showing that advertising worn by jockeys would not constitute “comment on a public matter;” or, more likely, (2) that the advertising would interfere with the stewards in the performance of their duties.<sup>84</sup>

On the first factor, it is worth noting that in *Perez* and *Leroy* the owners were fined for profanity and

making threats, forms of speech which have little to no First Amendment value.<sup>85</sup> Conversely, advertising is protected by the First Amendment, although not to the same extent as “pure” or “political” speech.<sup>86</sup> Given the lesser value placed on commercial speech, it is not clear whether jockey advertising would be considered as relating to any matter of “social” or “other concern to the community.”<sup>87</sup> If not, then the advertising ban could be upheld under the public employer doctrine.<sup>88</sup>

Assuming *arguendo* that jockey advertising would be considered “comment on a public matter,” the analysis then entails whether such communications would interfere with government operations—i.e., the stewards’ duties in officiating the races. As noted, the Commission determined that even the Guild patch could distract the stewards from performing their duties.<sup>89</sup> If this determination is reasonable, then the advertising ban could again be upheld under the public employer doctrine.<sup>90</sup>

## V. Non-Public Forum Analysis

Finally, the Commission may argue that the advertising ban is a valid restriction of speech in a non-public forum. Because the First Amendment is not absolute, even in a public forum the government may impose “reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’”<sup>91</sup> In contrast, in a non-public forum, a lesser standard applies: the government may prohibit all forms of communication, provided the ban is reasonable and content-neutral.<sup>92</sup>

The public forum determination is based on “how the locale is used. Streets, parks and sidewalks are the paradigms of a public forum because they have traditionally served as a place for free assembly and communication by citizens.”<sup>93</sup> Likewise, “municipal theaters and auditoriums are designed for and dedicated to expressive activities” and therefore are considered public forums.<sup>94</sup>

In *International Society for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority*, the Third Circuit affirmed an order denying a religious society the right to distribute literature and solicit funds at the Meadowlands Sports Complex, which includes a football stadium and racetrack.<sup>95</sup> In so holding, the court concluded that the Meadowlands, despite being a public place, was not a public forum.<sup>96</sup>

On the contrary, according to the court, the Meadowlands did not fit any of the traditional definitions of a “public forum,” but instead was a “commercial venture” aimed at “earn[ing] money by attracting and entertaining spectators with athletic events and horse races.”<sup>97</sup>

Because the Meadowlands was not a public forum, the court looked only to whether the solicitation ban was reasonable.<sup>98</sup> This, in turn, was determined by whether the “proposed activity is basically incompatible with the normal character and function of the place.”<sup>99</sup> Concluding that the proposed solicitation would “disrupt the normal activities of the [Meadowlands],” the court held the ban reasonable, and denied the First Amendment challenge.<sup>100</sup>

Given the above, the Commission could argue that Churchill Downs, where the Kentucky Derby is run, is, like the Meadowlands, a non-public forum. That is, it could be argued that the purpose of Churchill Downs is to be a place where horse races are run, not where messages are expressed. The question then would be the reasonableness of the jockey advertising ban.<sup>101</sup> The Commission’s determination that the Guild patch could interfere with the stewards’ duties may satisfy this burden.<sup>102</sup> In addition, whether advertising is “basically incompatible with the normal character and function of” the track could implicate the “traditions of the turf,” which the Commission has determined do not include commercial messages worn by jockeys.<sup>103</sup> Thus, the advertising ban could be upheld as a reasonable restriction of speech in a non-public forum.

## VI. Conclusion

The *Desormeaux* plaintiffs present a compelling “as applied” challenge to the jockey advertising ban in that they have been fined for essentially “pure speech,” i.e., wearing union patches. On the issue of overbreadth, however, the Commission has good arguments in support of the prohibition, particularly given the lesser value accorded commercial speech and the other theories under which the ban could be upheld. Whatever the ultimate outcome, *Desormeaux* has the potential to make significant First Amendment law, as well as impact the future of the horse racing industry.

\* William P. Barnette is Corporate Counsel—Commercial Litigation for The Home Depot. Previously, he was Product Litigation Counsel for Brown & Williamson Tobacco Corporation in Louisville, Kentucky, and also practiced with King & Spalding in Atlanta, Georgia.

The views expressed herein are the author’s alone. A longer version of this article is forthcoming in the *Cleveland State Law Review*.

## Footnotes

<sup>1</sup> At odds of 12-1, Funny Cide became the first gelding to win the Derby since 1929 and the first New York-bred winner ever. Andrew Beyer, *Funny Cide Up*, WASHINGTON POST, E01 (May 4, 2003).

<sup>2</sup> Shortly after the race, media from coast to coast reported on a picture appearing to show Santos with a black object—possibly an illegal electrical device with which to shock Funny Cide—in his hand while aboard the horse. Andrew Beyer, *Derby Stewards on Wrong Track*, WASHINGTON POST, D01 (May 13, 2003). Ultimately, the “object” was determined to be an optical illusion. *Id.* The Churchill Downs’ stewards thus cleared Santos of wrongdoing. *Id.*

<sup>3</sup> Marty McGee, *Riders file suit over logos worn in Kentucky Derby*, DAILY RACING FORM, p. 3 (November 9, 2003). The Jockeys’ Guild is the labor union for jockeys. *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

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

<sup>7</sup> See Petition for Review of Final Order of Kentucky Racing Commission (the “Petition”), No. 03CI09792 (Jefferson Circuit Court, Kentucky, November 6, 2003). On November, 17, 2003, the case was transferred to Franklin Circuit Court.

<sup>8</sup> McGee, *supra* note 4.

<sup>9</sup> *Id.*

<sup>10</sup> Billy Reed, *Patch or no patch, jockeys are just climbing aboard the train of corporate sponsorship*, SNITCH, p. 7 (November 26, 2003); see also Sigrid Kun, *Race Horses and Intellectual Property Rights: Racing Towards Recognition?*, 17 QUINNIPIAC L. REV. 207, 225 n.167 (1997) (describing one jockey at Remington Park being sponsored by Pepsi and wearing its logo during workouts and races). In addition, jockeys, including certain of the plaintiffs in *Desormeaux*, have allegedly worn the Jockey Guild patch in races at tracks in California, Illinois, Maryland, and Texas. Petition, ¶ 42.

<sup>11</sup> Petition, ¶ 22.

<sup>12</sup> Commission’s Findings of Fact and Conclusions of Law, attached as Exhibit A to the Petition, Finding of Fact No. 8.

<sup>13</sup> Conclusion of Law No. 9.

<sup>14</sup> Conclusion of Law No. 8.

<sup>15</sup> Finding of Fact No. 12 (emphasis added).

<sup>16</sup> Conclusion of Law No. 12 (emphasis added).

<sup>17</sup> Petition, ¶ 47.

<sup>18</sup> *Id.* ¶ 32. As independent contractors, jockeys are “responsible for their own expenses, including insurance premiums, which are astronomical because of the risk inherent in the profession.” Reed, *supra* note 11. The Jockeys’ Guild receives “an average of twenty-five hundred injury notifications per year, with two deaths and two and a

half cases of paralysis.” LAURA HILLENBRAND, *SEABISCUIT: AN AMERICAN LEGEND*, p. 73 (Ballantine Books, 2001). As of 2001, the Guild was “supporting fifty riders who were permanently disabled on the job.” *Id.*

<sup>19</sup> Petition, ¶ 16; *see* U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”). The provisions of the First Amendment are incorporated against the states by the Fourteenth Amendment. *Schneider v. State*, 308 U.S. 147, 160 (1939).

<sup>20</sup> The jockeys have challenged the regulation on overbreadth grounds. Petition, ¶ 51. The overbreadth doctrine is a “departure from traditional rules of standing,” *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), allowing an individual to “challenge a statute on its face ‘because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution . . .’” *Board of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (citation omitted). A law “should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications.” *New York v. Ferber*, 458 U.S. 747, 771 (1982). If a law is overbroad, “any enforcement” of it is “totally forbidden.” *Broadrick*, 413 U.S. at 613. Conversely, if a law is found unconstitutional “as applied,” it may not be applied to the challenger, but otherwise remains in effect. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 758-59 (1988).

<sup>21</sup> *NAACP v. Button*, 371 U.S. 415, 429 (1963).

<sup>22</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). In the words of the Supreme Court, the First Amendment secures “the great, the indispensable democratic freedoms.” *Thomas v. Collins*, 323 U.S. 516, 530 (1945). As is oft noted, the First Amendment’s purpose is “to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail . . .” *Turner Broadcasting Sys., Inc. v. Fed. Communications Comm’n*, 507 U.S. 1301, 1304 (1993) (quotations omitted). Consequently, the First Amendment generally bars the government “from dictating what we see or read or speak or hear.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).

<sup>23</sup> *Chaplinsky*, 315 U.S. at 571. For example, in *Schenck v. United States*, 249 U.S. 47, 52 (1919) (citation omitted), the Supreme Court recognized that “the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic.”

<sup>24</sup> *Chaplinsky*, 315 U.S. at 571.

<sup>25</sup> *Id.* In *Chaplinsky*, the Supreme Court affirmed the defendant’s conviction for violating a statute that prohibited a person from addressing another with “offensive” words in public, reasoning that such “fighting words” were not entitled to protection under the First Amendment. *Id.* at 569, 571-72.

<sup>26</sup> *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>27</sup> 391 U.S. 563, 573 (1968).

<sup>28</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (“When a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.”) (citations omitted). In addition, strict scrutiny requires there be no less restrictive alternative available. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

<sup>29</sup> *National Labor Relations Bd. v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477, 479 (1941).

<sup>30</sup> 323 U.S. 516, 518 (1945). The defendant was the president of the International U.A.W. and resided in Detroit. *Id.* at 520. He came to Texas to give a speech to local union members and supporters. *Id.* Prior to his speech, a state court issued an order enjoining the defendant from soliciting members for any union without first obtaining an organizer’s card, as required by statute; the defendant violated this order. *Id.* at 521 & n.3.

<sup>31</sup> *Id.* at 532.

<sup>32</sup> *Id.* at 532, 543.

<sup>33</sup> 310 U.S. 88, 102 (1940).

<sup>34</sup> *Id.* at 102, 103; *see also* *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 478 (1937) (“Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.”).

<sup>35</sup> *Thornhill*, 310 U.S. at 91-92, 101.

<sup>36</sup> The Supreme Court has “long recognized” that the First Amendment’s “protection does not end at the spoken or written word.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (holding Texas flag-burning statute unconstitutional); *Spence v. Washington*, 418 U.S. 405 (1974) (reversing conviction for improper exhibition of United States flag where defendant displayed flag upside down with peace symbol attached).

<sup>37</sup> 393 U.S. 503, 504 (1969).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 505-06. The Court acknowledged the need for school officials, “consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.” *Id.* at 507. But, given that there was no evidence of conduct which would “interfere with the requirements of appropriate discipline in the operation of the school,” the Court concluded the armbands prohibition violated the First Amendment. *Id.*

<sup>40</sup> 354 F.3d 249, 251 (4<sup>th</sup> Cir. 2003). In *Newsom*, a student sought a preliminary injunction against the school dress code after being disciplined for wearing a tee-shirt which “depicted three black silhouettes

of men holding firearms superimposed on the letters ‘NRA’ positioned above the phrase ‘SHOOTING SPORTS CAMP.’” *Id.* at 252.

<sup>41</sup> The court recognized there was no evidence that clothing with messages related to weapons “disrupted school operations or interfered with the rights of others.” *Id.* at 259.

<sup>42</sup> *Newsom*, 354 F.3d at 259-60. As an example, the court noted the code would prohibit clothing depicting the state seal of Virginia, which shows a woman holding a spear. *Id.* at 260. Likewise, the court reasoned that the “quintessential political message” the school was trying to promote—“‘Guns and School Don’t Mix’”—would be prohibited by the code. *Id.* at 260.

<sup>43</sup> *Id.*

<sup>44</sup> Petition, ¶ 32.

<sup>45</sup> *See* *Thomas*, 323 U.S. at 532; *Thornhill*, 310 U.S. at 102, 103.

<sup>46</sup> See *Tinker*, 393 U.S. at 505-06; *Newsom*, 354 F.3d at 260. The Commission, of course, could argue that the patch is “disruptive” based on its finding that the stewards could be distracted by it. See Finding of Fact No. 12; *Tinker*, 393 U.S. at 507. Given, however, that this finding was posited as a “slippery slope” consideration, such an argument is not particularly persuasive, especially when balanced against the high First Amendment value afforded union promotion speech. See Conclusion of Law No. 12.

<sup>47</sup> 599 P.2d 86, 87 (Cal. 1979). In so holding, the court noted there was no evidence of “disruption” in the prison, either past or future, caused by wearing the button. *Id.* at 88; cf. *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (finding ban on inmate union meetings and solicitation reasonable where such activities could pose “additional and unwarranted problems and frictions in the operation of the State’s penal institutions”).

<sup>48</sup> *Turner Broadcasting Sys., Inc. v. Fed. Communications Comm’n*, 512 U.S. 622, 641 (1994).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (citation omitted).

<sup>52</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574 (2001) (Thomas, J., concurring); *Turner Broadcasting*, 512 U.S. at 641-43.

<sup>53</sup> *Id.* at 642.

<sup>54</sup> *Id.* at 643.

<sup>55</sup> See 810 KRA 1:009, § 14 (banning commercial, but not other types, of speech). In fact, the *Desormeaux* plaintiffs have alleged that Pat Day, one of the other jockeys in the Derby, during the race wore a tunic with the symbol of a Crucifix, but was not fined by the stewards. Petition, ¶¶ 39, 41.

<sup>56</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 n.6 (1980) (applying intermediate standard to commercial speech and noting “[i]n most other contexts, the First Amendment prohibits regulation based on the content of the message”); see also *Lorillard*, 533 U.S. 525, 554 (applying intermediate review to content-based advertising restriction); *id.* at 574-75 (Thomas, J., concurring).

<sup>57</sup> 316 U.S. 52, 54 (1942).

<sup>58</sup> 425 U.S. 748, 762 (1976); see also *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (Advertising is not “stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.”).

<sup>59</sup> *Virginia State Board*, 425 U.S. at 764, 772.

<sup>60</sup> 447 U.S. 557 (1980).

<sup>61</sup> *Id.* at 566. Expounding on the interest necessary to sustain a restriction on commercial speech, the Court has noted that a state “must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); see also *Greater New Orleans Broadcasting Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (restrictions on commercial speech require more than “mere speculation or conjecture”).

<sup>62</sup> 492 U.S. 469, 480 (1989). Subsequently, several members of the

Court “have expressed doubt about the *Central Hudson* analysis and whether it should apply in particular cases.” *Lorillard*, 533 U.S. at 554 (citations omitted). The Court, however, has seen “no need to break new ground.” *Id.* (quotations omitted). Rather, *Central Hudson* remains an “adequate basis for decision.” *Id.* at 555 (quotations omitted).

<sup>63</sup> 447 U.S. at 564, 568-69.

<sup>64</sup> *Id.* at 566.

<sup>65</sup> *Id.*

<sup>66</sup> See *supra* notes 16 & 17.

<sup>67</sup> Whether the “traditions of the turf,” standing alone, would be an interest sufficient to justify the restriction is more problematic.

<sup>68</sup> 391 U.S. at 568. This balance is similar to the consideration given, when measuring First Amendment claims, to the need to maintain discipline and order in public schools and prisons. *Tinker*, 393 U.S. at 507; *Jones*, 433 U.S. at 129.

<sup>69</sup> *Connick v. Myers*, 461 U.S. 138, 146 (1983).

<sup>70</sup> *Lewis v. Cohen*, 165 F.3d 154, 162 (2d Cir. 1999).

<sup>71</sup> 248 F. Supp. 2d 189 (S.D. N.Y. 2003).

<sup>72</sup> *Id.* at 190, 191. The owner sought the meeting to raise his concerns regarding the manner in which certain horses were selected to run in certain races. *Id.* at 191. When told by one official that his complaint was “ridiculous,” the owner began his outburst. *Id.*

<sup>73</sup> *Id.* at 192; see 9 NYCRR § 4022.13.

<sup>74</sup> *Id.* at 192-93, 195.

<sup>75</sup> *Perez*, 248 F. Supp. 2d at 197.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 195 (quotations omitted); see *Heil v. Santoro*, 147 F.3d 103, 109 (2d Cir. 1998) (“the government can prevail if it can show that it reasonably believed that the speech would potentially interfere with or disrupt the government’s activities, and can persuade the court that the potential disruptiveness was sufficient to outweigh the First Amendment value of that speech”).

<sup>79</sup> 39 F.3d 711, 715 (7th Cir. 1994), *cert. denied*, 515 U.S. 1131 (1995). The *Perez* court cited *Leroy* in support of its decision. 248 F. Supp. 2d at 196.

<sup>80</sup> *Leroy*, 39 F.3d at 715.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*; see *Broadrick*, 413 U.S. at 607-15; *CSC v. Letter Carriers*, 413 U.S. 548, 568-81 (1973).

<sup>83</sup> *Leroy*, 39 F.3d at 715.

<sup>84</sup> See *supra* notes 69-71 and accompanying text.

<sup>85</sup> See *supra* notes 73 & 81 and accompanying text.

<sup>86</sup> See *supra* notes 61-63 and accompanying text.

<sup>87</sup> *Connick*, 461 U.S. at 146. This, of course, assumes that certain communications are either commercial speech or something else, for

---

example, political speech. In reality, commercial speech can be blended with other, more protected forms of expression. The question then becomes what standard of review will be given to the blended communication—strict scrutiny or the intermediate *Central Hudson* test. In *Nike, Inc. v. Kasky*, 45 P.3d 243, 247 (Cal. 2002), the California Supreme Court held that certain statements made by Nike during a labor dispute amounted to commercial speech, despite the fact that the statements also formed part of the “public dialogue” on a matter of public concern. Because the speech was commercial, the court reasoned that any false or misleading statements by Nike were not protected by the First Amendment, again without regard to whether they were related to a matter of public concern. *Id.* at 262. The United States Supreme Court initially granted certiorari to review this decision, but then withdrew the writ as “improvidently granted.” *Nike, Inc. v. Kasky*, 123 S.Ct. 2554 (2003).

<sup>88</sup> *Connick*, 461 U.S. at 146.

<sup>89</sup> *See supra* notes 16 & 17.

<sup>90</sup> *See Perez*, 248 F. Supp. 2d at 195.

<sup>91</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted).

<sup>92</sup> *United States Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 131 n.7 (1981).

<sup>93</sup> *International Society for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority*, 691 F.2d 155, 160 (3d Cir. 1982) (citing *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939)).

<sup>94</sup> *Id.* (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975)).

<sup>95</sup> *Id.* at 158. With the sole exception of concessionaires, no one was permitted to solicit funds or distribute literature at the Meadowlands. *Id.*

<sup>96</sup> *Id.* at 159 (“Not all public places are public forums.”).

<sup>97</sup> *Id.* at 161.

<sup>98</sup> *International Society for Krishna Consciousness*, 691 F.2d at 161.

<sup>99</sup> *Id.* (citations omitted).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *See supra* note 16 & accompanying text.