Commercial Speech Doctrine Knocked Out by Boxing Advertising: The Destructive Effect of *Adams v. Nevada Athletic Commission* on First Amendment Limitations

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On September 29, 2001, boxer Bernard Hopkins successfully defeated the defending middle-weight title holder, Felix Trinidad.[1] However, Hopkin's victory was overshadowed by the trend he began that night. In addition to the typical boxing apparel—shoes, shorts, and gloves—Hopkins sported a temporary tattoo across his back advertising Golden Palace's online casino website, GoldenPalace.com.[2] The ad ushered in a new trend in boxing marketing, where shirtless backs provide walking billboards for advertisers like Golden Palace.[3]

Athlete and celebrity endorsements are not a new concept. Every day television, radio, and print media showcase advertisements featuring celebrities who endorse products.[4] These ads serve three purposes: (1) to provide the showcasing media with revenue,[5] (2) to

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1. Harvey Araton, Sports of the Times, *Warlike Hyperbole, but Peaceful Ending*, N.Y. TIMES, Sept. 30, 2001, § 8, at 6. (describing the Trinidad-Hopkins bout).

2. Kevin Iole, *Online Casino Wins Injunction*, LAS VEGAS REV.-J., Mar. 7, 2002, at 7C.

3. *Id*.

4. Numerous companies use celebrity endorsements to promote their products. A morning listener of KPNT-FM 105.7 in St. Louis, Missouri, can often hear Howard Stern promoting automobile sales for O'Fallon Toyota and BMW in O'Fallon, Illinois. *The Howard Stern Radio Show* (KROCK syndicated radio broadcast). A reader of *Sports Illustrated* can view an image of Julius Erving endorsing the new General Motors GMC Envoy. SPORTS ILLUSTRATED, Feb. 17, 2003, at 21. And: A viewer of network television can witness Catherine Zeta-Jones espousing the virtues of T-Mobile, Inc., a cellular phone service provider. *See* Press Release, T-Mobil International, Actress Catherine Zeta-Jones Signs with T-Mobile International as Global Spokeswoman (June 11, 2002), *at* http://www.t-mobile.com/company/pressroom/pressrelease26.asp (announcing the actress' new role as company spokeswoman).

5. *Projected Ad Spending, 2005*, MARKET SHARE REP. 425 (Robert S. Lazich ed., 2002). Projected advertisement spending for 2005 indicates that nearly 196 billion dollars will be spent

expose the endorsed product to consumers,[6] and (3) to provide the featured celebrity with revenue and exposure.[7] Hopkin's temporary tattoo served all three purposes.[8]

Hopkins's tattoo also prompted one of boxing's major governing bodies to act in order to control the new form of celebrity endorsement. The Nevada Athletic Commission (the "Commission"), exerting its authority to control activity in the boxing ring, banned the use of temporary tattoos.[9] Clarence Adams, a Nevada-licensed boxer, challenged the ban on First Amendment grounds in *Adams v. Nevada Athletic Commission*.[10] On March 14, 2002, the Eighth Judicial District of Nevada issued a preliminary injunction against the ban.[11] By doing so, the court not only prevented the Commission from guarding against the distraction of match judges and promoting the integrity of the sport, but expanded the protection afforded commercial speech beyond that intended by the United States Supreme Court.

While the First Amendment[12] protects a person's freedom of speech,[13] it creates distinctions in the level of protection offered to different kinds of speech;[14] some forms of speech retain the full

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on advertisements, including 58.9 billion dollars on newspaper ads and 52.3 billion dollars on broadcast television ads. *Id.*

6. *Finding the Sweet Spot*, FOOTWEAR NEWS, July 22, 2002, at 22. In *Finding the Sweet Spot*, Neil Cole, President and CEO of Candie's apparel company, describes the relationship between celebrity endorsements and the footwear and clothing maker's business growth. Cole asserts that the "celebrity is a great vehicle to draw attention to the brand and product." *Id.* During Candie's celebrity campaign, Candie's witnessed a 7.4% rise in sales. *Id.*

7. *See* Associated Press, *Off-Air Jordan: Former NBA Great Quits Endorsement Deals* (Mar. 23, 2000), *available at* http://more.abcnews.go.com/sections/sports/DailyNews/jordan_000322.html. In 1999, basketball star Michael Jordan earned an estimated thirty-five to forty million dollars for his endorsement deals. *Id.*

8. Hopkins was no doubt paid to wear the tattoo and the tattoo exposed Golden Palace.com to the hundreds of thousands of viewers of the bout.

9. Nevada State Athletic Commission—Homepage, *at* http://boxing.nv.gov (last updated Nov. 12, 2003). Operating under Chapter 467 of the Nevada Revised Statutes Chapter 467, the Commission promulgates regulations governing unarmed combatants. *Id.*

10. A 446674, 2002 WL 1967500 at *1 (Nev. Dist. Ct. 2002).

11. *Id*. at *2.

12. U.S. CONST. amend. I.

13. The history of freedom of speech spans from the Sedition Act of 1792 to the modern era of First Amendment common law holdings. Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 818 (1984). For a discussion of seditious libel, see generally *id.*

14. *See, e.g.*, Patricia R. Stembridge, Note, *Adjusting Absolutism: First Amendment*

protection against government infringement, while others possess only limited protection.[15] Since 1942, one distinction stressed by the Court arises between "expressive" and "commercial" speech.[16] The Court views expressive speech broadly: as speech that involves the interchange of ideas.[17] However, the Court views commercial speech more narrowly: as speech that proposes a commercial transaction.[18] The Court affords only limited protection to commercial speech,[19] permitting content-neutral restrictions of commercial speech[20] that satisfy a four-part analysis.[21]

Hopkin's and Golden Palace's tattoo advertisement is commercial.[22] As such, the *Adams* court should have subjected the

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Protection for the Fringe, 80 B.U. L. REV. 907, 924-25 n.137 (2000) (quoting American Communications Ass'n, C.I.O. v. Douds, 339 U.S. 382, 399 (1950)).

15. *See id.* at 924-25. Limiting First Amendment protection is debatable at the academic level because some legal scholars view the Amendment in absolutist terms. *Id.* at 914. Stembridge describes Supreme Court Justice Hugo Black's absolutist position when interpreting the First Amendment, stating that Black believed the framers' intented to prohibit government from enacting any law that violated the Amendment. *Id.* at 915 (citing TINSLEY E. YARBROUGH, MR. JUSTICE BLACK AND HIS CRITICS 133 (quoting Justice Black in Edmund Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 557 (1962))). However, case law demonstrates less room for debate. *See id.* at 915 (describing how Justice Black distinguished between speech and conduct to limit the Amendment's protections in NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58, 77 (1964)); Hess v. Indiana, 414 U.S. 105, 108 (1973) (reaffirming the inability of the First Amendment to protect speech that incites imminent lawless action). Thus, there are limitations to the right to free speech.

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

17. Buckley v. Valeo, 424 U.S. 1, 14 (1976) (discussing the First Amendment's protection of expressive speech in terms of securing a free and unfettered exchange of political expressions) (citing Roth v. United States, 354 U.S. 476, 484 (1957); Winters v. New York, 333 U.S. 507, 510 (1948)).

18. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 153 (2002).

19. *See generally* Michael Hoefges & Milagros Rivera-Sanchez, *"Vice" Advertising Under the Supreme Court's Commercial Speech Doctrine: The Shifting Central Hudson Analysis*, 22 HASTINGS COMM. & ENT. L.J. 345 (2000) (tracing the history of governmental regulation of commercial speech since 1980).

20. *See, e.g.*, Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976).

21. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980). The test requires a court to determine whether the speech concerns lawful activity, the government has asserted a substantial interest in restricting speech, the government's restriction advances that interest, and the restriction is the least intrusive means to further the stated interest. *Id* at 566.

22. *See* Kasky v. Nike, Inc., 45 P.3d 243, 256 (Cal. 2002) (stating that when the speaker is engaged in commerce, its intended audience is potential customers, and its content is

Commission's ban to the Supreme Court's four-part analysis.[23] The regulation satisfies that four-part analysis, but the court mistakenly prohibited the Commission from exercising its power to regulate the commercial speech activities of its member athletes.[24]

This Note discusses the reasons why future reviews of bans on temporary tattoo advertisements should not follow *Adams*. That decision overextends the United States Supreme Court's Commercial Speech Doctrine. Further judicial action on temporary tattoo advertisements should permit their prohibition. Part I.A describes the history of the Commercial Speech Doctrine, focusing on the major Supreme Court rulings and permissible government restrictions of commercial speech. Part I.B discusses *Adams*. Part II analyzes *Adams* in light of controlling common law. Finally, Part III suggests that *Adams* should be overturned.

I. HISTORY

A. The History of the Commercial Speech Doctrine

The First Amendment protects the abridgment of an individual's freedom of speech by an act of federal or state government,[25] but this protection is not absolute.[26] The judiciary has examined a number of circumstances when state or federal actions restricting a person's right to free speech do not violate the Constitution.[27] One such circumstance is the government's restriction on commercial speech.

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commercial—it is made to promote the product—the speech is commercial). Commercial speakers, the casino corporations, produce the ads; these speakers direct the advertisement to a commercial audience; and the ads suggest the boxer supports the casino to promote sales.

23. *See infra* Part I.

24. Adams v. Nev. Athletic Comm'n, No. A446674, 2002 WL 1967500, at *2 (Nev. Dist. Ct. 2002).

25. U.S. CONST. amends. I, XIV.

26. *See* Stembridge, *supra* note 14 (describing an academic debate over the absolutist qualities of the First Amendment).

27. *Id.* These include bans on inciteful or obscene speech. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (dictum) (stating that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic"); Marks v. United States, 430 U.S. 188, 193-94 (1977) (describing the constitutionality of restricting obscene expressions).

1. Evolution of the Commercial Speech Doctrine

In *Valentine v. Chrestensen*, the Supreme Court first distinguished between expressive and commercial speech.[28] *Valentine* involved the owner of a decommissioned naval submarine who moored his vessel to docks on the East River to sell interior cabin tours.[29] To solicit customers the owner printed advertisements on pamphlets and distributed the pamphlets to people walking the city streets.[30] This action violated a New York City ordinance prohibiting the distribution of commercial and business advertising in city streets.[31] The man was ticketed and fined.[32] He challenged the ordinance, claiming that it violated his right to free speech.[33] At trial, the lower federal court struck down the ordinance as a violation of the First Amendment.[34] The Supreme Court unanimously reversed, ruling that the First and Fourteenth Amendments did not protect commercial speech.[35]

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court again addressed the Constitution's protection of commercial speech.[36] Unlike the Court's complete rejection of constitutional protection for commercial speech in *Valentine*, the Court granted commercial speech limited constitutional protection.[37] In doing so, the Court ushered in the modern era of the Commercial Speech Doctrine. In *Virginia State*, pharmacists challenged a Virginia law that considered a licensed pharmacist who advertised prices for prescription drugs as engaged in "unprofessional conduct."[38] Virginia suggested that such advertising caused customers to choose cheaper drugs without understanding that

28. Valentine v. Chrestensen, 316 U.S. 52 (1942).
29. *Id.* at 53.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 54.
34. *Id.*
35. *Id.* The Court reasoned that the submarine owner merely used the political protest exception to circumvent the sanitary code's ordinance. *Id.* at 55.
36. 425 U.S. 748 (1976).
37. *Id*. at 761-62.
38. *Id*. at 749-50.

the drugs may be less effective.[39] The Court overruled the law. It reasoned that while expressive commercial speech deserves only limited constitutional protections, a strong interest in the free flow of information required the Court to find the state law unconstitutional.[40] However, the Court's protection was limited because it based its holding on the fact that the Virginia ban was not content neutral.[41]

In *Central Hudson Gas & Electric v. Public Service Commission of New York*, the Court continued its exploration of commercial speech protections.[42] In *Central Hudson*, the Court reversed a ban on advertising that promoted the use of electricity.[43] In finding the ban unconstitutional, the Court established a four-part test to examine bans on commercial speech.[44] The test requires courts to determine whether: (1) the expression concerns unlawful activity, (2) the government asserted a substantial interest in restricting the speech, (3) the regulation directly advances that interest, and (4) the chosen regulation imposes the least restrictive means to affect that interest.[45] In reversing the ban, the Court found that the restriction was too broad,[46] and thus, failed the fourth prong of the analysis.[47]

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39. *Id.* at 769. The state believed it could remedy this problem by simply not allowing the pharmacist to advertise drug prices, thereby eliminating the possibility of customers seeking the lower-cost, and potentially lower-quality, medicines. *Id*. at 769.

40. *Id*. at 761.

41. *Id.* at 771 (citations omitted).

42. 447 U.S. 557 (1980).

43. *Id*. at 561. The lower court found that advertising for electricity served no public interest because the public had no choice in their source of electricity. *Id*. Consequently, the court found "the prohibition outweighed the limited constitutional value of the commercial speech at issue." *Id.* The Supreme Court rejected this argument, stating that this rationale was insufficient to infringe the constitutional protections affored commercial speech. *Id.* at 567.

44. *Id*. at 566.

45. *Id.*

46. *Id.* at 570. The State articulated two interests: to promote energy conservation and to prevent price inequities "caused by the failure to base the utilities' rates on marginal cost." *Id.* at 568. While the Court found a direct link between the ban and the interest to conserve energy, it found only a tenuous connection between the ban and the state's equity concerns and that less intrusive measures could adequately achieve the state's interest. *Id.* at 569–70. *See also* Richard Z. Lehv & Ronald E. Wiggins, *False Advertising and Other Lanham Act Section 43(A) Claims*, *in* LITIGATING COPYRIGHT, TRADEMARK & UNFAIR COMPETITION CASES FOR THE EXPERIENCED PRACTITIONER 425, 430 (Bruce P. Keller & D. Peter Harvey co-chairs, 1998) (stating that "the Court found that the ban was overly broad to the extent that it covered speech which in no manner interfered with the State's interest on energy conservation").

47. *Id.* at 564-66.

Together, *Virginia State* and *Central Hudson* establish the modern framework for the Commercial Speech Doctrine. As a threshold matter, a government's restriction on commercial speech must be content-neutral.[48] Non-content-neutral regulations are analyzed through *Central Hudson*'s four-part test.[49] Only non-content-neutral prohibitions that fail the test violate the speaker's protected right to engage in commercial speech.

2. Recent Decisions: Reflections on the *Central Hudson* Test

Although *Central Hudson*'s analysis continues, dissenting justices in recent cases have sought to grant increased First Amendment protection to commercial speech.[50] For example, in *44 Liquormart, Inc. v. Rhode Island*, a plurality of the Court sought to expand *Central Hudson*'s analysis.[51] *44 Liquormart* involved a challenge Rhode Island's prohibition against the advertisement of alcoholic beverage prices.[52] The state fined *44 Liquormart*'s owner for making an implied reference to liquor prices in his advertisements.[53] The district court found the statute unconstitutional,[54] but the circuit court reversed.[55] A divided Supreme Court reversed the circuit court, finding Rhode Island's ban unconstitutional.[56] In striking down the ban, the Court disagreed on the analysis to apply. Writing the plurality opinion, Justice Stevens expanded *Central Hudson*'s analysis, acknowledging a new "special care" requirement in the

48. *See* Va. State Bd. of Pharm., 425 U.S. at 771.

49. *See Central Hudson*, 447 U.S. at 566.

50. *See* Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

51. 517 U.S. 484, 488-89, 528 (1996).

52. *Id*. at 489-90. The first statute prohibited advertising the price of alcohol by in-state and out-of-state venders. *Id*. The second statute prohibited the Rhode Island news media from broadcasting advertisements containing alcoholic beverage price references. *Id*. The stated purposes of the statutes included furtherance of the state's temperance goals. *Id*.

53. *Id*. at 492-93 (stating that a $400 fine was imposed on the vendor for his advertisements, which included references to low prices for chips and mixers and identified, without reference to price, brands of available liquor).

54. 44 Liquormart, Inc. v. Racine, 829 F. Supp. 543, 545 (R.I. 1993).

55. *44 Liquormart*, 517 U.S. at 494 (citing 44 Liquormart, Inc. v. Racine, 39 F.3d 5 (1st Cir. 1994)).

56. *44 Liquormart*, 517 U.S. at 516.

four-pronged test.[57] Concurring, Justice O'Connor disagreed with Stevens' expansion, and affirmed *Central Hudson*'s four-part approach, finding that the ban violated the fourth prong.[58] Thus, while a plurality of the Court flirted with expanding the Commercial Speech Doctrine, no majority opinion existed to change it Doctrine.[59]

Subsequent Court decisions also failed to expand *Central Hudson*, but suggested the reasonableness of Stevens's *44 Liquormart* opinion. In *Greater New Orleans Broadcasting Association v. United States*, the Court referenced the judicial disagreement between O'Connor and Stevens, but declined to affirm Stevens' "special care analysis," unanimously adhering to *Central Hudson*'s four-part analysis.[60] *Greater New Orleans* involved a challenge to a federal statute prohibiting television or radio broadcasts of lottery and casino-gambling advertisements.[61] The Court found that the ban failed *Central Hudson*'s third prong because the restriction speech did not further Louisiana's interests in reducing the social cost associated with gambling[62] and assisting neighboring states'

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57. *44 Liquormart*, 517 U.S. at 500. Justice Stevens derived the "special care" language from *Central Hudson*. *Id*. (citing Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 n.9 (1980)). In *Central Hudson*, the Court stressed the need to treat regulations that ban commercial speech with "special care" to further non-speech-related policies. *Central Hudson*, 447 U.S. at 566 n.9.

58. *44 Liquormart*, 517 U.S. at 532 (O'Connor, J., concurring). O'Connor maintained that Steven's expansion was unnecessary and uncalled for because the Court could find the regulation violated *Central Hudson* standard without it. *Id*.

59. Stevens also addressed the state's contention that the legislature's ban should enjoy considerable deference because the state alone has the authority to prohibit advertising outright. *See* Lehv & Wiggins, *supra* note 47, at 431. Stevens rejected this contention and warned that "banning speech may sometimes prove far more intrusive than banning conduct." *Id*. (citing *44 Liquormart*, 517 U.S. at 511).

60. 527 U.S. 173, 183 (1999).

61. *Id.* at 176. 18 U.S.C. § 1304 (2003) houses the prohibition on gambling. During the first half of the 20th Century, § 1304's predecessor banned all broadcasts that disseminated information about lotteries. *Id*. The Federal Communications Commission enforced this ban through administrative sanctions on radio and television licensees. *Id.* (citing 47 C.F.R. § 73.1211 (1998)). However, in the last half of the 20th Century, Congress responded to the popularity of lotteries by narrowing the scope of § 1304. *Id.* at 178. Now, § 1304 allows advertisements for state-conducted lotteries, so long as they are broadcast from within the state conducting the lottery. *Id.* (citing 18 U.S.C. § 1307(a)(1)(B)). Additionally, Congress allows gambling by Native American casinos, not-for-profit organizations, and commercial organizations for which gambling is "clearly occasional and ancillary to its primary business." *Id*. at 179 (citing 18 U.S.C. § 1307(a)(2); 25 U.S.C. § 2710).

62. *Id.* at 185. According to Louisiana's Solicitor General, the social costs of gambling

prohibitions gambling. The Court also found that the ban failed the fourth prong because the regulation was not narrowly tailored.[63]

In 2001, the Court again affirmed *Central Hudson*'s analysis in *Lorillard Tobacco Co. v. Reilly*.[64] *Lorillard Tobacco* involved a challenge to Massachusetts's restriction on point-of-sale and outdoor tobacco advertisements.[65] The lower courts found that the ban did not violate free speech,[66] but the Supreme Court disagreed.[67] While again acknowledging the debate in *44 Liquormart*, the Court nevertheless affirmed *Central Hudson*'s analysis.[68] The Court recognized Massachusetts's multiple interests, but found that the restriction on point-of-sale advertising failed *Central Hudson*'s third and fourth prongs,[69] and that the ban on outdoor advertising failed the fourth prong.[70] Like *New Orleans*, the Court focused on the relationship between the stated interests and the restrictions imposed, finding that the ban violated the *Central Hudson*'s third and fourth prongs.[71]

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stem from the compulsive nature of the activity and include the promotion of organized crime, corruption, bribery, drug trafficking, and the imposition of a regressive tax on the poor. *Id*.

63. *Id*. at 188. The Court reasoned that because the ban restricted more speech than just the speech that threatened Louisiana's first interest—the dangers associated with gambling—the ban failed *Central Hudson*'s fourth prong. *Id.* at 189. The Court also determined that the second interest—preventing gambling ads from traveling into neighboring states that prohibit private casinos—failed *Central Hudson* scrutiny because the exceptions to § 1304 allowed various forms of gambling to travel across state lines. *Id.* at 194-95.

64. 533 U.S. 525 (2001).

65. *Id*. at 532. The regulations at issue included those governing advertising for "cigarettes, smokeless tobacco, and cigars." *Id.* (citing MASS. REGS. CODE TIT. 940 §§ 21.01-07, 22.01-.09 (2003)). *Id.*

66. *See* Lorillard Tobacco Co. v. Reilly, 218 F.3d 30 (1st Cir. 2000); Lorillard Tobacco Co. v. Reilly, 76 F. Supp. 2d 124 (D. Mass. 1999).

67. *Lorillard Tobacco*, 533 U.S. at 571 (permitting states to combat underage tobacco use through appropriate advertising restrictions, but recognizing that the First Amendment may protect the commercial speech of tobacco companies and remanding the case for further proceedings).

68. *Id*. at 554-55 (citing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501, 510-14 (1996); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 184 (1999)).

69. *Id*. at 566. See also *id.* at 566-67 for a discussion of how the *Central Hudson* test applied to the Massachusetts ban on indoor tobacco advertising.

70. *See id.* at 556-61. The Massachusetts's Attorney General proved that the ban on such advertising directly advanced the state's proffered interest in regulating that speech, satisfying the third prong. *Id.* However, the Court subsequently found the regulation was too broad. *Id*. at 565.

71. *Id.* at 556-61, 563. In describing the failed relationship between the restriction and Massachusetts's interests, the court stated:

> [T]he State's goal is to prevent minors from using tobacco products and to curb

In 2002, the Court analyzed commercial speech in *Thompson v. Western States Medical Center*.[72] *Thompson* involved a challenge to section 503(a) of the Food and Drug Administration Modernization Act of 1997 (FDAMA).[73] A group of pharmacists that were engaged in drug compounding activities challenged the FDAMA's conditional ban on advertising compounded drugs.[74] The government defended the ban as promoting three interests: protection of public health;[75] preservation of the availability of some compound drugs;[76] and achievement of a balance between the first two interests.[77] The Court found the ban unconstitutional, reasoning that the ban violated *Central Hudson*'s third prong because the government failed to demonstrate that the challenged restriction promoted the stated interests.[78]

In 2002, the Court also affirmed its treatment of commercial speech cases in *Watchtower Bible & Tract Society of New York, Inc.*

> demand for that activity by limiting youth exposure to advertising. The 5-foot rule [imposed on tobacco advertisers who place ads at the point-of-purchase] does not seem to advance that goal. Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.

Id. at 566.

72. 535 U.S. 357 (2002).

73. 21 U.S.C. § 353(a). This section exempts "compound drugs" from the Federal Drug Administration's (FDA's) standard drug approval system so long as the providers of those drugs honor specific restrictions. *Id*. One such restriction is the prohibition against advertising for certain listed compound drugs. *Thompson*, 535 U.S. at 360. The Court described drug compounding as "a process by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient." *Id*. at 360-61.

74. *Thompson*, 535 U.S. at 360. The state alleged that it had an interest in regulating compound drugs because the laws regulating ordinary drug manufacturers did not apply to manufacturer's engaged in compounding activities, and that compounding raised the same concerns associated with manufacturer's—mainly injury to the public consumer. *Id.* at 363-64.

75. *Id.* at 368. This interest included the goal of preserving the effectiveness of the "new drug" approval process. *Id.* at 368-69.

76. *Id.* at 368. Congress understood that commercially available non-compounded drugs did not always meet every patient's specific medical needs. *Id.* at 369.

77. *Id.* at 368. The third interest demonstrated Congress' recognition of the need to draw a line between large-scale public health issues and small-scale compounding activities. *Id.* at 370.

78. *Id.* at 373. The majority found that the other restrictions placed on pharmacists and doctors who mixed compound drugs, could also have served the state's interests. *Id.* at 371. Further, the Court found that the government did not meet its burden because it failed to provide legislative history documenting that these considerations played a prominent role in enacting the ban. *Id.* at 373.

v. Village of Stratton.[79] *Watchtower Bible* involved the challenge of a village ordinance that required door-to-door salesmen to obtain a permit before soliciting.[80] The petitioners organized Jehovah's Witnesses preaching activities and desired to enter private property to preach without obtaining the permit.[81] Although the petitioners claimed that they only solicited donations and did not sell products, the ordinance specifically required Jehovah's Witnesses to obtain a permit.[82] Both lower federal courts upheld the ordinance as content-neutral because it prohibited *any* uninvited solicitor from entering private property without cause.[83] The Supreme Court reversed.[84] It reasoned that the ordinance violated *Central Hudson*'s third prong because organizations without large funds often rely on door-to-door activities to spread their message.[85]

Thus, despite challenges to *Central Hudson*'s analysis the Court continues to adhere to its tenents and has yet to expand it or otherwise increase commercial speech protection.[86] The Court focuses on whether state restrictions promote lawful activity conducted in a non-misleading manner, the government has a substantial government interest in regulating the speech, the regulation directly advances the interest, and the regulation is narrowly-tailored.[87]

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79. 536 U.S. 150 (2002).

80. *Id.* at 154. Section 116.01 of Ohio's Ordinance No. 1998-5 prohibited solicitors or peddlers from entering private property unless they possessed a permit. *Id.* at 154 n.1. It required the solicitor or peddler to carry the permit on his person when canvassing and to present the permit to any police officer or property owner who requested to see it. *Id.* at 155.

81. *Id.* at 157-58.

82. *Id.* at 157 n.6.

83. *Id.* at 158-60. The district court upheld the ordinance by curing three overly broad provisions: a provision requiring that applicants list the specific addresses of homes they intend to visit; a provision allowing applicants to satisfy section 116.03(b)(6) by stating their purpose as the Jehovah's Witness ministry; and a provision that banned canvassing after 5:00p.m. *Id.* at 158. The circuit court affirmed the content-neutrality of the ordinance. *Id*. at 159.

84. *Id.* at 169.

85. *Id.* at 163–74.

86. *See supra* notes 51, 59, 60, 68, and accompanying text; *see also* Kasky v. Nike, Inc., 45 P.3d 243, 251 (Cal. 2002) (discussing California Supreme Court's application of the *Central Hudson* test in determining the constitutionality of a commercial speech regulation). The United States Supreme Court dismissed its initial granting of certiorari on June 26, 2003, again declining the opportunity to alter the Commercial Speech Doctrine.

87. *See supra* note 45 and accompanying text.

B. The History of Adams v. Nevada Athletic Association

The trend of using tattoos on the backs of boxers as commercial speech began on September 29, 2001.[88] Following Trinidad's lead, super bantamweight fighter Clarence "Bones" Adams sought to wear a tattoo advertisement for Golden Palace during a bout scheduled for February 23, 2002.[89] Prior to that fight, the Commission banned the use of temporary tattoos by all boxers competing in a Nevada ring.[90] The Commission proferred three concerns supporting the ban: boxer safety, judging accuracy, and dignity of the sport.[91]

Adams challenged the ban, seeking a preliminary injunction in Nevada's Eighth District Court.[92] The court awarded Adams an injunction, finding that the ban violated the First Amendment's protection of speech because the ban did not advance the Nevada's asserted interests and was not reasonable as to time, manner, and place.[93] In so ruling, the court impermissibly extended the constitutional protection afforded commercial speech.

II. ANALYSIS

A. The Advertisement at Issue Fits the Definition of Commercial Speech

In order to distinguish between commercial and expressive speech, a content analysis of the speech at issue must be performed.[94] The content of Adam's temporary tattoo encouraged consumers to visit and engage in commercial transactions on GoldenPalace.com.

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88. Iole, *supra* note 2, at 7C.

89. Adams v. Nev. Athletic Comm'n, No. A 446674, 2002 WL 1967500, at *2 (Nev. Dist. Ct. 2002).

90. *Id*.

91. *Id.* at *1. *See also* NEV. ADMIN. CODE ch. 467, § 598(1) (requiring all boxers to present a tidy appearance); Iole, *supra* note 2; Kirk D. Hendrick & Keith E. Kizer, *National Association of Attorneys General Seeks to Improve the Sport of Boxing*, NEVADA LAWYER, April, 1999, at 22.

92. Adams, 2002 WL 1967500, at *1.

93. *Id*. at *2 (stating the findings of the district court).

94. *See, e.g.*, Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 153 (2002).

The content of the ad encouraged a commercial transaction. Hence, it clearly fits within the meaning of commercial speech.

B. Reviewing Courts Should Uphold the Commission's Ban Because the Ban is Content-Neutral

Because temporary tattoo advertisements constitute commercial speech, the rationale applied by the Court in *Virginia State Board* applies.[95] In *Virginia State Board* the Court held that a content neutral commercial speech regulation is permissible, excusing the regulation's time, manner, and place restrictions.[96] As found by the district court in *Adams*, the Commission's restriction is content-neutral.[97] Therefore, the ban should be upheld.

Even ignoring the district court's finding in *Adams*, the Commission's ban is not content-specific. In *Virginia State Board*, the Court found that the public possessed an important need for the free flow of information regarding prescription drug prices that trumped the government's interest in maintaining "professional decorum."[98] Unlike the ban in that case, the Commission's ban does not disrupt the free flow of information. Rather, the Commission's ban merely disrupts the means of transferring that information. Thus, the Commission's ban of temporary tattoos is permissible, and a reviewing court should not uphold the district court's determination that the ban violates the First Amendment.

C. Presuming the Ban is not Content-Neutral, the Ban still Fails to Infringe on Speech Protected by the First Amendment

Central Hudson's four-pronged analysis applies to non-content-neutral restrictions of commercial speech.[99] Even if the Commission's ban restricts commercial speech in a content-specific

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95. Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976).

96. *Id.*

97. *Adams*, 2002 WL 1967500, at *1. The district court found that the ban applied [i]rrespective of content." *Id.*

98. *Va. State Bd. of Pharm.*, 425 U.S. at 761.

99. *See supra* notes 42–87 and accompanying text.

manner, the ban should be upheld because it satisfies *Central Hudson*'s test.

1. Application of the First Prong

The Commission's ban survives *Central Hudson*'s first prong, which seeks to determine whether the First Amendment protects the desired expression.[100] The First Amendment only protects commercial speech that concerns lawful activities.[101] Bans on speech promoting illegal activity are entirely constitutional.[102] While Nevada permits gambling activities,[103] it prohibits online gambling.[104] The content of speech at issue in *Adams* encourages online gambling.[105] Therefore, the ban concerns illegal activity and survives scrutiny under *Central Hudson*'s first prong.

2. Application of the Second Prong

The Commission's ban also survives *Central Hudson*'s second prong, which seeks to determine whether the government has a substantial interest in restricting the challenger's speech.[106] In *Central Hudson*, *44 Liquormart*, *Greater New Orleans Broadcasting Ass'n*, *Lorillard Tobacco*, and *Thompson*, the Court deferred to the

100. Lehv & Wiggins, *supra* note 47, at 430 (citing Cent. Hudson Gas. & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980)).

101. *Central Hudson*, 447 U.S. at 560; *see also* Lorillard Tobacco Co. v. Neilly, 533 U.S. 525, 554 (2001); Greater New Orleans Bd. Ass'n v. United States, 527 U.S. 173, 183 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 500 n.9.

102. *Id.*

103. NEV. REV. STAT. § 463.0129(1)(a) (2002).

104. *See id.* §§ 465.091 (2002) (defining "medium of communication" to include the Internet), 465.092(1) (prohibiting a person from knowingly accepting a wager through any medium of communication other than in-person communication), 465.093(1) (prohibiting a person from knowingly transmitting a wager through any medium of communication other than by in-person communication); *see also* Defendant's Opposition to Petitioner's Motion, 2, Adams v. Nev. Athletic Comm'n, No. A446676, 2002 WL 1967500 (Nev. Dist. Ct. 2002) [hereinafter *Defendent's Opposition*] (arguing that because the message conveyed by the temporary tattoo advertisement does not concern a lawful activity in the State of Nevada, the court must deny the Adam's claim).

105. *See supra* note 8.

106. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).

legislature's stated interests.[107] In *Adams*, while not explicitly deferring to the Commission's interests in preventing the distraction of judges and preserving the dignity of the sport, the district court failed to indicate any deficiency in those interests.[108] Thus, the ban satisfies *Central Hudson*'s second prong.

3. Application of the Third Prong

The Commission's ban also survives *Central Hudson*'s third prong, which requires that commercial speech restrictions directly advance the government interests.[109] The district court found that the Commission failed to show that the ban directly advanced its articulated interests.[110]

However, banning temporary tattoos does in fact, forward the Commission's articulated interests. In *Thompson*, *Lorillard Tobacco*, and *Greater New Orleans*, the court analyzed the nexus between the stated interests in restricting commercial speech and the imposed restriction, reasoning in each case that a government must demonstrate that the restriction directly alleviates a real concern.[111] The Commission's ban alleviates real concerns. Interfering with a judge's duties while scoring a bout will cause harm to boxing.[112] Judges play a crucial role in determining the winner, and the integrity of the sport may suffer if a judge cannot accurately score a fight.[113]

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107. Thompson v. W. States Med. Ctr., 535 U.S. 357, 371 (2002); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001); Greater New Orleans Board Ass'n v. United States, 527 U.S. 173, 186-87 (1999); 44 Liquormart v. Rhode Island, 517 U.S. 484, 506-14 (1996); *Central Hudson*, 447 U.S. at 568-69. This fits with the Commission's argument in *Adams*. *See Defendant's Opposition*, *supra* note 104, at 5 (arguing the Commission has sole direction to manage and control all boxing contests within the State of Nevada) (citing NEV. REV. STAT. ch. 467 § 070(1) (2002)). Additionally, the Nevada Supreme Court has held that an agency's conclusions of law "are entitled to deference." *Defendant's Opposition*, *supra* (quoting Dep't of Motor Vehicles v. Torres, 779 P.2d 959, 961 (Nev. 1989)).

108. 2002 WL 1967500, at *1.

109. *Central Hudson*, 447 U.S. at 568; *see also Lorillard Tobacco*, 533 U.S. at 554; *Greater New Orleans*, 527 U.S. at 183; *44 Liquormart*, 517 U.S. at 500 n.9; Lehv & Wiggins, *supra* note 47, at 429-31.

110. *Adams*, 2002 WL 1967500, at *1.

111. *Supra* notes 71 and 78.

112. *See Adams*, 2002 WL 1967500, at *1; Iole, *supra* note 2.

113. Poor officiating can have negative effects on the image of a sport. For instance, a New York Giants fan will likely characterize the 2003 playoff loss to the San Francisco 49ers as a

The temporary tattoo markings are much larger than a typical clothing logos or even typical permanent tattoos[114] as illustrated by Hopkins' GoldenPalace.com endorsement.[115] These tattoos will distract judges given their excessive size.[116] Thus, by prohibiting the large ink markings on boxer's backs, the Commission alleviates a judge's distraction.

Safety is also a real concern.[117] Because of the tattoo's temporary nature, the ink runs during bouts.[118] The ink has the potential to rub into a boxer's eyes.[119] Prohibiting temporary tattoo advertisement in the ring prevents this health and safety risk, a risk not associated with the other forms of advertising permitted by the Commission. Therefore, the ban survives *Central Hudson*'s third prong, because it directly alleviates the government's concerns.

4. Application of the Fourth Prong

Finally, the Commission's ban satisfies the fourth prong, which requires the regulation to promote the stated interest using the least restrictive means.[120] The Commission's ban is clearly narrowly-

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"fixed" game. Although the referee simply made the wrong call at a key point in the game, spectators will likely see the score as the result of a larger conspiracy against the Giants. Such opinions can lead to a broader belief that victories do not come by honest in the National Football League; *see also* Associated Press, *Real Deal Real Lucky: Lewis Dominates Holyfield in 12, but Judges Rule Title Bout a Draw*, SPORTS ILLUSTRATED (Mar. 15, 1999), *available at* http://sportsillustrated.cnn.com/more/boxing/news/1999/03/13/fight_story/ (describing the boos from the crowd after the judges' scores were announced).

114. Kernaghan, *supra* note 116 (describing the tattoos as "large Henna temporary tattoos").

115. *Tattooed Hopkins Breaks Record with Latest Victory*, BOXING NEWS, *at* http://euro.goldenpalace.com/boxing/hopkins-vs-daniels.htm (last visited Mar. 23, 2003).

116. Stuart Kernaghan, *Golden Palace Tattoos Breed Controversy*, *at* http://www.winneronline.com/articles/april2002/golden_palace.htm (Apr. 22, 2002).

117. Iole, *supra* note 2 ("The commission was concerned that the tattoos could smear and get into the eyes of fighters."). For information on the Commission's general concern for boxer safety, see Hendrick & Kizer, *supra* note 91.

118. Chris Bushnell, *Hopkins Dismantles Trinidad in Shocker*, *at* http://www.cyberboxingzone.com/boxing chronicle/articles_titoloses.html (last visited Mar. 23, 2003) (describing the payment Hopkins received from Golden Palace as a "good deal" because the markings ran off after only a few rounds).

119. *See* Iole, *supra* note 2 (suggesting that the ink could find its way to a boxer's eyes).

120. Cent. Hudson Gas & Elec. v. Pub. Serv. Corp. of N.Y., 447 U.S. 557, 569 (1980); *see also* Part I.A.2.

tailored. The ban is limited to only temporary tattoos,[121] and it continues to permit a fighter to endorse products on his shorts[122] and the shirts worn by his "corner men,"[123] as well as permanent tattoos.[124]

The ban also addresses the Commission's distraction concern[125] by the least restrictive means. Unlike logos placed on the boxer's shorts or the corner men's shirts, the temporary tattoo advertisements endorsing GoldenPalace.com used large lettering that covered most of the boxer's back.[126] The ban prohibits only this.

Whether the ban addresses the Commission's dignity concern turns on what the Commission means when it states that it has an interest in maintaining dignity.[127] The Commission does not impose a similar ban on permanent tattoos, which suggests the insincerity of the dignity concern.[128] This argument is unpersuasive because the fourth-prong requires a ban to affect the stated interest in the least intrusive means.[129] The sheer largeness of the temporary tattoo endorsement poses a threat to boxing's dignity. Thus, the ban targets in the least intrusive means, those markings that pose only the greatest risk to the sport's dignity.[130] While the Commission could target all tattoos, it focuses only on temporary tattoos, permitting other types of commercial speech and narrowly tailoring its ban.

Hence, even if we assume that the Commission's ban is content-based and the speech at issue concerns legal activity, the

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121. Adams v. Nev. Athletic Comm'n, No. A446674, 2002 WL 1967500, at *1 (Nev. Dist. Ct. 2002) (acknowledging that the Commission did not ban permanent tattoos).

122. *See Defendant's Opposition*, *supra* note 104, at 6. The boxer has a variety of alternative places to advertise, including his robe and shorts. *Id.*

123. *See id.* (listing the jackets of corner men as potential sites upon which to place logos). The term "corner men" refers to the three or four men who assist the boxer between rounds. *See* NEV. ADMIN. CODE ch. 467, § 628 (2002) (describing the corner men as "seconds"). Each of these men typically wears clothing bearing the boxer's name in the boxer's colors.

124. *See supra* note 121.

125. *See supra* text accompanying note 108.

126. Kernaghan, *supra* note 116.

127. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 568-69 (1980).

128. *Id.*

129. *Id*. at 564-66.

130. Adams v. Nev. Athletic Comm'n, No. A446674, 2002 WL 1967500, at *1 (Nev. Dist. Ct. 2002). The district court's characterization of the "undignified nature" of these tattoos suggests such a conclusion. *Id.*

Commission's actions still should uphold because the ban survives *Central Hudson*'s analysis.

III. PROPOSAL

A. The Commission Should Re-Institute the Ban on Temporary Tattoo Advertisements

Because Adams's scheduled boxing match took place in February of 2002, the *Adams* injunction can not be timely appealed by the Commission.[131] However, based on the above analysis, the Commission should re-adopt the ban on temporary tattoo advertisements. The Commission can survive any constitutional challenge to its ban by connecting the ban to Nevada's interests and debunking attempts to analyze the ban's time, manner, and place reasonableness.

B. A Reviewing Court Should Not Follow Adams

Because the ban addresses commercial speech in a content-neutral manner, *Virginia State Board of Pharmacy* permits the restriction to stand as a legitimate commercial speech limitation.[132] However, even if the ban fails a content-neutral examination as ordered by the court in *Adams*, it retains viability because it survives *Central Hudson*'s analysis.[133] Therefore, a reviewing court should uphold the Commission's ban on temporary tattoo advertisements.

CONCLUSION

The District Court for the Eight District of Nevada erred when it enjoined the Commission's ban on the use of temporary tattoo advertisements.[134] The ruling extended the constitutional protection

131. NEV. R.A.P. 4(a) (2002).
132. Va. State Bd. of Pharm. v. Va. Citizens Consumer Counsil, 425 U.S. 748, 771 (1976).
133. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566-69 (1980).
134. *Adams*, 2002 WL 1967500, at *1-*2.

of commercial speech beyond that which the Supreme Court holds protectable under the landmark cases since 1976, and hence, it should be ignored.