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**CONSTITUTIONALITY OF NEW YORK LAW
GOVERNING BROADCASTING OF HORSE
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CONSTITUTIONALITY OF NEW YORK LAW GOVERNING BROADCASTING OF HORSE RACING

KELLY MARKS, '06

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Memorandum of Law

Kelly Marks
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Class of 2006

Re: Constitutionality of New York Law on Televising Horse Racing

Question Presented

1. Are New York Racing, Pari-Mutuel, Wagering and Breeding Law § 1003 (1), entitled “licenses for simulcast facilities,” and its attendant regulations limiting the simulcast of races into “individual and group residences, homes and common living areas,” valid under *Greater New Orleans Broadcasting Ass’n v. United States*, which held that a federal law banning broadcast advertisements of private casino gambling, but not tribal-owned casino gambling or state-run lotteries, violated the First Amendment’s protection of commercial speech?
2. Are §§ 4004.6 and 4210.6 of title nine of the Official Compilation of Codes, Rules and Regulations of the State of New York governing the “transmission of racing information” unconstitutional prior restraints on free speech, under *Freedman v. Maryland* which requires a prompt process of “judicial determination” for content-based licensing schemes, when §§ 4004.6 and 4210.6 regulate the content of speech and fail to provide for a judicial review process of the Racing and Wagering Board’s licensing decision?

Brief Answer

1. Possibly. A court might possibly find New York’s statutory and regulatory scheme for licensing in-home simulcasts violates First Amendment rights to commercial speech because the government’s interests in enacting the laws and regulations are conflicting and the laws and regulations are ineffective at advancing these interests.
2. Probably. A court would probably find that New York’s regulations of the transmission of racing information are content-based regulations that do not provide for a government-initiated

judicial review of the Board's decision, a time constraint on suppression of speech resulting from the Board's denial of a license during the judicial review process, and speedy judicial review.

Facts

New York grants licenses allowing racing associations or corporations or regional off-track betting corporations permitted to conduct pari-mutuel wagering to simulcast horse races for the purposes of betting. N.Y. RAC. PARI-MUT. WAG. & BREED. § 1003 (1)(a) (McKinney 2004).

Generally, the state will not grant licenses to simulcast horse races into individual or group homes or common living areas. § 1003 (1)(a). However, § 1003 (1)(a) does authorize racing associations, corporations, and off-track betting corporations, acting together, to “experiment” with “in-home” simulcasts of races for which the off-track betting corporation is allowed to take bets until June 30, 2007. § 1003 (1)(a). Residences must be within the off-track betting corporation's geographic region, capable of receiving the simulcast signal, and a contracting party. § 1003 (1)(a). In addition, revenues must be distributed per contractual agreement and in line with statutory requirements. § 1003 (1)(a).

The New York State Racing and Wagering Board is charged with reviewing and awarding license applications for in-home simulcasting. N.Y. COMP. CODES R. & REGS. tit. 9, § 4101.3 (2003). When deciding whether to award a license for in-home simulcasts of races, the Board takes into account the type of information to be simulcast, origin and destination of the simulcast, contractual terms between “simulcaster” and recipient, and other pertinent information. See N.Y. COMP. CODES R. & REGS. tit. 9, §§ 4004.6, 4210.6 (2003).

According to the legislative intent statement, the purpose of the statute relating to simulcasting horse races is to promote simulcast experimentation to further economic gains, as long as the simulcasts do not endanger “employment opportunities” or “operations” of racing

organizations, tracks and corporations. N.Y. RAC. PARI-MUT. WAG. & BREED. § 1000 (McKinney 2004). The Legislature also found that the racing industry provides significant economics benefit to the state and its municipalities. § 1000. Moreover, the Legislature stated that simulcasting races where betting is authorized will increase state and local revenue. § 1000.

Discussion

I. FIRST AMENDMENT PROTECTION OF COMMERCIAL SPEECH FROM GOVERNMENT REGULATION

Both commercial and non-commercial speech is protected from undue government restriction by the First Amendment, although to varying degrees. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 562-563, 561, 100 S.Ct. 2349, 2350 (1980). Commercial speech is speech which “proposes a commercial transaction.” *Anderson, et al v. Treadwell*, 294 F.3d 453, 459 (citation omitted) (2002). Relative to other forms of speech, it is afforded reduced “protection” from restriction by States under the First and Fourteenth Amendments. *Central Hudson*, 447 U.S. at 561, 100 S.Ct. at 2349. To determine whether a government restriction on commercial speech violates the First Amendment, courts apply the *Central Hudson* test. *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 183, 119 S.Ct. 1923, 1930 (1999). In general terms, the test requires that (1) the speech in question be “protected by the First Amendment,” (2) the government have a “substantial interest” in regulating the speech, (3) the legislation “directly advances” that interest, and (4) the legislation “not be more extensive” than required to advance that interest. *Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2351.

The First Amendment protects commercial speech that, at a minimum, relates to a legal action and is not “misleading.” *Greater New Orleans Broadcasting Ass'n, Inc.*, 527 U.S. at 183, 119 S.Ct. at 1930. In *Greater New Orleans Broadcasting Ass'n, Inc.*, federal laws and

regulations banned Louisiana radio and television stations from advertising casino gambling at privately-owned casinos because the advertisements reached, under some circumstances, states where such gambling was illegal. *Id.*, at 180-181, 1928-1929. The Court found the advertisements were constitutionally-protected commercial speech because they would transmit non-misleading information about gambling at private casinos, a legal activity in Louisiana and Mississippi. *Id.*, at 184, 1930.

While the Court does usually not make judgments about policy choices, it will question the substantiality of the state's interest if the statutory scheme appears incoherent. *Id.*, at 187, 1932. For example, in *Greater New Orleans Broadcasting Ass'n, Inc.*, the Court doubted the substantiality of the government's interests in lessening gambling's societal costs by lowering demand and helping states choosing to limit or forbid gambling within their borders, but it ultimately recognized the government's interests as substantial. *Id.*, at 185-186, 1931. The Court was concerned with the congressional policies of suppressing gambling in privately-owned casinos and simultaneously promoting gambling through exceptions for tribal-owned casinos and state lotteries subverted the government's asserted interests. *Id.*, at 187, 1931.

A restriction on commercial speech directly advances a substantial government interest if it effectively and closely supports that interest. *Id.*, at 188, 1932. In *Greater New Orleans Broadcasting Ass'n*, for instance, the Court held the legislative scheme banning privately-owned casino advertising while allowing advertising for tribal-owned casinos and state lotteries unconstitutional in part because it did not further the government's interest in lessening social costs of gambling by lowering demand. *Id.*, at 188-189, 1932. The Court reasoned that the government weakened its asserted interest by passing other statutes allowing state lotteries, tribal-owned casinos, and not-for-profit gambling establishments to advertise on broadcast

media. *Id.*, at 178-179, 189; 1928-929, 1933. It noted that gamblers might be “channeled” to tribal casinos and away from private casinos by the permitted advertisements. *Id.*, at 189, 1933.

The Court determines whether a restriction is more extensive than required to advance an interest by considering whether the restriction reaches all commercial speech or a narrowly defined segment, the restricted commercial speech jeopardizes the asserted interest or “misleads the public,” and the government failed to demonstrate that its interest cannot be advanced by “more limited regulation” of commercial speech. *Central Hudson*, 447 U.S. at 570, 100 S.Ct. at 2353-2354 (holding that a New York regulation banning *all* advertisements encouraging electricity use violated First Amendment protection in part because the regulation forbade advertising of products or services irrespective of their effect on “energy use” and banned advertising that promoted energy efficiency, and the government failed to show that a narrowly-tailored regulation could not advance its interests of energy conservation and fair and efficient rates (emphasis added)). In *Greater New Orleans Broadcasting Ass’n*, for example, the Court found that the government’s failure to present a compelling basis for forbidding all private casino-owners from advertising as opposed to tribal- or state- owned or run gambling contributed in part to the finding that the legislation’s scope was over-extensive. *Greater New Orleans Broadcasting Ass’n, Inc.*, 527 U.S. at 191, 119 S.Ct. 1934.

II. FIRST AMENDMENT PROTECTION AGAINST UNCONSTITUTIONAL PRIOR RESTRAINTS

Regulating speech through licensing schemes presents another potential First Amendment concern because the schemes may pose an unconstitutional prior restraint on speech. A regulation requiring a speaker to obtain a license before speaking constitutes a prior restraint on speech. Such a regulation is not constitutionally invalid, *per se*, but it bears a strong

“presumption” of unconstitutionality. *FW/PBS, Inc. v. City of Dallas et al.*, 493 U.S. 215, 225, 110 S.Ct. 596, 604 (1990).

A licensing scheme will be upheld against a First Amendment-prior restraint challenge if it restricts the discretionary power of the licensing official or agency, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 2143 (1988), or if it places restrictions on the time in which a licensor may grant a license, *Freedman v. Maryland*, 380 U.S. 51, 59, 85 S.Ct. 734, 739 (1965). Two basic concepts form the foundation of the prior restraint jurisprudence. First, the Court has expressed concern that unlimited discretionary power of a licensor would lead to censorship, either by the state or by the person applying for the license. *Lakewood*, 486 U.S. at 757, 108 S.Ct. at 2144. Secondly, the Court has noted that a content-based licensing statute without time restrictions on the licensor “creates the risk of indefinitely suppressing permissible speech.” *FW/PBS, Inc.*, 493 U.S. at 227, 110 S.Ct. at 605.

In determining whether a licensing scheme authorizes an excessive use of discretion by the licensor, the *Lakewood* Court considered whether the licensing scheme contained express standards to guide a licensor’s decision. *Lakewood*, 486 U.S. at 758, 108 S.Ct. at 2144. The licensing scheme at issue in *Lakewood* required a newspaper publisher to request yearly a news rack license. *Id.*, at 759, 2145. In addition, the regulation was only directed at newspaper distribution. *Id.*, at 760. According to the Court, the licensing scheme did not provide express guidance to limit the licensor’s discretion. *Id.*, at 769, 2150. The Court gave particular weight to language in the ordinance authorizing the licensor, who is the mayor, to authorize a permit based on “(7) such other terms and conditions deemed necessary and reasonable by the Mayor.” *Id.* The licensing scheme’s scant limits on the Mayor’s power in granting licenses led the Court to

hold unconstitutional those portions of the ordinance failing to restrict discretion. *Id.*, at 772, 2152.

To ensure that a licensing scheme which regulates the content of speech provides appropriate time limits for the decision-making process, the Court requires three “procedural” measures. *Freedman*, 380 U.S. at 58-59, 85 S.Ct. at 739. The measures require that the government must “institute judicial proceedings,” “restraint prior to judicial review can be imposed only briefly in order to preserve the status quo,” and that the regulation must ensure “prompt judicial review.” *Id.*, at 62, 741. In *Freedman*, a Maryland statute required that before motion pictures could be shown in the state of Maryland they first be submitted to the Maryland State Board of Censors for approval and license. *Id.*, at 53, 736. The statute allowed the Board to deny a license based on the content of the film. *Id.* The statute did not restrict the time in which the Board could make its decision. *Id.*, at 55, 737. Moreover, the statute failed to provide a process for judicial oversight or prompt judicial review. *Id.* The Court based its holding that the statute was unconstitutional on the grounds that the “exhibitor” must initiate a cause of action to show that the film was protected speech, the film could not be shown until the Board’s decision was reviewed by a court, and the regulation did not ensure quick judicial review. *Id.*, at 59-60, 739-740.

Application

I. COMMERCIAL SPEECH; THE *CENTRAL HUDSON TEST*; AND § 1003 (1)(a) OF NEW YORK’S RACING, PARI-MUTUEL, WAGERING AND BREEDING LAW

Applying the *Central Hudson* test to § 1003 (1)(a) of New York’s Racing, Pari-Mutuel, Wagering and Breeding Law and its related regulations of in-home simulcast licenses, a court might possibly find the laws to be unconstitutional under *Greater New Orleans Broadcasting*

Ass'n, Inc. because the statutory scheme fails to directly advance the government's interest in promoting simulcasts and protecting members of the racing industry.

A. Protection of Commercial Speech under the First Amendment

The first part of the *Central Hudson* test requires that speech is the type that is protected by the First Amendment. A simulcast of horse races for the purposes of wagering is most likely commercial speech, which is speech that "proposes a commercial transaction." *Anderson*, 294 F.3d at 459 (citation omitted). A simulcast of a horse race proposes a commercial transaction because it promotes wagering by providing information on odds and payoff prices, horses racing, program numbers, names of jockeys, positions of horses, see 9 N.Y.C.R.R. § 4004.6, and a telephone number by which viewers can place bets. To be afforded First Amendment protection, the simulcast must relate to a legal activity and "not be misleading." *Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 183, 119 S.Ct. at 1930. Generally, betting on horse races is a legal activity in New York State. N.Y. CONST. art. I, § 1. Furthermore, it is likely that a court would find that simulcast racing information is not misleading, and viewers, in fact, know that their chances of winning. Therefore, a court will most likely find that a simulcast of horse racing is commercial speech protected by the First Amendment.

B. Substantiality of the Government's Interest in Regulating Commercial Speech

A court will most likely find that the government's interest in regulating commercial speech is substantial, under the second component of the *Central Hudson* test. Using the legislative intent as a statement of New York's interests, a court will likely find that encouraging in-home simulcast experiments will lead to industry growth and thereby improve the economic welfare of the state and protection of the racing industry are substantial government interests. § 1000.

However, a court may suspect that the restrictions on licenses for in-home simulcasts of horse races undermine New York's interest in promoting the use of simulcasts. The Court in *Greater New Orleans Broadcasting Ass'n* questioned the asserted government interest in minimizing the social costs of gambling because the conflicting congressional policies of suppressing private casino gambling advertising and encouraging advertisements for tribal-owned casino gambling and state lotteries subverted the government's interest. *Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 186-187, 119 S.Ct. at 1931. Similarly, a court here may question the State's interest in promoting simulcast horse races because restrictions on in-home simulcast licenses in the current law appear to thwart the spread of simulcasts and industry growth. However, as the *Greater New Orleans Broadcasting Ass'n* Court did, a court here will likely accept New York's interests as substantial despite any conflicts. *Id.*, at 186, 1931.

C. Whether the Statute Directly Advances the Government's Interests

The strongest case against the constitutionality of the in-home simulcast restrictions rests on the third prong of the *Central Hudson* test which requires that restrictions on commercial speech directly advance a substantial government interest. A court may find that the legislation fails to "directly advance" the State's interests in promoting in-home simulcasts of horse races and industry growth to further the economic welfare of the state and in protecting members of the racing industry because the legislation does not effectively enhance these interests. As the Court said in *Greater New Orleans Broadcasting Ass'n*, a law that "provides only ineffective or remote support for the government's purpose" will not be upheld. *Id.*, at 188, 1932.

Currently, § 1003(1)(a) restricts the simulcast of horse races to a limited number of private residences on an experimental basis. On one hand, restrictions on the number of licenses for in-home simulcasts appear to directly advance the government's interest in protecting race

tracks and OTB because the restrictions prevent the cannibalization of revenue at racing organizations from simulcasts of races into all private homes. It would reasonably follow that removing restrictions on the number of licenses for simulcast of races into private residences would cause a large number of bettors who normally place bets at a race track or OTB to bet on races from their homes. As a result, race tracks and OTB may lose money on other services and products they provide because of the reduced number of customers on-site. By limiting the number of licenses for simulcasts into private residences, the government encourages bettors to wager on-site at race tracks and OTB outlets.

However, a court might also find that the statute's in-home simulcast experimentation program does not directly advance the protection of racing organizations because the regulatory process for granting licenses does not specifically address issues of cannibalization. For instance, the regulations describing the application requirements for licenses to simulcast races into private residences seem ineffective in protecting members of the racing industry because they do not specifically require the Racing and Wagering Board to consider the economic impact of in-home simulcasts of races on tracks and OTB outlets or on local governments. 9 NYCRR §§ 4004.6, 4210.6. Moreover, authorizing even a small number of licenses for in-home simulcasts of races will discourage wagers from betting at race tracks or OTB outlets and will, thereby, reduce revenue at these venues. In fact, data shows that with the advent of simulcasts, in general, the handle at race tracks and OTB outlets declined throughout the 1990s. "New York Racing by the Numbers," available at <http://www2.als.edu/glc/wagering/New%20York%20Racing%20By%20the%20Numbers.doc>. In *Greater New Orleans Broadcasting Ass'n*, the Court found that statutes allowing Indian casino gambling and state lottery advertisements subvert the government's interest in reducing the social costs of gambling. *Greater New Orleans*

Broadcasting Ass'n, 527 U.S. at 189-190, 119 S.Ct. at 1933. Similarly, a court here may find that § 1003 (1)'s experimentation program and the associated regulations undermine, as oppose to advance, New York's interest in protecting members of the racing industry.

A court may also question whether the statute and regulations advance the State's interest in promoting simulcasts and industry growth and, thereby, improving state-wide economic growth. On one hand, a court might find that the state's interest is directly advanced by § 1003 (1) limitations on in-home simulcasting and its attendant regulations. To receive licenses for in-home simulcasting, regulations only require racing associations or corporations to submit basic information relating to the type of racing information simulcast, the locations of the simulcast, the manner in which the information will be simulcast, and the terms of contractual agreements relating to the simulcast of racing information. 9 NYCRR §§ 4004.6, 4210.6. A court may reason that these regulations promote the simulcast of horse racing because they ensure that accurate information pertaining to wagering is conveyed and require that simulcast locations are technologically able to simulcast information.

However, a court might find that regulations limiting in-home simulcast experiments undermine the State's goal of promoting simulcasts of horse races and the growth of the racing industry and, thereby, improving economic welfare of the state. A court might reasonably assume that demand for betting would increase if more people had access to races and racing and wagering information in their homes. In addition, a court might find that the June 30, 2007, termination date of the experimentation program discourages owners of private residences from participating in a program that will soon end.

A court may find that the legislation fails the third prong of the *Central Hudson* test because the conflicting interests in protecting members of the racing industry and promoting simulcasts seems to have produced legislations that advances neither interest particularly well.

D. Whether the Statute is More Extensive than Necessary

The fourth prong of the *Central Hudson* test requires that regulations of commercial speech be narrowly tailored to serve the government's interest. *Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 188, 119 S.Ct. at 1932. In the present case, a court may find that statutory and regulatory limitations on the numbers of private residences receiving simulcast horse races are more extensive than required to fulfill its interests in protecting the members of the racing industry and promoting the simulcast of horse races.

A court may reason that the government's interest in protecting members of the racing industry could be served by more narrowly tailored regulations in the licensing process for in-home simulcasts. The information required in the licensing application seems narrowly tailored to promote simulcasts because it addresses content of the simulcasts and the technical and contractual requirements associated with the simulcast of horse races. 9 NYCRR §§ 4004.6, 4210.6. However, these requirements appear unrelated to the government's interest in insuring the financial stability of racing organizations. A more effective regulation might require racing organizations to submit data on the economic impact simulcasting races into private residence will have on tracks and OTB outlets.

On the other hand, a court may find that the mere act of limiting the number of licenses granted for in-home simulcasts because of technological problems, for example, will serve to protect members of the racing industry. In addition, regulations permit the Racing and Wagering

Board to request additional information, to order hearings, and to approve applications “consistent with the best interests of the racing industry.” 9 NYCRR §§ 4004.6, 4210.6.

A court may find that the statute and its regulations are not narrowly tailored to serving the government’s interest in promoting the simulcast of horse races and thereby promoting industry and economic growth. In *Greater New Orleans Broadcasting Ass’n*, the Court found that “no meaningful relationship” existed between restricting advertisements based on casino or lottery ownership and the government’s interest in reducing gambling’s social costs. *Greater New Orleans Broadcasting Ass’n*, 527 U.S. at 193, 119 S.Ct. at 1935. Similarly, in the present case, a court might find that a relationship does not exist between limiting simulcasts based on the destination of a simulcast signal and the government’s interest in promoting the simulcast of horse races. In fact, a court could reason that removal of limitations on in-home simulcasts of horse races would further promote the government’s interest in the simulcast program.

A court could possibly find that the legislation fails to meet the fourth component of the Central Hudson test because the licensing process does not appear to effectively protect members of the racing industry from the economic impact of the spread of in-home simulcasts. In addition, limitations on licenses for in-home simulcasts seem to contradict the government’s interest in the expansion of simulcast races.

II. FIRST AMENDMENT PROTECTION AGAINST PRIOR RESTRAINT AND NEW YORK’S LICENSING REGULATIONS

A court would probably find that §§ 4004.6 and 4210.6, which restrict the “transmission of racing information,” are unconstitutional prior restraints on protected speech. The regulations describe criteria pertaining to the “transmission of racing information” that the Racing and Wagering Board is to consider when deciding whether to approve a license application. 9 NYCRR §§ 4004.6, 4210.6. The Board should take into account the type of information

conveyed, origination and destination points of the transmission, how the information will be broadcast, contractual terms, among other things. 9 NYCRR §§ 4004.6, 4210.6. These guidelines provide standards for the decision maker and, thereby, may prevent abuse of discretion unlike the statute at issue in *Lakewood* which provided little or no guidance for the decision-making process in granting news rack licenses. *Lakewood*, 486 U.S. at 769, 108 S.Ct. at 2150.

However, the regulations do not provide a process of State-initiated and prompt judicial review. 9 NYCRR §§ 4004.6, 4210.6. The statute at issue in *Freedman* specifically authorized the film censorship board to deny a license for a film which contained obscene language, for instance. *Freedman*, 380 U.S. at 53, 85 S.Ct. at 736. While the regulations governing licensing of the transmission of racing information do not go so far as to authorize the Racing and Wagering Board to refuse a license based on the information transmitted, the Board does consider that information in its review process. 9 NYCRR §§ 4004.6, 4210.6. By way of comparison, the Court found the ordinance at issue in *Thomas v. Chicago Park District* to be content-neutral because it only regulated the “time, place, and manner” of expression. 534 U.S. 316, 319, 322, 122 S.Ct. 775, 778, 779 (2002). In that case, the Court refused to apply the *Freedman* procedural safeguard test because the ordinance was mute on the content of the speech. *Id.*, at 322, 779. Here, §§ 4004.6 and 4210.6, however, explicitly require the Racing and Wagering Board to consider the “nature” of the racing information transmitted when making its decision to grant or deny a license. 9 NYCRR §§ 4004.6, 4210.6. A court would probably find that these standards allow the Board to regulate the content of transmitted racing information. In then applying the *Freedman* test, a court would probably hold that the regulations violate the First Amendment because they are a prior restraint on speech. The regulations clearly lack a

state-initiated judicial review of the Board's decision, a time limit on the restraint of speech following the Board's denial of a license during the judicial review process, and do not insure speedy judicial review. 9 NYCRR §§ 4004.6, 4210.6.

Conclusion

A court may possibly find that New York's laws and regulations pertaining to licensing in-home simulcast horse races are unconstitutional restrictions on commercial speech because of the inherent conflicts in the purported interests served by the laws and the ineffective means by which those interests are advanced.

A court would probably hold that New York's regulations on the transmission of racing information are unconstitutional prior restraints of speech because they probably regulate content of the transmission and they lack the *Freedman* procedural safeguards of judicial review of the Racing and Wagering Board's licensing decision.