THE NINTH CIRCUIT'S EXOTIC DANCE WITH THE COMMERCIAL SPEECH DOCTRINE

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I. INTRODUCTION

Since the 1980s, Las Vegas has successfully redefined itself from mob casinos to the status of adult entertainment center of the world.[1] Every year millions of visitors from all over the world tour the hotels lining the Las Vegas Boulevard (commonly known as the "Strip"). Tourists are entertained by the theme-based architectures and live sidewalk shows. However, pedestrians walking along on the sidewalks, watching pirate shows or water shows, are also the target of "off-premises canvassers." Off-premises canvassers are persons hired by merchants to distribute advertising handbills on the public sidewalks instead of where the businesses are located.[2] A majority of these canvassers distribute graphic advertising of erotic dancers who provide entertainment to tourists in their hotel rooms, known as "adult outcall entertainment."[3] Because merchants regard the high volume of pedestrians on the Strip as a captive audience for this form of cheap advertising,[4] the off-premises canvassers hired by them had increased to perhaps as many as ten to thirty canvassers at any particular Strip hotel sidewalk by the late 1990s.[5] Fierce competition among the canvassers led them to line up on both sides of the sidewalk forming gauntlets or cordons. Pedestrians had to pass through these cordons and were forced to accept the advertising handbills thrust at them by the canvassers.[6] The aggres-

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[1] *See William* R. Eadington, *Casino Management in the 1990s: Concepts and Challenges, in* CASINO GAMBLING IN AMERICA: ORIGINS, TRENDS, AND IMPACTS 14 (Klaus J. Meyer-Arendt & Rudi Hartmann eds. 1998).

[2] *See* Clark County Ordinance 16.12.020 (5)(a) defining "Off-premises canvassing" as distributing handbills on public sidewalks. *See* Section III of the paper which discussed the definition in more details.

[3] *See* Joint Answering Brief of Appellees, p. 7, S.O.C., Inc. v. County of Clark, 152 F.3d 1136, 1140 (9th Cir. Nev. 1998) (No. 97-15912); see also Order (Case No. CV-S-97-0123-LDG(RJJ) CV-S-97-0146-LDG(RJJ)) at 3 and 6 (March 4, 1997).

[4] *See id.* at 7.

[5] *See id.* at 9-11; *see also* Order at 6-7.

[6] *See* Order at 7.

sive nature of the canvassers resulted in intimidation, at times forcing pedestrians into the streets thereby creating potential for injury. The disputes among the canvassers sometimes required the interference of hotel security and policemen.[7] Furthermore, the large quantity of handbills discarded by pedestrians caused litter problems.

In response, and primarily to ensure pedestrian safety, Clark County enacted Ordinance 16.12 that prohibited off-premises canvassing of commercial handbills based on a traffic study that found only commercial canvassers causing these problems.[8]

Clark County modeled Ordinance 16.12 after the language of an ordinance enforced in the city of Key West, Florida.[9] Key West, a tourist community, had problems similar to those experienced by Las Vegas. The Key West ordinance banned off-premises canvassing on public beaches and required canvassers to apply permits.[10] The business people of Key West challenged the Key West ordinance as violating the First Amendment[11] of the Constitution. Nevertheless, the Eleventh Circuit Court of Appeals upheld the Key West ordinance in *Sciarrino v. City of Key West.*[12]

Likewise, two Nevada outcall-service companies challenged the Clark County Ordinance in *S.O.C. v. Clark County.* However, the Ninth Circuit Court of Appeals struck down the Ordinance as unconstitutionally "overbroad."[13] The court reasoned that the Ordinance may inhibit expressions of "fully protected noncommercial speech inextricably intertwined with commercial speech."[14] The court ruled that although the County may impose reasonable time, place, and manner restrictions on protected speech in a public forum, the Ordinance is regulating the commercial content of the speech, thus the content-based Ordinance is subject to strict scrutiny.[15]

The Ninth Circuit's ruling that the Ordinance was overbroad was based on

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[7] *Id.* at 6.

[8] *Id.*; *see also* Clark County Ordinance 16.11.040(e). Based on a traffic study conducted by the Clark County department of public works according to the methodology set forth in the Las Vegas Boulevard South Pedestrian Walkway Study. (Ord. 1616 § 1 (part), 1994).

[9] The City of Key West enacted Ordinance 94.02 which defines off-premises canvassing as distribution of information or solicitation of customers on publicly-owned property in connection with a business. Business is defined as any commercial activity in which any real property, goods or services are sold or offered for sale, performance for lease, or for rent.

[10] *See* Sciarrino v. City of Key West, 83 F.3d 364, 366 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 768 (1997).

[11] The First Amendment provides, in part, that "Congress shall make no law . . . abridging the freedom of speech . . ." By the Fourteenth Amendment, this fundamental right is also protected from invasion by state action. *See* Lovell v. Griffin, 303 U.S. 444, 450 (1938).

[12] 83 F.3d 364 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 768 (1997).

[13] 152 F.3d 1136, 1140 (9th Cir. Nev. 1998), amended by S.O.C., Inc. v. County of Clark, 160 F.3d 541 (9th Cir. Nev. 1998).

[14] *Id.*

[15] *Id.* at 1144-46.

the Supreme Court's holding in *Riley v. National Federation of the Blind.*[16] However, the *S.O.C.* Court misapplied *Riley* by making commercial speech too easy to become "inextricably" intertwined with fully protected speech. It failed to reconcile the Court's repeated holdings that commercial communications intertwined with important public issues still constitute commercial speech.[17] Furthermore, in contrast to the Eleventh Circuit's opinion in *Sciarrino*, the *S.O.C.* Court failed to draw the common sense distinction between commercial and noncommercial speech as dictated by the Supreme Court.[18] The Ninth Circuit concluded that the Ordinance was overbroad[19] when the Supreme Court has repeatedly held that the doctrine of overbreadth does not apply to commercial speech regulations. As a consequence, the Ninth Circuit erred by applying strict scrutiny to the Ordinance instead of the less restrictive intermediate level scrutiny that applies to commercial speech regulations.

In Section II this paper discusses the Supreme Court's First Amendment jurisprudence on commercial speech. It explores the non-application of the overbreadth doctrine to commercial speech. It also discusses the three levels of judicial scrutiny applicable to the public forum doctrine and the implication of the different levels of judicial scrutiny on commercial speech conducted in a public forum. In Section III the paper analyzes the *S.O.C.* opinion, and concludes that the Ninth Circuit erred by ruling the Ordinance as overbroad. This paper proposes a better approach to the problem of regulating commercial speech in public fora in Section IV.

II. BACKGROUND

A. Commercial Speech Doctrine

The Supreme Court developed the doctrine of commercial speech almost sixty years ago in *Valentine v. Christensen.*[20] In that seminal case a merchant attempted to outsmart the New York City ban on off-premises canvassing of handbills advertising submarine tours. Because New York only allowed the dissemination of "public interest" handbills, the merchant printed his ad on one side and public interest issues on the other and argued that both speeches were "inextricably" attached to the medium.[21] The Court ruled that the distribution of such handbills still constituted "commercial speech." However, the Court

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[16] 487 U.S. 781 (1988).

[17] *See, e.g.*, Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 474 (1989).

[18] This common sense distinction first appeared in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976). *See also Sciarrino*, 83 F.3d at 367.

[19] *See S.O.C.*, 152 F.3d, 1144.

[20] 316 U.S. 52 (1942).

[21] *Id.* at 53-55.

also declared that the Constitution imposed no restraint on government's power to restrict purely commercial advertising in a public forum after it unanimously upheld the City's ban.[22] (The public forum doctrine will be discussed in subsection C.) Implicitly, the Court assumed that First Amendment protection only applied to expressions of public interest and not speech motivated by the economic self-interest of the speaker.[23] Expressly, the Court decided that "commercial speech merits no First Amendment protection."[24]

1. First Amendment Affords Reduced Protection to the Commercial Speech Doctrine

It was not until 1975 that the Court took a different approach and extended a less than full constitutional protection to commercial speech.[25] The Court ranked commercial speech as a form of "lower-value" speech compared to the "high value" of political speech;[26] thus, "the Constitution accords less protection to commercial speech than other constitutional guaranteed forms of expression."[27] The Court also held that commensurate with the subordinate position of commercial speech in the scale of First Amendment values, the government has more leeway and can subject it to "modes of regulation that might be impermissible in the realm of noncommercial expression."[28]

2. Commercial Communications Containing Public Issues Still Constitute Commercial Speech

For the next twenty-five years, the Supreme Court attempted to define commercial speech in order to distinguish it from noncommercial speech, also known as pure speech, or fully-protected speech.[29] The Court first defined the core notion of commercial speech as "speech which does no more than propose a commercial transaction."[30] However, this core notion does not give clear guidance on how to classify commercial speech that contains pure speech, such as the advertising handbill in *Christensen*. Thus, the Court identified three common traits to further define commercial speech in *Bolger v. Youngs Drug*

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[22] *Id.* at 54. The Court did not decided on the "inextricable attached" argument.

[23] Arlen W. Langvardt & Eric L. Richards, *The Death of Posadas and the Birth of Change in commercial Speech Doctrine: Implications of 44 Liquormart*, 34 AM. BUS. L.J. 482, 486 (1997).

[24] *Id.*

[25] Bigelow v. Virginia, 421 U.S. 809, 826 (1975) ("The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas").

[26] *See* Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455-56 (1978).

[27] *See, e.g., Ohralik*, 436 U.S. at 455-56. Other constitutionally guaranteed speech includes political, religious, philosophical, ideological, or erotic messages.

[28] *See Fox*, 492 U.S. at 477 (quoting *Ohralik*, 436 U.S. at 456).

[29] *See, e.g., Virginia State Bd. of Pharmacy,* 425 U.S. at 762.

[30] *Id.*

Products Corp.[31]

In *Bolger*, the Court held that unsolicited mailings of contraceptives advertising to the mass public, which also contained discussions of important public issues such as family planning, constituted commercial speech.[32] It identified three common traits that when combined provided strong support for a classification of commercial speech: use of the advertisement form, a reference to a specific product, and a motivation solely related to the economic interest of the advertiser and its audience. Specifically, *Bolger* concluded that advertisements, which link a product to important public issues, still constitute commercial speech and are "not thereby entitled to the constitutional protection afforded noncommercial speech."[33]

Bolger demonstrated the Court's identification of commercial speech intertwined with pure speech as commercial speech in its entirety. However, the Court often faces the reverse situation of pure speech intertwined with commercial activities, such as charitable solicitations. Many non-profit organizations in the course of proselytizing or propagating their causes would sell products or solicit charitable donations; nevertheless, the Court treats the entire activity as pure speech.[34] Furthermore, in *Riley*, the Court has held that commercial speech will become "inextricably intertwined with otherwise fully protected speech" when the state compelled such commercial speech in a non-profit organization's donation solicitations.[35] *Riley* invalidated the North Carolina Charitable Solicitations Act that required professional fundraisers to give a "compelled statement," which must disclose the percentage of donations actually turned over to charities, before appealing for funds from donors.[36]

Riley began its analysis by categorizing the type of speech at issue.[37] It concluded that solicitation of charitable contributions is protected speech and not commercial speech.[38] In response to the State's contention that the "compelled statement" was merely commercial speech, the Court held that, if so, it was "inextricably intertwined with otherwise fully protected speech."[39] *Riley* asserts "the lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of speech taken as a whole" and finds the component parts of charitable solicitations cannot be separated from the fully pro-

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[31]463 U.S. 60, 66-67, 73-74 (1983).

[32]*Id.* at 62 n.4.

[33]*Id.* at 67-68.

[34]*See, e.g.*, Village of Schaumburg, v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) (door to door charitable solicitation is not purely commercial speech); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981)(group soliciting religious donations in parkgrounds does not lose the protection of First Amendment).

[35]487 U.S. 781, 796.

[36]*Id.* at 796, 789.

[37]*Id.* at 787.

[38]*Id.* at 788-89 (citing *Schaumburg*, 444 U.S. at 632).

[39]*Id.* at 796.

tected whole.[40]

A year after *Riley* was decided, the Supreme Court in *Board of Trustees of State University of New York. v. Fox,*[41] mandated that *Riley* does not apply to commercial speech that can be separated from pure speech. In *Fox*, a state university's regulation prohibited a corporation from conducting "Tupperware parties," which also taught home economics during the products presentation, in campus dormitory rooms.[42] The company and some college students challenged the university's regulation as violating the First Amendment. Relying on *Riley*, they contended that the home economics element of the speech is "inextricably intertwined" with commercial speech, "and that the entirety must therefore be classified as noncommercial."[43] The Court rejected the argument.[44]

More importantly, *Fox* delineated that the first inquiry for the court is to determine "whether the principal type of expression at issue is commercial speech.[45] It found that "Tupperware parties" proposed a commercial transaction and specifically rejected the student's reliance on *Riley. Fox* held that "there is nothing whatever 'inextricable' about the noncommercial aspects of these presentations." [46] *Fox* demonstrated that the inclusion of home economics teachings does not convert a Tupperware party into educational speech any more than "opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." [47] It reiterated the Court's holdings that commercial communications even if intertwined with important public issues do not convert it into pure speech.

In contrast, the commercial speech in *Riley* is "inextricably" intertwined with pure speech because the state law compelled such commercial speech. *Fox* narrowed the scope of *Riley* to protecting only government-compelled commercial speech as inseparable from pure speech.

In sum, to make a common sense distinction between commercial speech and commercial speech intertwined with pure speech, the court at the outset must determine "whether the principal type of expression at issue is commercial speech" based on the core notion of whether the expression proposes a commercial transaction.[48] If an activity seeks financial support for public causes or solicits donations while proselytizing, the entire activity is pure speech. If a government-compelled commercial statement is included in the charitable solicitation, then the compelled statement is "inextricably" inter-

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[40] *Id.*
[41] 492 U.S. 469, 474 (1989).
[42] *Id.* at 472.
[43] *Id.* at 474.
[44] *Id.*
[45] *Id.* at 473.
[46] *Id.* at 474.
[47] *Id.* at 474-75.
[48] *Id.* at 473.

twined with pure speech. However, if the commercial speech merely contains discussions of public issues, or where the pure speech elements can be separated from the commercial speech, the entire speech constitutes commercial speech.

3. *Commercial Speech Is Subject to Intermediate Level of Scrutiny*

The Supreme Court's definition of commercial speech, as proposing a commercial transaction, could exclude a great deal of modern day advertising such as "Just Do It" which does not propose to consumers to buy any Nike products.[49] It can also include political speech that essentially says "vote for me and I will lower your taxes."[50] This definition also excludes some commercial speech that is "inextricably" intertwined with fully protected speech as in *Riley*'s donation solicitations.[51] Finally, it can include communications that constitute commercial speech notwithstanding the fact that they contain important public issues as the handbill in *Chrestensen,* the mailings in *Bolger*, or the home economics teachings in *Fox.*

These overinclusive, or underinclusive problems demonstrate the difficulties of the Court's attempts with the definition of commercial speech. The Court finally narrowed the definition to "proposing a commercial transaction" in *Fox* and to rely on the distinction between commercial and noncommercial speech as a matter of "common sense distinction."[52] Nevertheless, to help the federal courts to determine whether a commercial speech regulation violates the First Amendment, in the landmark case of *Central Hudson Gas & Electricity Corp. v. Public Service Commission,*[53] the Court established a four-prong, intermediate-level scrutiny test.[54]

The first prong determines whether the commercial speech is within the ambit of First Amendment protection. To be protected, the commercial speech "must concern lawful activity and not be misleading."[55] The second prong asks whether the asserted government interest is substantial. If the answers are yes to these two questions, then the government must show that the restriction on commercial speech is "no more broad than necessary" to serve its substantial interest.[56] The Supreme Court later interpreted "no more broad than neces-

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[49]JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1066 (5th Ed. 1995).
[50]*Id.*
[51]487 U.S. at 796.
[52]*See* 492 U.S. at 473. The common sense distinction first appeared in *Virginia State Bd. of Pharmacy,* 425 U.S. 748, 772 n. 24.
[53]447 U.S. 557 (1980).
[54]*Id.* at 566, 573 (Justice Blackmun concurring opinion stating that commercial speech is subject to an intermediate level of scrutiny).
[55]*Id.* at 566.
[56]*Id.*

sary" to mean a "reasonable fit"[57] between the ends and the means when the government is regulating the "commercial content" of the expression.[58]

In comparison to the level of scrutiny applied to pure speech, the First Amendment prohibits restrictions based on the content of the message in most other contexts.[59] A regulation limiting pure speech based on its content is subject to strict scrutiny and must adopt the "least restrictive means" to advance a compelling state interest.[60] But strict scrutiny does not apply to commercial speech even though the government is regulating the "commercial content" of the speech.[61]

4. Commercial Speech meets the Overbreadth Doctrine

The Supreme Court has repeatedly and explicitly stated that the First Amendment overbreadth doctrine does not apply to commercial speech.[62] The overbreadth doctrine permits a party whose conduct is not constitutionally protected to raise the constitutional rights of third parties not before the court.[63] If the challenger can show that a number of applications of the regulation as applied against third parties will be unconstitutional, the overbreadth facial challenge may succeed. Once the challenger succeeds, even if the regulation is otherwise valid, the state can no longer enforce it against any party.[64] Consequently, the regulation would be invalidated as overbroad.

The overbreadth doctrine's principal purpose is to protect third parties "who might fear prosecution under an overbroad statute, from self-censoring or 'chilling' protected speech."[65] However, the Court understands that restrictions on commercial speech will not have the same "chilling" effect as restrictions on pure speech. *Central Hudson* specified that two features of commercial speech permitted the government to regulate its content without being subject to strict scrutiny or the overbreadth doctrine:

First, commercial speakers have extensive knowledge of both the market and

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[57]*See Fox*, 492 U.S. at 480. The reasonable fit between means and ends of commercial speech regulations is reiterated in City of Cincinnati v. Discovery Network, Inc.,507 U.S. 410, 426 (1993).

[58]The Supreme Court's distinction of content-based and content-neutral regulations presents many analytical difficulties and complexities. For a detailed discussion on this issue, *see* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113. (1981).

[59]*Central Hudson*, 447 U.S. at 564 n.6.

[60]*See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 481 (1988).

[61]*See Bolger*, 463 U.S. at 65 (quoting Friedman v. Rogers, 440 U.S. 1 (1979) (content based restrictions on commercial speech may be permissible)).

[62]Bates v. State Bar of Arizona, 433 U.S. 350, 390 (1977).

[63]Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 369 (1998); citing New York v. Ferber, 458 U.S. 747, 768-69 (1982).

[64]*Id.* at 371.

[65]*Id.* at 369.

> their products. Thus they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." (Internal citation omitted.)[66]

The Court explained that where the expression is linked to commercial self-interest, it is not easily deterred by overbroad regulations because the speaker will find other alternatives to disseminate the commercial information.[67] Moreover, the Court described the overbreadth doctrine as "strong medicine."[68] It should be employed sparingly and as a last resort only when there is "a realistic danger that the statute itself will significantly compromise the recognized First Amendment protection of third parties."[69]

To summarize, several principles emerge from the Supreme Court's jurisprudence on commercial speech. First, commercial speech is afforded less constitutional protection than non-commercial speech. Second, even though a law is regulating the "commercial content" of speech, it is only subject to intermediate scrutiny under the *Central Hudson* test.[70] Third, the overbreadth doctrine does not apply to commercial speech regulations in general. Fourth, when categorizing commercial speech or pure speech, the first question a court must determine is whether the principal type of expression at issue is commercial speech or pure speech. Such a determination should be based on common sense distinction, the three common traits of commercial speech, and the definition of "proposing a commercial transaction." Fifth, under *Riley*, only state-compelled commercial speech will become "inextricably" intertwined with otherwise protected speech. Finally, communications constitute commercial speech notwithstanding the fact they may contain important public issues under *Fox, Bolger,* and *Christensen*. These principles should guide the lower courts' determination of the constitutionality of regulations restricting commercial speech conducted in the public forum.

B. The Public Forum Doctrine

1. The Court Has Divided the Public Forum Doctrine into Three Categories

The Supreme Court has established that certain public places are protected by the Constitution in trust for people to exercise their First Amendment

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[66]*Central Hudson,* 447 U.S. at 564 n.6 (citing Bates v. State Bar of Arizona 433 U.S. 350, 390 (1977)). *See also* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 369 (1998).

[67]*See Central Hudson*, 447 U.S. at 566 n.8.

[68]*Bates,* 433 U.S. at 381.

[69]*Id.*; *see also* City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984).

[70]*Central Hudson,* 447 U.S. at 563-64.

rights.[71] The Supreme Court formalized three categories of properties under the public forum doctrine in *Perry Education Association v. Perry Local Educators' Association*.[72] The first category is the traditional public forum. It encompasses public places, such as parks and public sidewalks, because historically people used such places to disseminate information and opinion.[73] The second category is the designated public forum, or limited purpose forum, which consists of facilities the state has intentionally opened to the public for expressive activities, such as university meeting halls.[74] The third category of property is a nonpublic forum, such as jails, military bases, and airport terminals.[75]

After it delineated the three categories of public fora, the Supreme Court applied the level of judicial scrutiny based on whether the government regulation was content-neutral or content-based. Government's content-based or viewpoint regulations restricting the use of the first two categories of public fora are subject to strict scrutiny.[76] "For example, a law regulating 'communist' publications must be subject to strict scrutiny" because the government has no power to restrict expression based on its message, its ideas, its subject matter, or its content under the First Amendment.[77] Government may enforce such restrictions only if it can show that the regulation "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[78]

However, if the government regulation is content-neutral, it is subject to an intermediate level of scrutiny. The Supreme Court has held that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."[79] In *Ward v. Rock Against Racism,* the Court held that even in a public forum the government may impose "reasonable restrictions" on time, place, or manner of protected speech

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[71]Michael J. Mellis, *Modifications to the Traditional Public forum Doctrine: United States v. Kokinda and Its Aftermath*, 19 HASTINGS CONST. L.Q. 167, 169-70,(1991)(explaining Justice Robert's opinion in Hague v. CIO, 307 U.S. 496 (1939), as the origin of the public forum doctrine).

[72]460 U.S. 37, 45-46 (1983).

[73]*See id.* at 45.

[74]*See* Mellis, *supra* note 71, at 171 (quoting Widmar v. Vincent, 454 U.S. 263 (1981) and Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985)).

[75]*See* Stephen K. Schutte, *International Society for Krishna Consciousness, Inc. v. Lee: The Public Forum Doctrine Falls to Government Intent Standard*, 23 GOLDEN GATE U. L. REV. 563, 579, 586 (1993). One of the two significant principles of Lee is that publicly-owned airport terminals are nonpublic fora and government regulations are only subject to rational basis analysis.

[76]*See* Mellis, *supra* note 71, at 170-71 (The non-public forum regulations are only subject to rational basis review).

[77]*See* Ofer Raban, *Content-Based, Secondary Effects, And Expressive Conduct: What In The World Do They Mean (and What Do They Mean to the United States Supreme Court)?*, 30 SETON HALL L. REV. 551-53(2000)(quoting the basic idea of content-based/content-neutral regulation formulated in Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).

[78]*Id.*

[79]*Heffron*, 452 U.S. at 647 (citations omitted).

(TPM regulations).[80] *Ward* specified that so long as the TPM regulations do not refer to the contents of the speech, leave open alternative channels of communication, they need not adopt the least restrictive means to promote the government's substantial interest.[81] In short, if the TPM regulation is "content neutral" and the government's substantial interest is only to cure some evil, such as noise, that may implicate free speech in the public forum, it is only subject to intermediate scrutiny, the same level of judicial scrutiny applied to commercial speech.[82]

Hence, pursuant to *Ward* and *Central Hudson*, intermediate scrutiny applies to the content-neutral TPM regulations and the content-based commercial speech regulations. *Fox* endorsed this conclusion by stating that the test for commercial speech is "substantially similar to" the TPM regulations on protected speech in public forum.[83] However, commercial speech regulations are never content-neutral TPM regulations as the Court has ruled in *City of Cincinnati v. Discovery Network, Inc.*[84] Indeed, sharing the same level of scrutiny is where the similarity between the two doctrines ends.

2. *Commercial Speech Meets the Public Forum Doctrine*

The public forum doctrine is distinct from the commercial speech doctrine. When the two doctrines converge, the Court would first examine the nature of the speech in its entirety, then apply the appropriate level of scrutiny to government restrictions.[85] There are three possible outcomes under the Court's analysis.

First, as in *Fox,* the Court may determine the primary activity as commercial speech if it proposes a commercial transaction and the noncommercial messages are separable from the commercial communications. The *Hudson* test that applies intermediate-level scrutiny validates the constitutionality of the regulation, but the public forum doctrine is subsumed in the *Central Hudson*

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[80] 491 U.S. 781, 791 (1989).

[81] *Id.* at 798-800 (narrowly tailored does not require the government to adopt the least restrictive means).

[82] *Id.* at 796 (cited cases that used "substantial" and "significant" state interest interchangeably); *Id.* at 798-99 n.6 (the Court never applied strict scrutiny to TPM regulations).

[83] 492 U.S. at 477 (the test for the TPM regulation does not require least restrictive means).

[84] *See* 507 U.S. 410, 429 (1993)(government regulation to ban the use of newsracks that distribute commercial handbills is based on the different content between ordinary newspapers and commercial speech; thus, the ban is "content based").

[85] *See* Mellis, *supra* note 71, at 170-72, 195 (citing e.g., Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981)(parks and religious solicitation)). The public forum cases, or the progeny of *Perry*, are all cases involving religious, political, or other ideological expressions that are intertwined with religious solicitation, charity donation, political advertising, or picketing in the public forum. The Court treated all these cases as a restriction on fully protected speech and not commercial speech cases. In *Riley*, the Court reiterated that charitable solicitations are not commercial speech but fully protected speech.

test or ignored. For example, the "Tupperware party" conducted in school dormitories should be categorized as a non-public forum under *Perry* because the university did not open the dormitory to the public for expressive activity. Thus, rational-based scrutiny should apply; nevertheless, the *Fox* Court still applied intermediate level scrutiny and analyzed the prohibition under the *Central Hudson* Test.[86]

Second, the Court may decide that the primary activity, such as proselytizing combined with selling products or solicitation donations, is fully-protected speech. If the Court decides that the primary activity is pure speech, government regulation restricting such activity is subject to the public forum doctrine. The Court then determines whether the communication takes place in a traditional, designated, or nonpublic forum.[87] If the communication takes place in the traditional or the designated forum, the Court examines whether the regulation is content-based or content-neutral. A content-based regulation is subject to strict scrutiny. In contrast, a content-neutral TPM regulation is subject to intermediate-level scrutiny. If the communication takes place in a non-public forum, the Court only applies rational basis scrutiny to the regulation be it content-based or content-neutral.[88]

Finally, the distinction between commercial speech and pure speech may be a close question; for example, a newspaper that contains commercials and advertisements that contain public issues. In such a situation, the Court will assume the regulation as a commercial speech regulation and apply the *Central Hudson* test as in *Discovery Network*[89]

The relationship between these two doctrines, the overinclusive and underinclusive definition of the commercial speech, and the "common-sense distinction" requirement of commercial speech have created conflicting holdings in the circuit courts. At one end of the spectrum, when the government is restricting only commercial speech conducted in the public forum, the federal courts can apply intermediate scrutiny to the regulation because the government can regulate the commercial content of speech, as the Eleventh Circuit held in *Sciarrino*. At the other end, the federal courts can apply strict scrutiny by making commercial speech "inextricably" intertwined with fully protected-speech so easily that the whole speech becomes the latter and thus demand full First Amendment protection, as the Ninth Circuit ruled in *S.O.C.*

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[86]*See* 492 U.S. at 472; *See also Discovery Network*, 507 U.S. at 429. The ban on commercial newracks on sidewalks is a content-based regulation in a public or designated fora, thus strict scrutiny should apply to the city's ban. But the Court still applied Hudson's intermediate level scrutiny.

[87]*See* Schutte, *supra* note 75, at 571 (citing Justice Reqhnquist opinion in *Lee*).

[88]*See* Mellis, *supra* note 71, at 174-77 (citing United States v. Kokinda, 497 U.S. 720 (1990)(postal office sidewalks are not public forum, thus rational basis scrutiny applies to regulation on political solicitations on such sidewalks)).

[89]507 U.S. at 424 and n.19.

III. ANALYSIS

A. Facts of S.O.C., Inc. v. County of Clark

The plaintiffs, S.O.C. Inc. and Hillsboro Enterprises, Inc., are companies that provide exotic dance services to tourists and convention attendees in their hotel rooms, known as adult outcall entertainment.[90] They regularly hired canvassers to distribute leaflets that advertised such adult outcall entertainment in public streets and sidewalks in areas surrounding the Las Vegas "Strip" and the Las Vegas Convention Center (collectively the "Resort District").[91] Plaintiffs filed suits challenging the constitutionality of Ordinance 16.12 (Ordinance), which prohibited off-premises canvassing within the Las Vegas Resort District.

The American Civil Liberties Union of Nevada (ACLU) intervened. ACLU raised a facial overbreadth challenge to the Ordinance, contending that the Ordinance was facially unconstitutional because it regulated not only commercial speech but also "fully protected noncommercial speech 'inextricably intertwined' with commercial speech."[92]

The plaintiffs named Clark County (County) and the Las Vegas Metropolitan Police Department as the defendants. The Nevada Resort Association, Flamingo Hilton, Mirage Casino-Hotel, and Circus Circus Enterprises also intervened as defendants.[93] The defendants cited the Eleventh Circuit's decision in *Sciarrino* to support the validity of the Ordinance.[94]

The Nevada District Court held a one-day evidentiary hearing and, based on affidavits, photographs, and videos, found that the County satisfied the four-part test outlined in *Central Hudson*.[95] First, assuming the plaintiffs are involved in legal commercial activities and non-misleading advertising, the court found that the County had "substantial" interest in preventing the real harm caused by canvassers.[96] The district court found that the canvassers vying for strategic locations slowed pedestrian traffic and their harassing activities resulted in fights that sometimes required the intervention of hotel security or Clark County police.[97] Thus, the harm is real and substantial. Second, because

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[90] *See* Order at 3.

[91] *S.O.C.*, 152 F.3d at 1140.

[92] *Id.* at 1143.

[93] *Id.* at 1141.

[94] *See S.O.C.*, 160 F.3d at 542. In *Sciarrino*, the court held that the Florida city ordinance prohibiting off-remises commercial solicitation in tourist centers as valid under the First Amendment because the canvassers impeded free access to public roads, harassed pedestrians, and increased littering.

[95] *See* Order at 3-4.

[96] *See* Ordinance 16.12.040 which exempts the distribution of leaflets placed in authorized newsracks and stated that the purposes in passing Ordinance 16.12 were: (1) to improve the pedestrian environment; (2) to maintain accessible sidewalks (3) to prevent harassment of pedestrians; and (4) to reduce litter.

[97] *See* Order, at 6.

the Ordinance exempted newsracks, taxi-cab billboards, and other locations in the Resort District, the Ordinance left open alternative channels of communication. Thus, the Ordinance was a "reasonable" restriction that "directly" advanced the County's interest to prevent harassment of pedestrians, and to reduce congestion and litter.[98] The district court denied the plaintiff's request for a preliminary injunction.[99] The plaintiffs and the ACLU appealed.

The Court of Appeals reversed the district court's decision, holding that the civil liberties organization demonstrated probable success on the merits of its claim that the restrictions imposed by Clark County Ordinance Section 16.12 were overbroad.[100] Unlike the Key West regulation which the Eleventh Circuit determined reached no further than purely commercial speech,[101] the Clark County Ordinance was held to "reach both pure commercial speech and non-commercial speech inextricably intertwined with commercial speech."[102] In addition, the Court of Appeals held that the Clark County Ordinance not only imposed more extensive restrictions than the Key West Ordinance, but also lacked several of the narrowly-tailored features included in the Key West Ordinance.[103]

B. *Failure to follow Board of Trustees, State Univ. of N.Y. v. Fox and Bolger v. Youngs Drug Products Corp.*

The S.O.C. Court erred in its determination that the Ordinance is not a commercial speech regulation from the outset.[104] It failed to apply the Supreme Court's "common-sense distinction" approach to commercial speech. Instead the Ninth Circuit approached the Gordian knot of commercial speech, commercial speech intertwined with pure speech, and commercial speech "inextricably" intertwined with pure speech by cutting commercial speech right at the knee in applying the overbreadth doctrine and, therefore, strict scrutiny to strike down the Ordinance.

The *S.O.C.* Court failed to follow the *Fox* dictate, which provided that when categorizing the type of speech at issue, "the first question" a court confronts is whether the principle type of expression is commercial speech.[105] The *S.O.C.* Court concluded the Ordinance as overbroad without discussing why the principal type of expression of the handbills was not commercial communications subject to the *Hudson* test.[106] Instead, it started by examining whether the communications regulated by the Ordinance were accorded "full protection"

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[98] *Id.* at 11-14.
[99] *See id.* at 16-17.
[100] *S.O.C.* 160 F.3d 541.
[101] *Sciarrino,* 83 F.3d 363, 366.
[102] *S.O.C.*, 160 F.3d 541.
[103] *Id.*
[104] *See S.O.C.*, 152 F.3d at 1140.
[105] *See, Fox*, 492 U.S. at 473.
[106] *See S.O.C.*, 152 F.3d at 1143-44.

under the First Amendment.[107] It ruled the Ordinance was overbroad because it would be likely to restrict pure speech "inextricably" intertwined with commercial speech.[108]

Handbills of outcall girls provide a classic example of a case where a court can easily make a "common sense distinction" as the handbills do not contain any public, religious, or political issues, or charitable solicitations. Even if the handbills contain all of those important messages, the handbills are still commercial speech. As dictated by *Fox* and *Bolger,* commercial communications "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues."[109]

Furthermore, the Ordinance is regulating only commercial expressions by adopting the language of *Bolger* and *Fox*. However, the *S.O.C.* Court ruled that the language of the Ordinance was not limited and lacked exemptions even though it tracked the language of *Bolger.*[110] *Bolger* identified the three common traits that when combined would characterize commercial speech: use of the advertisement form, a reference to a specific product, and a motivation solely related to the economic interest of the advertiser and its audience.[111] *Fox* identified the test for commercial speech even more narrowly as "proposing of a commercial transaction."[112] The Ordinance incorporated the three factors of *Bolger* and *Fox*, and defined "off-premises canvassing" as:

> distributing, handing out, or offering on public sidewalks, handbills, leaflets, brochures, pamphlets or other printed or written literature, materials, or information, which advertise or promote services or goods for sale lease or rent or which otherwise propose one or more commercial transactions and which specifically refer to products or services for sale, lease or rent and which are distributed with an economic motivation or commercial gain; or (b) soliciting on public sidewalks, pedestrians to purchase, lease, or rent services or goods or otherwise propose one or more commercial transactions. C.C.C. § 16.12.020(5) (emphasis added).

The *S.O.C.* Court acknowledged that the Ordinance tracked the language of *Bolger;* but it held that it did not use "any limiting language such as 'solely,' 'exclusively,' or 'primarily'."[113] It asserted that the phrase "or otherwise propose one or more commercial transaction" in the Ordinance was not the same as "propose no more than a commercial transaction."[114] The *S.O.C.* Court did not explain why adding the words solely, exclusively, or primarily, will exonerate the Ordinance from being "overbroad" or escape the courts conclusion that the Ordinance is likely to regulate pure speech "inextricably" intertwined

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[107] *Id.* at 1142.
[108] *Id.* at 1143.
[109] *See Fox*, 492 U.S. at 475.
[110] 152 F.3d at 1144.
[111] 463 U.S. at 66-67.
[112] *Fox*, 492 U.S at 475; *see also Discovery Network*, 507 U.S. at 423.
[113] *S.O.C.*, 152 F.3d at 1143-44.
[114] *Id.* at 1144.

with commercial speech.[115]

Moreover, the *Fox*'s test for identifying commercial speech as "proposing of a commercial transaction" is overinclusive and underinclusive. No one would dispute that a Nike commercial that does not propose any commercial transaction is still commercial speech; or, a car dealer proposing more than one commercial transaction, such as selling the car, the warranty, and financing of the car, is not commercial speech. The *S.O.C.* Court's assertion that the phrase "or otherwise propose one or more commercial transaction" in the Ordinance was not the same as "propose no more than a commercial transaction" is too vague to give clear guidance to Clark County and the district courts.

After the *S.O.C.* Court failed to draw the common sense distinction between commercial speech and noncommercial speech, it then misapplied *Riley* to conclude the Ordinance as likely to regulate pure speech "inextricably" intertwined with commercial speech.

C. *Misapplication of Riley v. National Federation of the Blind*

The *S.O.C.* Court failed to reconcile *Riley* with *Fox* by making commercial speech too easy to become "inextricably" intertwined with pure speech. The court never explained why pure speech, even if intertwined with the outcall-girl handbills (commercial component), cannot be extricated from the latter. Misapplying *Riley*, the court held that the Ordinance could have regulated speech that may potentially be intertwined with commercial speech and must be treated as regulating pure speech. The court erred in equating "could" be intertwined with commercial speech as the same as "inextricably" intertwined with pure speech.[116]

Riley involved charitable solicitation, which is pure speech.[117] The Supreme Court found the commercial speech is "inextricably" intertwined with pure speech because the state compelled the commercial statement.[118] In S.O.C., Las Vegas has not compelled any speech on the canvassers, and the canvassers are handing out advertising of outcall girls without any charitable solicitation. Clearly, *Riley*'s conditions of charitable solicitation and state-compelled speech are not met under the facts of *S.O.C.* Even if the canvassers are conducting charitable solicitation while handing out advertising of outcall girls, under *Fox*, such solicitation can easily be separated from the commercial communication and the whole activity should be deemed commercial speech. It should never be categorized as commercial speech "inextricably" intertwined with pure speech as the *S.O.C.* Court has done. The court erred in its overbroad application of *Riley*.

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[115] *Id.* at 1140.
[116] *Id.*
[117] *See* 487 U.S. at 788.
[118] *See id.* at 796.

D. Misapplication of the Overbreadth Doctrine

The S.O.C. Court accepted ACLU's facially overboard challenge and denied the Ordinance the status of a commercial speech regulation. Consequently, the circuit court can circumvent the Supreme Court's mandate that the overbreadth doctrine does not apply to commercial speech regulations. The Court has emphasized that the overbreadth doctrine is strong medicine and should not be applied to commercial speech unless it poses as a "realistic danger" of smothering fully protected speech.[119] The Court also explained that commercial speech will not be "crushed" by overbroad regulations because economic self-interest will motivate the speech to find other channels of expression.[120]

The Ordinance does not pose as a "realistic danger" that will significantly compromise the First Amendment protection of people who solicit donations, sell products for public causes on the Strip, or canvassers giving out handbills and proselytizing. Many alternative channels of advertising are available to the outcall businesses. For example, Clark County allows outcall-service advertisements in telephone book yellow pages, taxi-cab billboards, at certain conventions held in Las Vegas, and in any other area outside the Strip.[121]

Furthermore, the *S.O.C.* Court can provide only one application of the Ordinance against third parties that would be unconstitutionally overbroad. The court stated that the Ordinance would sweep in a newspaper or a magazine that stressed social, religious, political, or environmental issues but also contained some advertisements.[122]

However, in *Discovery Network,* the Supreme Court held that regardless of the difficulty in defining the distinction between a "newspaper" and a "commercial handbill," it would assume that all of the speech barred by the city's regulation was commercial speech.[123] In contrast, the *S.O.C.* Court allowed the overbreadth doctrine in to strike down the Ordinance as invalid "on its face" even though it tracked the language of *Bolger* and Fox, and would not pose a "realistic danger" of inhibiting the constitutionally protected speech of third parties.[124] After declaring the Ordinance as facially overbroad, the court applied the public forum doctrine and strict scrutiny to invalidate the Ordinance.

E. Failure to Follow Cincinnati v. Discovery Network, Inc.

Once the *S.O.C.* Court ruled the Ordinance as an overbroad pure speech regulation, *a priori*, it ruled the Ordinance was not a content-neutral TPM regu-

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[119]*See, e.g., Bates,* 433 U.S. at 390.

[120]*Central Hudson*, 447 U.S. at 564 n.6 (citing *Bates*, 433 U.S. at 350, 390).

[121]*See* Order at 13-14.

[122]*See S.O.C.*, 152 F.3d at 1144.

[123]City of Cincinnati v. Discovery Network, Inc., 507 U.S.410 at 422-24 & n.19.

[124]*See Note, The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844, 853-858 (1970).

lation.[125] Since the Ordinance is banning the commercial-content of the handbills, the court correctly ruled that it is not a content-neutral TPM regulation.[126] However, because the court's premise that the Ordinance is a pure speech regulation is incorrect, its deduction that the Ordinance is not a TPM regulation, although correct, leads the court to apply strict scrutiny to a commercial speech ordinance.[127] A Commercial speech regulation inherently is never content-neutral since it is restricting the commercial-content of the speech as explained in *Discovery Network*.[128] However, the Court's commercial speech jurisprudence allows governments to regulate the commercial-content of speech where such restrictions would be impermissible under pure speech.[129]

The court also ignored the Supreme Court's practice of analyzing commercial speech without applying the public forum doctrine. In *Discovery Network*, the Court held that regardless of the difficulty in distinguishing a "newspaper" containing advertisements from a "commercial handbill" containing public issues involving sidewalks, it would apply the intermediate scrutiny of the *Central Hudson* test.[130] Here, the *S.O.C.* Court is also faced with the difficulty of distinguishing newspaper intertwined with commercial on sidewalks. Nevertheless, it failed to follow *Discovery Network* and found the Ordinance as a regulation of speech subject to strict scrutiny.

Interestingly, the Ninth Circuit seems to encourage a total ban of any first Amendment activities in a traditional public forum. In *One World One Family Now v. City and County of Honolulu*, the Ninth Circuit upheld the city's ordinance that flatly banned the sale of merchandise on public streets, sidewalks, malls, beaches and other public places in Waikiki.[131]

The court held that the flat ban was a TPM regulation that was content neutral even "as applied" to the plaintiff, a non-profit organization that sold merchandise to communicate its philosophical and inspirational views.[132] Reviewing the judicially illogical results of the decisions of *S.O.C.* and *One World,* clearly, the Ninth Circuit favors a flat ban on busy tourist streets rather than trying to make a common sense distinction of commercial and non-commercial regulations.

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[125]*S.O.C.*, 152 F.3d at 1144.

[126]*Id.* at 1145.

[127]*Id.* at 1146

[128]*See Discovery Network*, 507 U.S. at 429 (government regulation to ban the use of newsracks that distribute commercial handbills is based on the different content between ordinary newspapers and commercial speech; thus, the ban is "content based.")

[129]See *Bolger*, 463 U.S. at 65 (quoting Friedman v. Rogers, 440 U.S. 1 (1979) (content based restrictions on commercial speech may be permissible)).

[130]507 U.S. at 422-24 & n.19.

[131]76 F.3d 1009, 1011 (1996).

[132]*Id.* at 1012.

F. Implications of S.O.C. Court's Ruling

The *S.O.C.* Court's ruling contradicted the Supreme Court's principles of commercial speech doctrine. First, its misapplication of *Riley* destroyed the different level of protection afforded to commercial speech and non-commercial speech as dictated by *Fox*. It violated the concept that speech of lesser value is only afforded less protection under the First Amendment jurisprudence.[133] Second, when a government regulates the commercial-content of speech, it is only subject to intermediate level of scrutiny and not strict scrutiny even in the context of public forum.

1. Violation of the First Principle

The S.O.C. Court, by a leveling process, destroyed twenty-five years of the Supreme Court's jurisprudence that commercial speech is given less protection than non-commercial speech. It ignored the Supreme Court's holding in *Bolger* that "communications can constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. . . ."[134] It also ignored the *Fox* mandate that, absent government compelled commercial speech, *Riley* does not apply to commercial speech even if it could be unnecessarily intertwined with pure speech.

The *S.O.C.* Court read too broadly the *Riley* holding as mandating that commercial speech, which may "potentially" be combined with protected-speech, should automatically be deemed as fully protected-speech. Based on the *S.O.C.* Court's logic, all commercial speech that can be "unnecessarily" combined with pure speech qualify as the latter and demand full protection. If this reading is correct, then, commercial speech can easily be maneuvered to become non-commercial speech and have full protection instead of lesser protection.

Furthermore, the *S.O.C.* Court's interpretation of *Riley* is specifically rejected in *Fox* where the Supreme Court reiterated *Bolger* and *Central Hudson* that "advertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech."[135] *Fox* emphasized that to require a parity of constitutional protection for commercial and non-commercial speech alike would dilute the force of First Amendment's guarantee with respect to the latter.[136]

Clearly, the *S.O.C.* decision violated the Supreme Court's First Amendment jurisprudence that commercial speech is afforded lesser protection than noncommercial speech.

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[133] *See, e.g., Ohralik*, 436 U.S. at 455-56.

[134] 463 U.S. 67-68.

[135] *Id.* at 475 (quoting *Central Hudson*, 447 U.S. at 562-63, n.5).

[136] *Id.* at 481.

2. Violation of the Second Principle

The *S.O.C.* Court's reading of *Riley* is contrary to the Supreme Court's principle that expressions of lesser values are only subject to intermediate scrutiny and can be regulated to an extent to which political speech could not.[137]

Under the *S.O.C.* Court's reading of *Riley*, a government regulating pure commercial speech would always be subject to strict scrutiny. Under its reasoning, since the commercial speech regulation could easily become "inextricably" intertwined with some element of noncommercial speech, it must then be deemed in its entirety as the latter. Consequently, the commercial speech regulation becomes a content-based regulation and must be subject to strict scrutiny, which is almost always fatal.

Moreover, under the court's rationale, if the communications are conducted in a public forum, any commercial speech regulation would not be a content-neutral TPM regulation. Again, it could become "inextricably" intertwined with some element of noncommercial speech and thus violating a third party's First Amendment rights and must be deemed in its entirety as pure speech. Such easy intertwining with pure speech, yet never extricating from the commercial speech contradicts the Supreme Court's commercial speech jurisprudence, which mandates that commercial speech is subject to only intermediate scrutiny due to its economic motivations.

Without a doubt, a handbill advertising adult outcall entertainment need not be intertwined with political, religious, environmental, or other ideological messages. Nothing in the nature of these ideological messages requires them to be combined with adult outcall entertainment advertisements. Even if they are combined with the graphic handbills, they do not convert the handbills into pure speech. Thus, striking the appropriately worded Ordnance as not regulating commercial speech simply because it lacked words such as "solely, primarily or exclusively," the *S.O.C.* Court rewrote *Riley, Fox,* and *Bolger.* Moreover, it does not explain why adding such words would distinguish pure commercial speech regulations from regulations that may restrict pure speech "inextricably" intertwined with commercial speech.

The consequences of the *S.O.C.* Court's decision were that the County is without guidance with respect to how to draft regulations on commercial speech. It denied the government its sovereign right to protect the safety of pedestrians on the congested sidewalks of the Resort District. Moreover, the district courts cannot rely on *Central Hudson, Bolger,* or *Fox*, to review commercial speech regulations even in preliminary injunction hearings.

IV. A BETTER SOLUTION

The *S.O.C.* Court could have determined that the Ordinance was a regulation of commercial speech and still rule it as not a "reasonable" restrictive

[137] *Central Hudson,* 447 U.S. at 564 n.6.

means to advance the County's legitimate interest in pedestrian safety by following the Supreme Court's holding in *City of Cincinnati v. Discovery Network, Inc.*[138] In *Discovery Network*, the city's municipal code (Code) prohibited the distribution of commercial handbill through 62 newsracks located on public property while allowing newspapers to be distributed in about 1,500-2,000 newsracks.[139]

The Code defined commercial handbills as printed material that advertised things for sale or promoted interest in any business establishment.[140] Justice Stevens, writing for the majority, criticized the Code's definition of a commercial handbill as blurring the narrow definition of commercial speech in *Bolger and Fox*, thus making the already hard to define distinction between a "newspaper" and a "commercial handbill" even less clear.[141]

Nonetheless, for the purpose of deciding the case, the Supreme Court assumed that all of the speech barred by the Code was commercial speech.[142] It found the city's purported interest for removing the 62 commercial newsracks was in protecting the attractive appearance of its streets, rather than any harm associated with the newsracks, but nevertheless qualified as a substantial state interest.[143] However, it concluded that removing 62 newsracks achieved only a marginal degree of the city's interest in the visual blight since the city still has to contend with over 1500-2000 newsracks on its streets.[144] Thus, because the distinction between commercial handbills and newspapers had absolutely no bearing on the city's interests in esthetics, the Court held that the city's chosen means to advance its esthetic interest was not reasonable.[145]

The *S.O.C.* Court should have followed *Discovery Network* and assumed for the purpose of deciding this case that Ordinance 16.12 was regulating commercial speech. It can then remand the case back for further determination as to the "reasonable fit" between the County's interest and the chosen means. The *S.O.C.* Court could even have applied its own findings that no evidence supported the conclusion that commercial canvassers were more aggressive in harassing pedestrians than noncommercial canvassers.[146] It could then have determined that there was not enough evidence to support the idea that the solution effectively addressed the problem.

Another solution is to follow the rationale in *Sciarrino*. In *Sciarrino*, the city elicited the testimony of various witnesses to establish the frequency of harassment of pedestrians; for example, the chamber of commerce office re-

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[138]507 U.S. at 428-29.
[139]*Id.* at 412
[140]*Id.* at 414.
[141]*Id.* at 422-23 & n.19.
[142]*Id.* at 424.
[143]*Id.* at 417.
[144]*Id.* at 426.
[145]*Id.* at 428.
[146]152 F.3d at 1146.

ceived "hundreds" of complaints. Thus, the Eleventh Circuit concluded the harm was sufficiently real.[147] Here, the district court's order for the preliminary injunction motion stated that canvassers occasionally broke out in fights.[148] The *S.O.C.* Court may conclude that the frequency of harassment is insufficient to pose real harm to justify the County's regulation.

Furthermore, the demand for news racks in the Resort District exceeded supply and permits for renting the newsracks were by lottery, hence, it is more cost effective to use canvassers to generate business for the plaintiffs.[149] The *S.O.C.* Court could have found that the County has not "carefully calculated" the costs and benefits associated with the burden on commercial speech imposed by the Ordinance as *Discovery Network* stipulated.[150] Therefore, the means adopted is not a reasonable fit and burdens more than what is reasonably necessary to regulate commercial speech.

Overall, the *S.O.C.* Court should have followed the *Discovery Network* approach of characterizing the Ordinance as commercial regulation yet finding that it failed the *Central Hudson* test. The benefit of following the *Discovery Network* holding is that the district courts and the government would have better guidelines on how to review and regulate commercial speech. The *S.O.C.* Court would not run afoul of the commercial speech doctrine and the government cannot hide behind commercial speech to suppress the free flow of truthful information related to legal commercial activities.

V. CONCLUSION

In this information age, commercial speech definitely occupies a significant position in the scale of First Amendment values. From *Christensen* to *S.O.C.*, the commercial speech has come full circle. Merchants using canvassers to distribute advertising still argue its expression is not purely commercial speech because it is inextricably intertwined with fully protected-speech and should be treated as the latter. Nevertheless, the Supreme Court continues to make a "common sense distinction" between commercial speech and fully protected-speech that the federal courts are left to disentangle.

So long as the Supreme Court mandates that commercial speech only enjoys limited protection compared to other constitutional guaranteed speech, the overbreadth doctrine should not be applied to commercial speech through the overbroad reading of *Riley*. Certainty in the relationship between commercial speech and the public forum doctrine undoubtedly will help the federal courts and the government in regulating the economic behavior of businesses in the public forum. Hopefully, some certainty on commercial speech doctrine will

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[147] 83 F.3d at 368 & n.1.
[148] *See* Order at 12.
[149] *Id.* at 13.
[150] 507 U.S. at 417.

come out in the new millennium for the Ninth Circuit.