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The Run for the Roses Meets the First Amendment: An Examination of *Desormeaux v. Kentucky Racing Commission* and the Constitutionality of Prohibitions on Jockey Advertising

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THE RUN FOR THE ROSES MEETS THE FIRST AMENDMENT:
AN EXAMINATION OF *DESORMEAUX V. KENTUCKY RACING
COMMISSION* AND THE CONSTITUTIONALITY OF
PROHIBITIONS ON JOCKEY ADVERTISING

WILLIAM P. BARNETTE¹

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I. INTRODUCTION

In addition to an upset winner and nationwide sensation in Funny Cide,² the 2003 Kentucky Derby produced a great deal of controversy. While the cheating allegations against, and subsequent exoneration of, winning jockey Jose Santos are well known,³ less so is another issue which may have significant impact both on the future of horse racing and the First Amendment. During the running of the Derby, Santos and thirteen of his fellow riders wore patches on their pants promoting the Jockeys' Guild.⁴ The patches, which measured 3 by 5 inches, were determined by the Churchill Downs' stewards to violate a regulation which prohibits jockeys from wearing advertising during a race.⁵ The stewards, therefore, fined each rider who wore the patch \$500.⁶ Following an unsuccessful appeal to the Kentucky Racing Commission (the "Commission"),⁷ the jockeys have filed suit in Kentucky state court seeking to have the fines overturned.⁸

Desormeaux v. Kentucky Racing Commission raises a number of significant First Amendment issues. After providing the background of the case and discussing issues related to jockey advertising, this article will analyze the *Desormeaux* plaintiffs' claims under a variety of First Amendment doctrines, including: political speech, commercial speech, public employer, and public forum. The article concludes that the jockeys present a strong First Amendment challenge to the regulation as applied in *Desormeaux*, but that on the larger issue of jockey advertising the Commission has valid arguments in support of the prohibition.

II. BACKGROUND

A. Controversy Over Jockey Advertising

Professional athletes "have been endorsing products as long as there has been a medium to record or broadcast [their] exploits."⁹ In recent years, these endorsement

²At odds of 12-1, Funny Cide became the first gelding to win the Derby since 1929 and the first New York-bred winner ever. Andrew Beyer, *Funny Cide Up*, WASH. POST, May 4, 2003, at E1.

³Shortly after the race, media across the country reported on a picture appearing to show Santos with a black object — possibly an illegal electrical device with which to shock Funny Cide — in his hand while aboard the horse. Andrew Beyer, *Derby Stewards on Wrong Track*, WASH. POST, May 13, 2003, at D1. Ultimately, the "object" was determined to be an optical illusion. *Id.* The Churchill Downs' stewards thus cleared Santos of wrongdoing. *Id.*

⁴Marty McGee, *Riders file suit over logos worn in Kentucky Derby*, DAILY RACING FORM, Nov. 9, 2003, at 3. The Jockeys' Guild is the labor union for jockeys. *Id.*

⁵*Id.*

⁶*Id.*

⁷*Id.*

⁸*See Desormeaux v. Kentucky Racing Comm'n, Petition for Review of Final Order of Kentucky Racing Commission*, No. 03CI09792 (Jefferson Cir. Ct., Ky., Nov. 6, 2003) [hereinafter *Petition*]. On November, 17, 2003, the case was transferred to Franklin Circuit Court. *See* Nov. 17, 2003 Order (Jefferson Cir. Ct., Div. 3).

⁹Sean Wood, *Athlete Endorsements Sell*, HAMILTON SPECTATOR, Aug. 26, 2002, at B11.

deals have become increasingly lucrative, culminating in Nike's \$90 million, seven year contract with LeBron James, the number one pick in the 2003 National Basketball Association draft.¹⁰ In horse racing, it is not individual athletes but rather premier events, such as the Derby and the Breeders' Cup, that "are saturated with core sponsors."¹¹ Most prominent is Visa's sponsorship of the Triple Crown — i.e., the Derby, the Preakness, and the Belmont Stakes — with its \$5 million bonus to the winner of all three races.¹²

Jockeys do not receive a direct financial benefit from corporate sponsorships of races.¹³ But like other independent contractor athletes, such as golfers or tennis players,¹⁴ many jockeys¹⁵ are interested in making "extra income from endorsement deals."¹⁶ This desire, in turn, has given rise to the notion of jockeys entering contracts to wear advertising or promotional messages during races.¹⁷ Traditionalists, however, oppose such promotion or advertising, in particular because they do not "want jockeys to look like NASCAR drivers."¹⁸ Thus, the wearing of advertising or other promotional items by jockeys "has been a hot-button issue for years in a number of racing jurisdictions throughout North America."¹⁹

¹⁰*Id.*; Jeff Caplan, *Megadeals That Were, and Weren't*, FT. WORTH STAR TELEGRAM, Jan. 4, 2004, at 2C.

¹¹Marcus Green, *Suit Could Open Door to Ad Laden Jockeys*, THE COURIER-JOURNAL, Nov. 12, 2003, at F1.

¹²Andrew Beyer, *Tight Schedule Puts Squeeze on Preakness Field*, WASH. POST, May 14, 2003, at D1.

¹³Green, *supra* note 11.

¹⁴In 2002, tennis player Venus Williams "signed a reported five-year, \$40 million US deal with Reebok, which would be the richest endorsement contract for a female athlete." Wood, *supra* note 9. Likewise, golfer Tiger Woods' endorsement deals reportedly earn him \$100 million annually. Masuoka Brandon, *Golfers Weigh in on Wie's Future*, THE HONOLULU ADVERTISER, Mar. 29, 2004, at 2C.

¹⁵Larry Stumes, *California Jockeys Giving Wearable Ads a Leg Up*, S. F. CHRONICLE, Apr. 23, 2002, at C6 (noting that "[n]early all of [California's] riders have signed with Jockeys Management Group," an organization founded to pursue marketing deals for jockeys).

¹⁶Green, *supra* note 11. While the value of jockey endorsement deals would not be expected to even approach the levels of athletes in other sports, any additional income would be beneficial because, among other reasons, jockeys are "responsible for their own expenses, including insurance premiums, which are astronomical because of the risk inherent in the profession." Billy Reed, *Patch or No Patch, Jockeys are Just Climbing Aboard the Train of Corporate Sponsorship*, SNITCH, Nov. 26, 2003, at 7. While some top jockeys, such as Jerry Bailey, may make over \$2 million a year, others "barely make a living." *Id.* The lower a jockey is on the economic scale, obviously "the more burdensome the insurance premiums become." *Id.*

¹⁷Green, *supra* note 11.

¹⁸Reed, *supra* note 16. According to Albert Fiss, vice-president of the Jockeys' Guild, the *Desormeaux* lawsuit will come down to whether the courts look at racing tradition "as more important than the First Amendment." Green, *supra* note 11 (quotations omitted).

¹⁹McGee, *supra* note 4; see Dave Joseph, "Shock Mode": *This Space Available; A Tradition-Bound Sport Resists Corporate Ads on Jockey Apparel*, SUN-SENTINEL, July 9,

Regulations on jockey attire vary from state to state, but generally “racetracks and government regulators have been able to control advertising rights despite the collective protestations of jockeys.”²⁰ Not entirely, however. While Kentucky bans jockey advertising,²¹ California and New York permit it, subject to certain limitations.²² Thus, in the 2003 Belmont Stakes, held in New York, “some jockeys wore patches advertising Wrangler and Budweiser,” reportedly angering Visa, the sponsor of the Triple Crown.²³ Later in 2003, during the Breeder’s Cup at Santa Anita Park, the California racing board suspended that state’s rule permitting advertising by jockeys.²⁴ The California board’s suspension of jockey advertising was viewed as an effort to “protect some or all of the sponsors or marketing partners that participate in the Breeder’s Cup”²⁵

2003, at 1C. Unlike in North America, advertising on “jockeys’ clothing [is] common in European racing” Kevin Modesti, *Skimming Way to Classic*, THE DAILY NEWS OF LOS ANGELES, July 27, 2001, at S8.

²⁰McGee, *supra* note 4; see Green, *supra* note 11 (quoting R.J. Kors, founder of Jockeys Management Group, which has marketing agreements with more than 150 riders: “How can you look at a professional jockey as any different from any other professional athlete that’s an independent contractor? . . . How can an industry suppress an economic opportunity for a jockey’s career?”) (quotations omitted); see Joseph, *supra* note 19 (quoting Jerry Bailey: “We’re the lowest paid athletes on the field . . . I don’t think you can deny us the opportunity to make money through advertisements if it’s done under certain guidelines.”) (quotations omitted).

²¹See 810 KY. ADMIN. REGS. 1:009, § 14 (2002). Minnesota likewise prohibits such advertising. See MINN. R. 7877.0170(3)(L) (2003).

²²See 4 CAL. BUS. & PROF. § 1691(b) (2004); N.Y. COMP. CODES R. & REGS. title 9, § 4041.6 (2004). Other state regulations are silent on the issue, see, e.g., MASS. REGS. CODE title 205, § 4.15 (2004); ILL. ADMIN. CODE title 11, § 1411.05 (2004); TEX. ADMIN. CODE title 16, § 313.406 (2004); MD. REGS. CODE title 09, § 10.01.21 (2004); OHIO ADMIN. CODE § 3769-6-26 (2003); W. VA. CODE S.R. § 178-1-45 (2004), although some require that jockeys wear “traditional” or “conventional” attire, see, e.g., DEL. CODE ANN. title 13, § 402-001-8.13 (2004); ARK CODE ANN. title 6, § 06-003-2162 (2004); 58 PA. CODE § 163.175 (2004); LA. ADMIN. CODE title 46, § 741 (2002), which presumably would exclude advertising.

²³Reed, *supra* note 16. The jockeys in question, Jerry Bailey and Jose Santos, reportedly received “five-figure deals” to wear the logos. Joseph, *supra* note 19. Bailey put on a “Wrangler hat in the winner’s circle after riding Empire Maker to victory in the Belmont.” *Id.*; see also Sigrid Kun, *Race Horses and Intellectual Property Rights: Racing Towards Recognition?*, 17 QUINNIPIAC L. REV. 207, 225 n.167 (1997) (describing one jockey at Remington Park being sponsored by Pepsi and wearing its logo during workouts and races); Notes, *Skip Away Captures Massachusetts Handicap*, THE SPORTS NETWORK, June 1, 1997 (jockeys in the race allowed to wear advertisements on their silks after officials determined there was nothing in Massachusetts regulations barring riders from wearing promotional materials). In addition, jockeys, including certain of the plaintiffs in *Desormeaux*, have allegedly worn the Jockey Guild patch in races at tracks in California, Illinois, Maryland, and Texas. Petition, ¶ 42.

²⁴Green, *supra* note 11.

²⁵*Id.* (quotations omitted). Corporate sponsors of races “may feel undercut” by jockey advertising, particularly promotions by competing brands, a phenomenon known as “ambush marketing.” *Id.* (quotations omitted). See *supra* note 23 and accompanying text.

Following the Belmont and Breeder's Cup controversies, *Desormeaux* is the "third salvo" in the "growing battle" over jockey advertising.²⁶ Both sides agree that the First Amendment issues presented may ultimately require resolution by the United States Supreme Court.²⁷

B. *Desormeaux Proceedings Before the Commission*

The Kentucky Legislature has "vest[ed] in the [C]ommission forceful control of horse racing in the Commonwealth," giving it "plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted"²⁸ The Commission's purpose is to ensure horse racing in Kentucky is of the "highest quality and free of any corrupt, incompetent, dishonest, or unprincipled" practices, and to "maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth."²⁹ Pursuant to this authority, the Commission has enacted comprehensive rules governing horse racing, including, *inter alia*, jockey attire.³⁰ Specifically, the Commission prohibits jockeys during a race from wearing any "advertising, promotional, or cartoon symbols or wording" which is "not in keeping with the traditions of the turf."³¹

On the appeal of their fines, the Commission determined that the *Desormeaux* jockeys' purpose in wearing the Guild patch during the Derby was "to promote their organization and gain more members."³² The Commission, however, deemed this purpose to be commercial, rather than political, finding that the patch "is an advertising and promotional symbol."³³ Further, because the traditional attire of a "jockey does not include advertising or promotional symbols," the Commission concluded that wearing the patch violated the regulation.³⁴ In addition, the Commission reasoned that wearing the patch "could be a distraction to the eye and

²⁶Green, *supra* note 11.

²⁷*Id.* (quoting J. Bruce Miller, attorney for the Commission: "It probably is a Supreme Court case if it keeps going."); see Tom Wolski, *Jockeys Protest*, THE VANCOUVER PROVINCE, Nov. 16, 2003, at A68 (quoting Darrell Haire, representative for the Jockeys' Guild: "We will take this as far as it has to go, even if that means the Supreme Court.").

²⁸KY. REV. STAT. ANN. § 230.215 (2002).

²⁹*Id.* On January 6, 2004, Governor Ernie Fletcher announced that he was abolishing the Commission and replacing it with a new entity called the Kentucky Horse Racing Authority. Editorial, *A Clean Break*, THE COURIER-JOURNAL, Jan. 8, 2004, at A6; Tom Loftus, *State's Top Racing Official Resigns*, THE COURIER-JOURNAL, Jan. 15, 2004, at B1. In addition to regulating racing, the new body will be charged with promoting the sport. *Id.* For consistency, this article will refer to the defendant in *Desormeaux* as "the Commission."

³⁰See 810 KY. ADMIN. REGS. 1:009.

³¹*Id.* at § 14; see Petition, ¶ 22.

³²Commission's Findings of Fact and Conclusions of Law [hereinafter Conclusion of Law], attached as Exhibit A to the Petition, Finding of Fact No. 8 [hereinafter Finding of Fact].

³³Conclusion of Law, *supra* note 32, at No. 9.

³⁴Conclusion of Law, *supra* note 32, at No. 8.

effect the concentration of the stewards in the performance of their duties.”³⁵ Whether the Commission found the patch in fact to be a distraction is unclear, particularly given its later statement that “allow[ing] the patch in this case *could* lead down the slippery slope where the jockeys would resemble NASCAR drivers and therefore hinder the stewards in the performance of their duties.”³⁶

In contrast to the Commission’s characterization, the *Desormeaux* plaintiffs explicitly disavow any commercial intent in wearing the patch, and instead allege that the emblem merely “identified the jockeys as members of their labor union”³⁷ Further, the jockeys allege that the purpose of “wearing the patch was to promote their labor union, to increase membership in the union and to bring to the attention of the public the unconscionable plight of disabled jockeys.”³⁸ Thus, the jockeys assert, *inter alia*, that being fined for wearing the patch violated their First Amendment rights.³⁹

C. Overbreadth Challenge

As a preliminary matter, it should be noted that the *Desormeaux* plaintiffs have challenged the regulation on overbreadth grounds.⁴⁰ The overbreadth doctrine is a “departure from traditional rules of standing,”⁴¹ allowing an individual to “challenge a statute on its face ‘because it also threatens others not before the court — those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution’”⁴² A law should be invalidated for overbreadth

³⁵Finding of Fact, *supra* note 32, at No. 12 (emphasis added).

³⁶Conclusion of Law, *supra* note 32, at No. 12 (emphasis added).

³⁷Petition, *supra* note 8, at ¶ 47.

³⁸*Id.* at ¶ 32. In some states, including Kentucky, tracks will pay a disabled jockey up to \$100,000. Reed, *supra* note 16. As noted, however, jockeys are responsible for their own insurance premiums, which can be prohibitively expensive. *Id.* Thus, even with a payment from the track, a catastrophic injury can leave a jockey with no way to pay his medical expenses. *Id.* And the dangerousness of a jockey’s life cannot be overstated: the Jockeys’ Guild receives “an average of twenty-five hundred injury notifications per year, with two deaths and two and a half cases of paralysis.” LAURA HILLENBRAND, SEABISCUIT: AN AMERICAN LEGEND, 73 (Ballantine Books, 2001). As of 2001, the Guild was “supporting fifty riders who were permanently disabled on the job.” *Id.*

³⁹Petition, *supra* note 8, at ¶ 16; *see* U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press”). The provisions of the First Amendment are incorporated against the states by the Fourteenth Amendment. *Schneider v. State*, 308 U.S. 147, 160 (1939).

⁴⁰Petition, *supra* note 8, at ¶ 51.

⁴¹*Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Generally, “courts will not assess the constitutionality of a provision apart from its particular application.” *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 257 (4th Cir. 2003). Cases involving freedom of speech, however, “are frequently excepted from this general rule.” *Id.*

⁴²*Board of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (citation omitted). The *Desormeaux* plaintiffs who are before the court challenging the fines for wearing the Guild patch are, of course, equally affected by the advertising ban.

only if “it reaches a substantial number of impermissible applications,”⁴³ and no “‘limiting construction’ or ‘partial invalidation’ could ‘remove the seeming threat or deterrence to constitutionally protected expression.’”⁴⁴ If a law is overbroad, “any enforcement” of it is “totally forbidden.”⁴⁵ Conversely, if a law is found unconstitutional “as applied,” it may not be applied to the challenger, but otherwise remains in effect.⁴⁶

Under the Supreme Court’s interpretation of the First Amendment, certain classes of speech have more value than others; that is, different standards govern restrictions on different types of speech.⁴⁷ Thus, the proper characterization of the *Desormeaux* jockeys’ wearing the Guild patch — i.e., whether this amounts to commercial speech or so-called “pure speech” — is of critical importance in determining the validity of the regulation as applied by the Commission.⁴⁸ Because a state “cannot foreclose the exercise of constitutional rights by mere labels,”⁴⁹ the Commission’s terming the patch an “advertising or promotional symbol,” that consequently is subject to regulation, will likely not be dispositive.⁵⁰ Rather, as will be discussed, there is a compelling argument that wearing the patch constitutes “pure speech,” which is entitled to full First Amendment protection.⁵¹ On the broader question, however, of whether true commercial speech can be prohibited in these circumstances, the Commission has good arguments in support of the regulation.⁵²

III. CORE FIRST AMENDMENT SPEECH: STRICT SCRUTINY

A. *Overview of Political Speech Doctrine*

While the First Amendment’s free speech guarantee is recognized as a fundamental right,⁵³ it is equally well recognized that this right is not “absolute at all

⁴³*New York v. Ferber*, 458 U.S. 747, 771 (1982). An overbreadth plaintiff must show “that a regulation’s overbreadth is ‘not only . . . real, but substantial as well, judged in relation to the [challenged regulation’s] plainly legitimate sweep’” *Newsom*, 354 F.3d at 258 (quoting *Broadrick*, 413 U.S. at 613).

⁴⁴*Id.* (quoting *Broadrick*, 413 U.S. at 613, 615). This is not to say, however, that a court will rewrite a law “to conform it to constitutional requirements.” *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 397 (1988).

⁴⁵*Broadrick*, 413 U.S. at 613.

⁴⁶*City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 758-59 (1988).

⁴⁷*See, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (noting that lower court “applied a significantly more lenient standard than is appropriate in a case of this kind”).

⁴⁸*See infra* Section III.

⁴⁹*NAACP v. Button*, 371 U.S. 415, 429 (1963).

⁵⁰*See* Conclusion of Law, *supra* note 32, at No. 9.

⁵¹*See infra* Section III.

⁵²*See infra* Sections IV-VI.

⁵³*Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). In the words of the Supreme Court, the First Amendment secures “the great, the indispensable democratic freedoms.”

times and under all circumstances.”⁵⁴ Thus, there are “certain well-defined” classes of speech which may be prohibited consistent with the First Amendment.⁵⁵ On this low end of the constitutional spectrum are things like “fighting words,” which have no protection under the First Amendment.⁵⁶

Conversely, discussion of public issues — so-called “political speech” — is afforded the broadest protection by the First Amendment.⁵⁷ In *Pickering v. Board of Education*, the Supreme Court characterized the “public interest in having free and unhindered debate on matters of public importance” as the First Amendment’s “core value.”⁵⁸ Restrictions on such speech are subject to the most stringent form of review, strict scrutiny.⁵⁹

Of relevance to *Desormeaux*, communications which attempt to persuade or dissuade the joining of labor unions are considered core speech protected by the First Amendment.⁶⁰ To illustrate, in *Thomas v. Collins* the defendant was cited for

Thomas v. Collins, 323 U.S. 516, 530 (1945). As is oft noted, the First Amendment’s purpose is “to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail” *Turner Broadcasting Sys., Inc. v. Fed. Communications Comm’n*, 507 U.S. 1301, 1304 (1993) (quotations omitted). Consequently, the First Amendment generally bars the government “from dictating what we see or read or speak or hear.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).

⁵⁴*Chaplinsky*, 315 U.S. at 571. For example, in *Schenck v. United States*, 249 U.S. 47, 52 (1919) (citation omitted), the Supreme Court recognized that “the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic.” While admitting that “in many places and in ordinary times” the defendants would have been within their constitutional rights to distribute a circular objecting to the military draft, in the context of World War I the Court held that such activity was not protected by the First Amendment: “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured” *Id.*

⁵⁵*Chaplinsky*, 315 U.S. at 571.

⁵⁶*Id.* In *Chaplinsky*, the Supreme Court affirmed the defendant’s conviction for violating a statute that prohibited a person from addressing another with “offensive” words in public, reasoning that such “fighting words” were not entitled to protection under the First Amendment. *Id.* at 569, 571-72.

⁵⁷*Roth v. United States*, 354 U.S. 476, 484 (1957).

⁵⁸391 U.S. 563, 573 (1968). In *Pickering*, a public school teacher was fired after sending a letter critical of the school board to his local newspaper. *Id.* at 564. The Supreme Court ruled the firing violated the First Amendment, holding that “absent proof of false statements knowingly or recklessly made by him, a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.” *Id.* at 574 (footnote omitted).

⁵⁹*McIntyre*, 514 U.S. at 347 (“When a law burdens core political speech, we apply ‘exact scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.”) (citations omitted). In addition, strict scrutiny requires there be no less restrictive alternative available. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

⁶⁰*National Labor Relations Bd. v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477, 479 (1941).

contempt for violating a restraining order prohibiting him from soliciting members for certain unions without first obtaining an organizer's card.⁶¹ In reversing the conviction, the Supreme Court noted that the right "to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected" free speech.⁶² Thus, the Court concluded that the defendant's First Amendment rights had been violated.⁶³

Similarly, in *Thornhill v. Alabama* the Supreme Court recognized that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."⁶⁴ The Court further termed "[f]ree discussion concerning the conditions in industry and the causes of labor disputes" to be "indispensable."⁶⁵ Accordingly, the Court found unconstitutional a law which prohibited publicizing the facts of a labor dispute in the vicinity of the dispute, and reversed the defendant's conviction for picketing outside a business involved in a strike.⁶⁶

B. Expressive Conduct Equally Protected

While the First Amendment explicitly refers to "speech," it is well established that expressive conduct is also protected.⁶⁷ Indeed, the Supreme Court has "long recognized" that the First Amendment's "protection does not end at the spoken or written word."⁶⁸ For example, in *Tinker v. Des Moines Independent Community School District* a group of high school students wore black arm bands to school in protest of Vietnam.⁶⁹ They were then suspended from school.⁷⁰ In reversing the

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

⁶²*Id.* at 532.

⁶³*Id.* at 532, 543.

⁶⁴310 U.S. 88, 102 (1940).

⁶⁵*Id.* at 102, 103; *see also* *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 478 (1937) ("Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.").

⁶⁶*Thornhill*, 310 U.S. at 91-92, 101.

⁶⁷Perhaps the most famous constitutional recognition of expressive conduct is *Texas v. Johnson*, 491 U.S. 397, 404 (1989), where the Supreme Court struck down a state statute which prohibited flag burning. *See also* *Spence v. Washington*, 418 U.S. 405 (1974) (reversing conviction for improper exhibition of United States flag where defendant displayed flag upside down with peace symbol attached). *But see* *United States v. O'Brien*, 391 U.S. 367, 382 (1968) (rejecting First Amendment challenge to conviction for burning draft card; Court "cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

⁶⁸*Johnson*, 491 U.S. at 404.

⁶⁹393 U.S. 503, 504 (1969).

⁷⁰*Id.*

dismissal of the students' subsequent suit against the school officials, the Supreme Court reasoned that wearing the armbands "was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."⁷¹

Recently, in *Newsom v. Albemarle County School Board*, the federal Fourth Circuit, reviewing the denial of a preliminary injunction, held there was a strong likelihood of success on a First Amendment claim against a school dress code which prohibited messages on clothing related to weapons.⁷² Applying the *Tinker* standard,⁷³ the court concluded the dress code could "be understood as reaching lawful, nonviolent, and nonthreatening symbols of not only popular, but important organizations and ideals."⁷⁴ Because the code excluded a "broad range and scope of symbols, images, and political messages that are entirely legitimate and even laudatory," the court held the injunction should have been granted.⁷⁵

C. Political Speech Analysis of *Desormeaux*

In *Desormeaux*, the plaintiffs allege that they wore the Guild patch to promote their union, increase its membership, and bring attention to the issue of disabled jockeys.⁷⁶ This should be considered protected speech under *Thomas* and *Thornhill*, in that the jockeys allegedly were promoting their union and raising awareness of the dangerousness of their working conditions.⁷⁷ Further, under the reasoning of *Tinker* and *Newsom*, wearing the patch can be considered a form of expressive conduct protected by the First Amendment.⁷⁸

⁷¹*Id.* at 505-06. The Court acknowledged the need for school officials, "consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 507. But, given there was no evidence of conduct which would "interfere with the requirements of appropriate discipline in the operation of the school," the Court concluded the prohibition on armbands violated the First Amendment. *Id.*

⁷²354 F.3d 249, 251 (4th Cir. 2003). In *Newsom*, a student sought a preliminary injunction against the school dress code after being disciplined for wearing a tee-shirt which "depicted three black silhouettes of men holding firearms superimposed on the letters 'NRA' positioned above the phrase 'SHOOTING SPORTS CAMP.'" *Id.* at 252.

⁷³The court recognized there was no evidence that clothing with messages related to weapons "disrupted school operations or interfered with the rights of others." *Id.* at 259.

⁷⁴*Newsom*, 354 F.3d at 259-60. As an example, the court noted the code would prohibit clothing depicting the state seal of Virginia, which shows a woman holding a spear. *Id.* at 260. Likewise, the court reasoned that the "quintessential political message" the school was trying to promote—"Guns and School Don't Mix"—would be prohibited by the code. *Id.* at 260.

⁷⁵*Id.*

⁷⁶Petition, *supra* note 8, at ¶ 32.

⁷⁷See *Thomas*, 323 U.S. at 532; *Thornhill*, 310 U.S. at 102, 103.

⁷⁸See *Tinker*, 393 U.S. at 505-06; *Newsom*, 354 F.3d at 260. The Commission, of course, could argue that the patch is "disruptive" based on its finding that the stewards could be distracted by it. See Finding of Fact No. 12; *Tinker*, 393 U.S. at 507. Given, however, that this finding was posited as a "slippery slope" consideration, see Conclusion of Law No. 12, such an argument is not particularly persuasive, especially when balanced against the high

Indeed, in a similar case, *In re Reynolds*, the California Supreme Court held that an inmate's First Amendment rights were violated when he was denied permission to wear a prisoner's union button while incarcerated.⁷⁹ Under this rationale, the *Desormeaux* plaintiffs appear to have a valid "as applied" First Amendment challenge to the regulation at issue. Whether that regulation should be struck down on overbreadth grounds, however, is another issue, initially requiring analysis of the commercial speech doctrine.

IV. COMMERCIAL SPEECH: INTERMEDIATE STANDARD

A. *Distinction Between Content-Based v. Neutral Restrictions Inapplicable*

Traditionally, the First Amendment has given life to the "principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence."⁸⁰ A regulation that "stifles speech on account of its message" — i.e., its content — "contravenes this essential right."⁸¹ Such restrictions "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."⁸² In other words, through content-based restrictions the "Government may effectively drive certain ideas or viewpoints from the marketplace."⁸³ To prevent an outcome so obviously contrary to the First Amendment, the Supreme Court has "consistently applied strict scrutiny to content-based regulations of speech."⁸⁴

Determining whether a particular regulation is content-based is "not always a simple task."⁸⁵ The general rule, however, is that "laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content-based."⁸⁶ Singling out commercial speech for prohibition while leaving other forms of speech untouched — which the regulation at issue in

First Amendment value afforded speech promoting unions. *See supra* notes 60, 63 and accompanying text.

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

⁸⁰*Turner Broadcasting Sys., Inc. v. Fed. Communications Comm'n*, 512 U.S. 622, 641 (1994).

⁸¹*Id.*

⁸²*Id.*

⁸³*Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

⁸⁴*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574 (2001) (Thomas, J., concurring); *Turner Broadcasting*, 512 U.S. at 641-43.

⁸⁵*Turner Broadcasting*, 512 U.S. at 642.

⁸⁶*Id.* at 643.

Desormeaux does — arguably amounts to a content-based restriction, which ordinarily would be subject to strict scrutiny.⁸⁷ Despite being content-based, however, restrictions on commercial speech do not receive strict scrutiny.⁸⁸

B. Overview of Commercial Speech Doctrine

On the contrary, commercial speech has a checkered history under Supreme Court precedents.⁸⁹ In an early case, *Valentine v. Chrestensen*, the Supreme Court held that the First Amendment provided no “restraint on government as respects purely commercial advertising.”⁹⁰ Reversing course, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court held that simply because an advertiser’s “interest is a purely economic one . . . hardly disqualifies him from protection under the First Amendment.”⁹¹ Rather, recognizing that society has a “strong interest in the free flow of commercial information,”⁹² the Court struck down regulations prohibiting the advertising of prescription drug information.⁹³

Later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Supreme Court settled on an intermediate standard for determining whether commercial speech is protected by the First Amendment.⁹⁴ Under this standard, a court examines: (1) whether the speech concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is not more extensive than necessary to serve that interest.⁹⁵ In *Board*

⁸⁷See 810 KRA 1:009, § 14 (banning commercial, but not other types, of speech). In fact, the *Desormeaux* plaintiffs have alleged that Pat Day, one of the other jockeys in the Derby, during the race wore a tunic with the symbol of a Crucifix, but was not fined by the stewards. Petition, *supra* note 8, at ¶¶ 39, 41.

⁸⁸*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 n.6 (1980) (applying intermediate standard to commercial speech and noting “[i]n most other contexts, the First Amendment prohibits regulation based on the content of the message”). Indeed, even restrictions on advertising for particular products receive only intermediate review. See *Lorillard*, 533 U.S. at 554 (applying intermediate review to restrictions on tobacco advertising); *id.* at 574-75 (Thomas, J., concurring).

⁸⁹*Lorillard*, 533 U.S. at 574 (“There was once a time when this Court declined to give any First Amendment protection to commercial speech.”) (Thomas, J., concurring).

⁹⁰316 U.S. 52, 54 (1942).

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

⁹²*Virginia State Board*, 425 U.S. at 764; see, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996) (“Advertising has been a part of our culture throughout our history,” providing “vital information about the market.”).

⁹³*Virginia State Board*, 425 U.S. at 764, 772.

⁹⁴447 U.S. 557 (1980).

⁹⁵*Id.* at 566. Expounding on the interest necessary to sustain a restriction on commercial speech, the Court has noted that a state “must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield v. Fane*, 507 U.S.

of *Trustees v. Fox*, the Supreme Court clarified that the last *Central Hudson* factor requires only a “reasonable fit” between the regulation and the interest, rather than the least restrictive means available.⁹⁶

The *Central Hudson* test has been criticized on a number of grounds, including its flexibility,⁹⁷ which leaves “both sides of the debate with their own well of precedent from which to draw.”⁹⁸ Indeed, several members of the Supreme Court “have expressed doubt about the *Central Hudson* analysis and whether it should apply in particular cases.”⁹⁹ In addition to its malleability, another significant problem with the doctrine involves the difficulty in identifying commercial speech, as opposed to more protected forms.¹⁰⁰ In fact, the Court has expressly declined to define the necessary elements of commercial speech.¹⁰¹ Relatedly, the jurisprudence treats all speech as “either commercial or noncommercial,” with the former receiving less protection, despite the reality that some messages can carry both commercial and noncommercial meanings.¹⁰²

For instance, in *Nike, Inc. v. Kasky* the California Supreme Court held that certain statements made by Nike during a labor dispute amounted to commercial speech, despite the fact the statements were made in response to “public criticism.”¹⁰³ Because the speech was deemed commercial, the court reasoned that any false or misleading statements by Nike were not protected by the First Amendment, again

761, 770-71 (1993); see also *Greater New Orleans Broadcasting Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (restrictions on commercial speech require more than “mere speculation or conjecture”).

⁹⁶ 492 U.S. 469, 480 (1989).

⁹⁷ See *Lorillard*, 533 U.S. at 574 (“the Court has followed an uncertain course — much of the uncertainty being generated by the malleability of the four-part balancing test of *Central Hudson*”) (Thomas, J., concurring).

⁹⁸ Floyd Abrams, *A Growing Marketplace of Ideas*, LEGAL TIMES, July 26, 1993, at S28; Compare, e.g., *Cincinnati v. Discovery Network Inc.*, 507 U.S. 410 (1993) (holding ban on newsracks containing commercial handbills, but not newspapers, unconstitutional) with *United States v. Edge Broadcasting*, 509 U.S. 418 (1993) (upholding federal statute prohibiting radio and television stations from airing lottery advertisements in states where lotteries are illegal) and *Posadas de Puerto Rico Assoc.’s v. Tourism Co.*, 478 U.S. 328 (1986) (upholding restrictions on casino advertising in Puerto Rico).

⁹⁹ *Lorillard*, 533 U.S. at 554 (citations omitted).

¹⁰⁰ *Id.* at 575 (“I doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech.”) (Thomas, J., concurring); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 7 (2000) (the “impossibility of specifying the parameters that define the category of commercial speech has haunted its jurisprudence and scholarship”).

¹⁰¹ See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 n.14 (1983) (“We express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech”).

¹⁰² *Nike, Inc. v. Kasky*, 45 P.3d 243, 268 (Cal. 2002) (Brown, J., dissenting).

¹⁰³ *Id.* at 247.

without regard to whether they were related to a matter of public concern.¹⁰⁴ In dissent, one justice contended that because “the gap between commercial and noncommercial speech is rapidly shrinking,” the *Central Hudson* doctrine — with its lesser value for speech deemed commercial, regardless of the speech’s connection to public issues — “fails to account for the realities of the modern world.”¹⁰⁵

The Supreme Court, however, has seen “no need to break new ground.”¹⁰⁶ Rather, in commercial speech cases *Central Hudson* remains an “adequate basis for decision.”¹⁰⁷

C. Commercial Speech Analysis of *Desormeaux*

In affirming the *Desormeaux* plaintiffs’ fines, the Commission identified two interests furthered by the prohibition on jockey advertising: (1) upholding the “traditions of the turf,” and, relatedly, (2) protecting the ability of the stewards to perform their duties, i.e., ensuring the integrity and safety of the sport.¹⁰⁸ The latter interest, in particular, would seem to be “substantial” within the meaning of *Central Hudson*.¹⁰⁹ Whether the advertising ban “directly advances” that interest, and whether there is a “reasonable fit” between the ban and the interest, are potential battlegrounds.¹¹⁰

Specifically, on the issue of “reasonable fit,” there is a question as to whether all advertising or promotional symbols, regardless of size, have the ability to interfere with the stewards’ performance.¹¹¹ The Commission, of course, concluded that even the 3 by 5 inch Guild patch, much less larger symbols, “could be a distraction to the eye and effect the concentration of the stewards in the performance of their duties.”¹¹² The reasonableness of this determination will be significant in

¹⁰⁴*Id.* at 262. The state may ban all “commercial speech ‘that is fraudulent or deceptive without further justification,’ but may not do the same to fraudulent or deceptive speech in ‘matters of public concern.’” *Id.* at 268-69 (Brown, J., dissenting) (citations omitted).

¹⁰⁵*Id.* at 269 (Brown, J., dissenting); see Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993); Kozinski & Banner, *Who’s Afraid of Commercial Speech*, 76 VA. L. REV. 627 (1990).

¹⁰⁶*Lorillard*, 533 U.S. at 554 (quotations omitted). The Supreme Court initially granted certiorari to review *Nike*, but then withdrew the writ as “improvidently granted.” *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003).

¹⁰⁷*Lorillard*, 533 U.S. at 555 (quotations omitted).

¹⁰⁸See *supra* notes 34-36 and accompanying text.

¹⁰⁹447 U.S. at 564, 568-69; see KY. REV. STAT. ANN. § 230.215 (Commission’s purpose is to maintain “complete honesty and integrity of horse racing in the Commonwealth”); *Baffert v. California Horse Racing Bd.*, 332 F.3d 613, 618 (9th Cir. 2003) (“Preserving the integrity of racing is a significant interest, especially in view of the fact that California permits wagering on horse racing.”).

¹¹⁰*Central Hudson*, 447 U.S. at 566.

¹¹¹*Id.*

¹¹²See *supra* notes 35-36 and accompanying text.

determining whether the ban satisfies the *Central Hudson* standard.¹¹³ But in any event, given the lesser value placed on commercial speech and the substantial state interest promoted by the advertising ban, the Commission has at least a colorable argument that the ban is constitutional under *Central Hudson*.¹¹⁴

V. PUBLIC EMPLOYER RESTRICTIONS: WIDE LATITUDE FOR THE GOVERNMENT

A. Overview of Public Employer Doctrine

Another possible avenue of defense for the Commission is to argue that it should be considered a public employer for purposes of analyzing the advertising ban. In *Pickering*, the Supreme Court recognized the need to strike “a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”¹¹⁵ Under the public employer doctrine, when an employee’s “expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community,” government regulation “should enjoy wide latitude.”¹¹⁶ Moreover, even when an employee’s speech arguably addresses matters of public concern, the expression can still be regulated if it “threatens to interfere with government operations.”¹¹⁷

In a recent case, *Perez v. Hoblock*, the court relied on the public employer doctrine to uphold the New York racing board’s fine of a horse owner.¹¹⁸ The board fined the owner \$3,000 following his “profanity-laced verbal and physical outburst” at a meeting he requested with stewards for the Saratoga racetrack.¹¹⁹ The regulation under which the owner was fined permitted such a penalty for “any action

¹¹³This point is obviously a bone of contention in *Desormeaux*. Asked about the Commission’s determination that advertising on jockeys’ pants could obscure the stewards’ view, Mr. Fiss, the Guild vice-president, responded: “That’s reaching. That’s probably the most polite way I could put it.” Green, *supra* note 11 (quotations omitted). On the contrary, defense attorney Miller contends “the jockey’s uncluttered white breeches make it easier for the stewards to determine if a rider has done something wrong.” *Id.*

¹¹⁴Whether the “traditions of the turf,” standing alone, would be an interest sufficient to justify the prohibition is more problematic. See *supra* note 18.

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

¹¹⁶*Connick v. Myers*, 461 U.S. 138, 146 (1983).

¹¹⁷*Lewis v. Cohen*, 165 F.3d 154, 162 (2d Cir.), *cert. denied*, 528 U.S. 823 (1999). In *Connick*, 461 U.S. at 140, a government employee was terminated after circulating a questionnaire “concerning internal office affairs.” The Supreme Court held the firing did not violate the employee’s First Amendment rights, as it was reasonable to believe the questionnaire “would disrupt the office, undermine [the supervisor’s] authority, and destroy close working relationships.” *Id.* at 154.

¹¹⁸248 F. Supp. 2d 189 (S.D.N.Y. 2003).

¹¹⁹*Id.* at 190, 191. The owner sought the meeting to raise his concerns regarding the manner in which certain horses were selected to run in certain races. *Id.* at 191. When told by one official that his complaint was “ridiculous,” the owner began his outburst. *Id.*

detrimental to the best interests of racing.”¹²⁰ The owner filed suit challenging this provision on First Amendment grounds; the court found the public employer doctrine applicable because the owner was “a licensee in an industry closely regulated by defendants.”¹²¹

Rejecting his claim, the court looked to the first *Pickering* factor and noted that the owner was fined for disrupting the meeting with the stewards, not for “commenting on a matter of public concern.”¹²² In addition, the court recognized that the disruption of the meeting prevented the stewards from performing their duties — hearing and considering the owner’s alleged grievance.¹²³ Thus, the court reasoned that whatever value the owner’s speech possessed was outweighed by its interference with efficient government operations.¹²⁴ Accordingly, the court concluded the owner’s “disruptive and threatening behavior need not be” protected by the First Amendment.¹²⁵

Similarly, in *Leroy v. Illinois Racing Board*, the federal Seventh Circuit rejected a horse owner’s First Amendment challenge to sanctions levied by the state racing board.¹²⁶ As in *Perez*, the owner was fined for making threats and using profanity, in violation of a regulation which prohibited “improper language” or “improper conduct” towards members of the board.¹²⁷ In response to the owner’s argument that the regulation was vague and overbroad, the court conceded that “addressed to the general public for the conduct of daily affairs, [the rule] would be seriously deficient.”¹²⁸ Addressed solely to licensees, however, and governing only their relations with the board, the court considered the regulatory scheme to have “much in common with civil service laws, which despite their many vague terms were sustained” by the Supreme Court.¹²⁹ The court therefore held the regulation did not violate the First Amendment.¹³⁰

¹²⁰*Id.* at 192; see N.Y. COMP. CODES R. & REGS. title 9, § 4022.13.

¹²¹*Id.* at 192-93, 195.

¹²²*Perez*, 248 F. Supp. 2d at 197.

¹²³*Id.*

¹²⁴*Id.*

¹²⁵*Id.* at 195 (quotations omitted); see *Heil v. Santoro*, 147 F.3d 103, 109 (2d Cir. 1998) (“The government can prevail if it can show that it reasonably believed that the speech would potentially interfere with or disrupt the government’s activities, and can persuade the court that the potential disruptiveness was sufficient to outweigh the First Amendment value of that speech”) (citations omitted).

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

¹²⁷*Leroy*, 39 F.3d at 715.

¹²⁸*Id.*

¹²⁹*Id.*; see *Broadrick*, 413 U.S. at 607-15; *CSC v. Letter Carriers*, 413 U.S. 548, 568-81 (1973).

¹³⁰*Leroy*, 39 F.3d at 715.

B. Public Employer Analysis of Desormeaux

The *Desormeaux* plaintiffs are licensees in the same regulated industry as the owners in *Perez and Leroy*.¹³¹ Thus, the Commission may attempt to argue that under the public employer doctrine the jockey advertising ban is proper.¹³² Key to such an argument would be: (1) showing that advertising worn by jockeys would not constitute “comment on a public matter,” or, perhaps more likely, (2) that the advertising would interfere with the stewards in the performance of their duties.¹³³

On the first factor, it is worth noting that in *Perez and Leroy* the owners were fined for profanity and making threats, forms of speech that have little to no First Amendment value.¹³⁴ Conversely, advertising is protected by the First Amendment, although not to the same extent as “pure” or “political” speech.¹³⁵ Given the lesser value placed on commercial speech, it is not clear whether jockey advertising would be considered as relating to any matter of “social” or “other concern to the community.”¹³⁶ If not, then the advertising ban could be upheld under the public employer doctrine.¹³⁷

Assuming *arguendo* that jockey advertising would be considered “comment on a public matter,” the analysis then entails whether such communications would interfere with government operations — i.e., the stewards’ duties in officiating the races.¹³⁸ As noted, the Commission determined that even the Guild patch could distract the stewards from performing their duties.¹³⁹ If this determination is reasonable, then the advertising ban could again be upheld under the public employer doctrine.¹⁴⁰

VI. PUBLIC FORUM DOCTRINE

A. Overview of Time, Place, and Manner Restrictions

Finally, the Commission may argue that the advertising ban is a valid restriction of speech in a non-public forum. Because the First Amendment is not absolute, even

¹³¹See 810 KY. ADMIN. REGS. 1:009.

¹³²See *supra* notes 118-30 and accompanying text.

¹³³See *supra* notes 115-17 and accompanying text.

¹³⁴See *supra* notes 119 & 127 and accompanying text.

¹³⁵See *supra* notes 94-96 and accompanying text.

¹³⁶*Connick*, 461 U.S. at 146. Obviously, the content of the advertising would be critical in making this determination. And again, this assumes that certain communications are either commercial speech *or* something else, for example, political speech. See *Nike*, 45 P.3d at 268 (Brown, J., dissenting); see *supra* note 102 and accompanying text. In reality, commercial speech can be blended with other, more protected forms of expression, although the jurisprudence has not yet recognized this fact. *Nike*, 45 P.3d at 268-69 (Brown, J., dissenting).

¹³⁷*Connick*, 461 U.S. at 146.

¹³⁸See *supra* note 117 and accompanying text.

¹³⁹See *supra* notes 35-36 and accompanying text.

¹⁴⁰See *Perez*, 248 F. Supp. 2d at 195.

in a public forum the government may impose “reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’”¹⁴¹ In contrast, in a non-public forum, a lesser standard applies: the government may prohibit all forms of communication, provided the ban is reasonable and content-neutral.¹⁴²

The public forum determination is based on “how the locale is used. Streets, parks and sidewalks are the paradigms of a public forum because they have traditionally served as a place for free assembly and communication by citizens.”¹⁴³ Likewise, “municipal theaters and auditoriums are designed for and dedicated to expressive activities” and therefore are considered public forums.¹⁴⁴

In *International Society for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority*, the federal Third Circuit affirmed an order denying a religious society the right to distribute literature and solicit funds at the Meadowlands Sports Complex, which includes a football stadium and racetrack.¹⁴⁵ In so holding, the court concluded that the Meadowlands, despite being a public place, was not a public forum.¹⁴⁶ On the contrary, according to the court, the Meadowlands did not fit any of the traditional definitions of a public forum, but instead was a “commercial venture” aimed at “earn[ing] money by attracting and entertaining spectators with athletic events and horse races.”¹⁴⁷

Because the Meadowlands was not a public forum, the court looked only to whether the solicitation ban was reasonable.¹⁴⁸ This, in turn, was determined by whether the “proposed activity is basically incompatible with the normal character and function of the place.”¹⁴⁹ Concluding that the proposed solicitation would “disrupt the normal activities of the [Meadowlands],” the court held the ban reasonable, and denied the First Amendment challenge.¹⁵⁰

¹⁴¹*Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted). In *Ward*, the Supreme Court upheld noise control measures for a public bandshell, concluding that the regulation was content-neutral and a narrowly tailored restriction on the time, place, and manner of protected speech. *Id.* at 791, 803.

¹⁴²*United States Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 131 n.7 (1981).

¹⁴³*International Society for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Auth.*, 691 F.2d 155, 160 (3d Cir. 1982) (citing *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939)).

¹⁴⁴*Id.* (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975)).

¹⁴⁵*Id.* at 158. With the sole exception of concessionaires, no one was permitted to solicit funds or distribute literature at the Meadowlands. *Id.*

¹⁴⁶*Id.* at 159 (“Not all public places are public forums.”).

¹⁴⁷*Id.* at 161.

¹⁴⁸*International Society for Krishna Consciousness*, 691 F.2d at 161.

¹⁴⁹*Id.* (citations omitted).

¹⁵⁰*Id.*

B. Public Forum Analysis of Desormeaux

Given the above, the Commission could argue that Churchill Downs is, like the Meadowlands, a non-public forum.¹⁵¹ That is, it could be argued that the purpose of Churchill Downs, and more specifically the track itself, is to be a place where horse races are run, not where messages are expressed. The question then would be the reasonableness of the jockey advertising ban.¹⁵² The Commission's determination that the Guild patch could interfere with the stewards' duties would, if reasonable, satisfy this burden.¹⁵³ In addition, whether advertising is "basically incompatible with the normal character and function of" the track could implicate the "traditions of the turf," which the Commission has determined do not include commercial messages worn by jockeys.¹⁵⁴ Thus, the advertising ban could be upheld as a reasonable restriction of speech in a non-public forum.¹⁵⁵

VII. CONCLUSION

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

¹⁵¹Unlike the Meadowlands, Churchill Downs is privately owned. See www.churchilldowns.com. The Supreme Court, however, has applied the public forum analysis even to "conduct occurring on private property." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)). Thus, the track's purpose should govern its public forum status, not whether it is public or private property.

¹⁵²*Id.*

¹⁵³*Id.*; see *supra* notes 35-36 and accompanying text.

¹⁵⁴See *supra* note 34 and accompanying text.

¹⁵⁵See *supra* note 150 and accompanying text.