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Nicole E. Wolfe

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NOTE

COYOTE PUBLISHING, INC. v. MILLER: BLURRING THE STANDARDS OF COMMERCIAL AND NONCOMMERCIAL SPEECH

NICOLE E. WOLFE*

It is not easy to describe the present position of legal opinion on advertising and free speech. Only a poet can capture the essence of chaos.¹

INTRODUCTION

Prostitution is regarded as one of the world's oldest professions.² While the sale of sexual services has been in existence for centuries, practically every state in the United States has enacted laws that fully prohibit it.³ The underlying purposes for creating such laws include

* J.D. Candidate, May 2012, Golden Gate University School of Law, San Francisco, California; B.A. Political Science and Law, Societies and Justice, University of Washington, Seattle, Washington. I would like to thank the members of the *Golden Gate University Law Review* Editorial Board, without whose incredible guidance and expertise this Note would not have been published. Also, an immeasurable thanks to my friends and Matt for their patience and support throughout this publication process. I especially would like to thank my mother, Kathy; stepfather, Ian; and brother, Ryan for their never-ending love and encouragement as I pursue my legal career. This Note is dedicated to my father, Jim.

¹ R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 32 (1977).

² See, e.g., *People v. Smith*, 378 N.E.2d 1032, 1034 (N.Y. 1978).

³ *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 596 (9th Cir. 2010), *cert. denied*, 131 S. Ct.

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preventing communicable diseases, averting sexual exploitation of women and children, and reducing criminal misconduct associated with prostitution.⁴ Standing alone, the State of Nevada has adopted a nuanced approach to the legalized sale of sexual services.⁵ The motivation behind legalizing the commodification of sex is that it will reduce the negative health and safety impacts of unregulated and illegal prostitution.⁶ By legalizing prostitution in designated counties, however, Nevada prostitution laws have attracted constitutional controversy, more specifically the tension between First Amendment free speech rights and restrictions on commercial advertising.⁷ These constitutional issues recently came to the forefront in the United States Court of Appeals for the Ninth Circuit.

In *Coyote Publishing, Inc. v. Miller*, the Ninth Circuit considered the constitutionality of a Nevada statute that regulates commercial advertising of legal brothels.⁸ The Ninth Circuit held that severe restrictions on brothel advertising, even in counties where brothels are legal, are valid under the First Amendment.⁹ The court concluded that Nevada Revised Statutes sections 201.430(1) and 201.440, which largely prohibit the advertising of licensed brothels, met the four prongs of the *Central Hudson* test.¹⁰ Although the Ninth Circuit held that Nevada Revised Statutes section 201.430(1) was constitutional, the facts of the case did not apply to Nevada Revised Statutes section 201.430(2) and therefore the Ninth Circuit never addressed the constitutionality of this portion of the statute.¹¹ Nevada Revised Statutes section 201.430(2) nevertheless facially restricts more than just purely commercial speech. Consequently, section 201.430(2) is overbroad and should be subject to a

1556 (2011).

⁴ See generally *Commonwealth v. DeStefanis*, 658 A.2d 416 (Pa. 1995).

⁵ *Coyote Publ'g*, 598 F.3d at 605.

⁶ *Id.*

⁷ Compare U.S. CONST. amend. I (protecting right to free speech), with *Coyote Publ'g*, 598 F.3d 592 (holding that restrictions on brothel advertising were valid restrictions on speech).

⁸ *Coyote Publ'g*, 598 F.3d 592.

⁹ *Id.* at 611.

¹⁰ *Id.* at 602-11. According to the Supreme Court in *Central Hudson*, in order for a restriction on lawful commercial advertising to be valid there must be a substantial governmental interest, the restriction must be narrowly drawn toward that interest, and the restriction must be no more extensive than necessary to meet that interest. *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980).

¹¹ *Coyote Publ'g*, 598 F.3d 592. Whether the Ninth Circuit's decision regarding the constitutionality of Nevada Revised Statutes section 201.430(1) was correct is beyond the scope of this Note. This Note solely addresses the constitutionality of Nevada Revised Statutes section 201.430(2), which the Ninth Circuit did not address because it did not apply to the facts of the case.

strict scrutiny analysis, as opposed to the more moderate *Central Hudson* test.¹²

This Note discusses how Nevada Revised Statutes section 201.430(2) facially restricts more than just purely commercial speech and would fail strict scrutiny analysis.¹³ The Ninth Circuit in *Coyote Publishing, Inc. v. Miller* did not address the constitutionality of this section because the facts of the case pertained to advertising of licensed brothels, which is regulated by section 201.430(1), as opposed to advertising of unlicensed brothels, which is regulated by section 201.430(2).¹⁴ Part I of this Note gives a brief history of prostitution, outlines the constitutionality of commercial speech regulations pursuant to the *Central Hudson* test and explains the Ninth Circuit's reasoning in *Coyote Publishing* for concluding that Nevada Revised Statutes section 201.430(1) applies solely to commercial speech. Part II argues that although the Ninth Circuit held that Nevada Revised Statutes section 201.430(1) applies solely to commercial speech, section 201.430(2) should be invalidated by the doctrine of overbreadth because it regulates commercial as well as noncommercial speech. Finally, Part III proposes that a strict scrutiny analysis is the appropriate level of scrutiny to analyze Nevada Revised Statutes section 201.430(2). This Part also argues that section 201.430(2) would fail a strict scrutiny analysis because it is not narrowly tailored to achieve a compelling state interest.

I. BACKGROUND

A. HISTORY AND DEVELOPMENT OF PROSTITUTION

Prostitution, defined as the act of engaging in sexual activity for money or an equivalent, is frequently regarded as “an evil over which the legislature has almost plenary power.”¹⁵ Throughout the history of the United States, many state and municipal laws were passed in an attempt to curb the business of prostitution.¹⁶ In 1692, Massachusetts passed the

¹² *Cent. Hudson*, 447 U.S. 557.

¹³ The analysis of Nevada Revised Statutes section 201.440 is beyond the scope of this Note. The court in *Coyote Publishing* found section 201.440, which prohibits the advertising of brothels in counties where prostitution is illegal, to be constitutionally valid. *Coyote Publ'g*, 598 F.3d at 611. This Note solely addresses constitutional issues regarding section 201.430(2).

¹⁴ *Coyote Publ'g*, 598 F.3d 592.

¹⁵ *State v. Green*, 131 P.2d 411, 412 (Ariz. 1942); *see also State v. Pascal*, 950 A.2d 566, 576 (Conn. App. Ct. 2008); *State v. B Bar Enters., Inc.*, 649 P.2d 978 (Ariz. 1982).

¹⁶ Jessica N. Drexler, *Governments' Role in Turning Tricks: The World's Oldest Profession in the Netherlands and the United States*, 15 DICK. J. INT'L L. 201, 204 (1996) (citing ROBERT T.

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first laws that regulated sexual intercourse.¹⁷ During the 1800s, more laws targeting sexual services were enacted, yet prostitution was still tolerated.¹⁸ In the early 1900s, criminal sanctions prohibiting prostitution were executed at the state level throughout much of the United States.¹⁹ By 1971, every state, with the exception of Nevada, criminalized prostitution.²⁰

Today, the overwhelming majority of states heavily regulate prostitution in an effort to prevent communicable diseases, inhibit sexual exploitation, and reduce criminal misconduct associated with the sale of sexual services.²¹ Statutes that regulate and punish the act of prostitution and related offenses fall within the police power of the states.²² The purpose of these statutes is to protect public health and welfare and to prevent criminal activity associated with prostitution.²³ However, these criminal statutes have not ended the centuries-old practice.²⁴ Recognizing this reality, Nevada is currently the only state that permits the sale of sexual services in certain counties.²⁵

Prostitution houses are legal, yet heavily monitored, in eleven of the sixteen Nevada counties.²⁶ Nevada counties with more than 400,000 residents are prohibited from issuing licenses to brothels.²⁷ This includes Clark County, where the city of Las Vegas is located.²⁸ Even in counties where brothels are legal, the sale of sexual services is still prohibited unless it is held in a licensed, designated brothel.²⁹ Among the several

FRANCOEUR, TAKING SIDES: CLASHING VIEWS ON ISSUES IN HUMAN SEXUALITY 264 (Robert T. Francoeur ed., 1987)).

¹⁷ *Id.* (citing ROBERT T. FRANCOEUR, TAKING SIDES: CLASHING VIEWS ON ISSUES IN HUMAN SEXUALITY 264 (Robert T. Francoeur ed., 1987)).

¹⁸ *Id.* (citing ROBERT T. FRANCOEUR, TAKING SIDES: CLASHING VIEWS ON ISSUES IN HUMAN SEXUALITY 264 (Robert T. Francoeur ed., 1987)).

¹⁹ *Id.* at 204-05 (citing ROBERT T. FRANCOEUR, TAKING SIDES: CLASHING VIEWS ON ISSUES IN HUMAN SEXUALITY 264 (Robert T. Francoeur ed., 1987)).

²⁰ *Id.* (citing ROBERT T. FRANCOEUR, TAKING SIDES: CLASHING VIEWS ON ISSUES IN HUMAN SEXUALITY 264 (Robert T. Francoeur ed., 1987)).

²¹ *Id.* at 205-06.

²² *Moody v. Bd. of Cnty. Comm'rs*, 697 P.2d 1310, 1318 (Kan. 1985).

²³ *State v. Schultz*, 582 N.W.2d 113, 117 (Wis. Ct. App. 1998).

²⁴ *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 595 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1556 (2011).

²⁵ *Id.* at 596.

²⁶ *Id.*

²⁷ *Coyote Publ'g, Inc. v. Heller*, No. CV-06-329-JCM-PAL, 2007 WL 2254702, at *1 (D. Nev. Aug. 3, 2007), *rev'd sub nom. Coyote Publ'g v. Miller*, 598 F.3d 592 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1556 (2011).

²⁸ *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 596 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1556 (2011).

²⁹ NEV. REV. STAT. ANN. § 201.354(1) (Westlaw 2011).

restrictions³⁰ on legal brothels are severe limits on the advertising of brothels, both where prostitution is illegal and where it is legal.³¹ These restrictions that inhibit advertising are subject to First Amendment protections.³²

B. FIRST AMENDMENT PROTECTION OF COMMERCIAL SPEECH

One of the core principles of the First Amendment is to protect the rights of individuals to give and obtain truthful information about lawful activities.³³ From this principle, the First Amendment prevents the government from suppressing speech because of its mere disapproval of the message.³⁴ To safeguard the free flow of commercial speech, the United States Supreme Court articulated a four-part test to determine the constitutionality of restrictions that inhibit purely commercial speech.³⁵ Courts review laws that restrict commercial speech under a specific level of intermediate scrutiny referred to as the *Central Hudson* test.³⁶

1. *Defining Commercial Speech*

For First Amendment purposes, commercial speech is defined as an expression related to the economic interests of the speaker, generally in the form of commercial advertisement for the sale of goods or services.³⁷ Speech is considered commercial if (1) the speech is admittedly advertising, (2) the speech references a specific product, and (3) the speaker has an economic motive for the speech.³⁸ Alternatively, speech

³⁰ *Coyote Publ'g*, 598 F.3d at 596. The restrictions on legal brothels include imposing liability on owners of brothels if they knew or should have known that a prostitute has tested positive for HIV. *See, e.g.*, NEV. REV. STAT. ANN. § 41.1397 (Westlaw 2011). Nevada has also created statutory protections in an effort to prevent coercion of the employees by the operators of the brothels. For example, section 201.300 makes criminal the act of “pandering,” which includes inducing, persuading, encouraging, or enticing a person to engage in the sale of sexual services. Additionally, it is a crime for a person to live from the earnings of a sex worker or receive money from the proceeds of any prostitute without consideration. NEV. REV. STAT. ANN. § 201.320 (Westlaw 2011).

³¹ NEV. REV. STAT. ANN. § 201.440 (Westlaw 2011).

³² *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

³³ Brief of Amicus Curiae DKT Liberty Project in Support of Plaintiff-Appellee Coyote Publishing, Inc., *Coyote Publ'g*, 598 F.3d 592 (No. 07-16633), 2008 WL 1756433 at *2.

³⁴ *Id.*

³⁵ *Cent. Hudson*, 447 U.S. at 566.

³⁶ *See id.*

³⁷ *United States v. Bell*, 238 F. Supp. 2d 696, 703 (M.D. Pa. 2003), *aff'd*, 414 F.3d 474 (3d Cir. 2005).

³⁸ *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983)); *see also Ass'n of Nat'l Advertisers, Inc. v.*

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is not commercial if it does not promote the speaker's product for sale or encourage a commercial transaction with the user.³⁹

In order to be classified as commercial, speech must do "no more than" propose a commercial transaction.⁴⁰ In other words, commercial speech is an expression that relates solely to the economic interests of the speaker and its audience.⁴¹ The Ninth Circuit has accepted the Supreme Court's "no more than" criterion when defining commercial speech.⁴² The Ninth Circuit identified this criterion as follows: "If speech is not 'purely commercial'—that is, if it does more than propose a commercial transaction—then it is entitled to full First Amendment protection."⁴³

2. *The Central Hudson Test*

The Supreme Court's landmark decision in *Central Hudson* governs restrictions on commercial speech. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, a New York electrical utility company challenged the constitutionality of a regulation, promulgated by the Public Service Commission, that prohibited all advertising that promoted the use of electricity.⁴⁴ The Supreme Court, in finding that the ordinance restricted purely commercial speech, formulated a four-step test for analyzing the constitutionality of restrictions on commercial speech.⁴⁵ The Court explained that in order for a restriction on commercial advertising to be valid, (1) the speech must concern a legal activity and must not be misleading, (2) there must be a substantial governmental interest to be achieved by the restriction, (3) the restriction must be narrowly drawn to advance that interest, and (4) the restriction must be no more extensive than necessary to meet that interest.⁴⁶

Applying this test, the Court found that conserving energy was a substantial interest but the Commission's restriction was more extensive than necessary to serve that interest; thus, the regulation was

Lungren, 44 F.3d 726, 728 (9th Cir. 1994).

³⁹ *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1111 (C.D. Cal. 2004).

⁴⁰ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

⁴¹ *Cent. Hudson*, 447 U.S. at 561.

⁴² See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1143-44 (9th Cir. 1998).

⁴³ *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) (citing *Hoffman*, 255 F.3d at 1184).

⁴⁴ *Cent. Hudson*, 447 U.S. at 558-59.

⁴⁵ *Id.* at 566.

⁴⁶ *Id.* at 564.

unconstitutional under the First and Fourteenth Amendments.⁴⁷ Subsequently, courts analyze laws that regulate purely commercial speech for constitutional defects pursuant to the *Central Hudson* test. However, restrictions that inhibit more than purely commercial speech are granted full constitutional protection and are subject to a strict scrutiny analysis.

C. FACTS AND PROCEDURAL HISTORY OF *COYOTE PUBLISHING, INC. V. MILLER*

In March of 2006, Shady Lady Ranch, a licensed brothel, wished to place an advertisement in both *High Desert Advocate* and *Las Vegas CityLife*, two newspapers that were circulated in Nevada.⁴⁸ Coyote Publishing, Inc., a Nevada corporation that owned *High Desert Advocate* and *Las Vegas CityLife*, wanted to run the advertisement.⁴⁹ The newspapers circulated in counties where brothels were legal, as well as counties where brothels were prohibited.⁵⁰ Due to the provisions of Nevada Revised Statutes sections 201.430(1) and 201.440, *Las Vegas CityLife* rejected Shady Lady Ranch's advertisement out of fear of prosecution.⁵¹

Section 201.440 prohibits brothel advertising in counties where the sale of sexual services is illegal by local or state statute.⁵² Moreover, section 201.430 prohibits certain forms of advertising in counties where brothels are permitted.⁵³ Specifically, section 201.430(1) restricts individuals acting on behalf of brothels from advertising, section 201.430(2) restricts advertising of unlicensed brothels, and section 201.430(3) makes inclusion of locations of brothels in any publication prima facie evidence of advertising for the purposes of this section.⁵⁴ Violation of these advertising statutes may result in criminal penalties, including fines and imprisonment.⁵⁵

⁴⁷ *Id.* at 572-73.

⁴⁸ Plaintiffs' Motion for Summary Judgment, *Coyote Publ'g, Inc. v. Heller*, No. CV-06-329-JCM-PAL, 2007 WL 2254702 (D. Nev. Aug. 3, 2007), *rev'd sub nom.* *Coyote Publ'g v. Miller*, 598 F.3d 592 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1556 (2011).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* Additionally, Shady Lady Ranch wished to advertise in public theaters, streets, and highways, in a manner that was prohibited by section 201.430(1). *Id.*

⁵² NEV. REV. STAT. ANN. § 201.440 (Westlaw 2011).

⁵³ NEV. REV. STAT. ANN. § 201.430(1) (Westlaw 2011).

⁵⁴ NEV. REV. STAT. ANN. § 201.430(1)-(3) (Westlaw 2011).

⁵⁵ NEV. REV. STAT. ANN. § 201.430(4) (Westlaw 2011).

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Nevada Revised Statutes section 201.430 in its relevant portion states:

1. It is unlawful for . . . any owner, operator, agent or employee of a house of prostitution, or anyone acting on behalf of any such person, to advertise . . . any house of prostitution:

(a) In any public theater, on the public streets of any city or town, or on any public highway; or

(b) In any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute.

2. It is unlawful for any person knowingly to prepare or print an advertisement concerning a house of prostitution not licensed for that purpose pursuant to NRS 244.345 . . . in any county, city or town where prostitution is prohibited by local ordinance or where the licensing of a house of prostitution is prohibited by state statute.

3. Inclusion in any display, handbill or publication of the address, location or telephone number of a house of prostitution or of identification of a means of transportation to such a house, or of directions telling how to obtain any such information, constitutes prima facie evidence of advertising for the purposes of this section.

4. Any person, company, association or corporation violating the provisions of this section shall be punished . . . by imprisonment in the county jail . . . or by a fine . . . or by both fine and imprisonment.⁵⁶

Coyote Publishing, Inc., and Shady Lady Ranch (collectively “Coyote Publishing”) filed a complaint against the Nevada Secretary of State, the Nevada Attorney General, and the Clark County District Attorney.⁵⁷ Coyote Publishing challenged sections 201.430 and 201.440, alleging that the restrictions violated the First Amendment.⁵⁸ In a motion for summary judgment, Coyote Publishing argued that sections 201.430 and 201.440 restricted truthful, non-misleading commercial speech and that the defendants failed to demonstrate that the statutes met the *Central*

⁵⁶ *Id.*

⁵⁷ Plaintiffs’ Motion for Summary Judgment, *Coyote Publ’g, Inc. v. Heller*, No. CV-06-329-JCM-PAL, 2007 WL 2254702 (D. Nev. Aug. 3, 2007), *rev’d sub nom. Coyote Publ’g v. Miller*, 598 F.3d 592 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1556 (2011).

⁵⁸ *Id.*

Hudson test.⁵⁹ The defendants subsequently filed a motion to dismiss and a cross-motion for summary judgment arguing that these statutes satisfied the *Central Hudson* test and were thus constitutional.⁶⁰

The United States District Court for the District of Nevada granted Coyote Publishing's motion for summary judgment.⁶¹ The district court found that sections 201.430 and 201.440 restricted free speech and thus were unconstitutional.⁶² In reaching its decision, the district court stated that the definition of "prima facie evidence" contained in section 201.430(3) reached far more than commercial speech and therefore required a strict scrutiny analysis.⁶³ Accordingly, the district court found that section 201.430(3) violated the U.S. Constitution because the government had neither demonstrated a compelling interest nor shown that the statute used the least restrictive means to achieve such an interest.⁶⁴ The court then analyzed the remaining portion of section 201.430 using the four-part analysis set forth in *Central Hudson*.⁶⁵ The district court concluded that section 201.430 failed to meet the *Central Hudson* test and was thus unconstitutional.⁶⁶ Subsequently, in 2010, the Nevada Secretary of State appealed the grant of summary judgment, and the case went before the Court of Appeals for the Ninth Circuit.⁶⁷

D. NINTH CIRCUIT'S HOLDING AND REASONING

The Ninth Circuit reversed the district court's decision and upheld the constitutionality of the statutes, finding that both Nevada Revised Statutes section 201.430(1) and 201.440 targeted purely commercial

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Coyote Publ'g, Inc. v. Heller*, No. CV-06-329-JCM-PAL, 2007 WL 2254702, at *7 (D. Nev. Aug. 3, 2007) (order granting summary judgment), *rev'd sub nom.* *Coyote Publ'g v. Miller*, 598 F.3d 592 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1556 (2011).

⁶² *Id.* at *3.

⁶³ *Id.* at *2-3.

⁶⁴ *Id.* at *3.

⁶⁵ *Id.* at *3-7.

⁶⁶ *Id.* at *7. The district court rejected the defendants' argument that advertising of licensed brothels in counties that do not allow them will increase illegal prostitution in those counties. The court also found that defendant's second argument, protecting the county option to ban prostitution, was unfounded. The court relied on *Bigelow v. Virginia*, which stated that a state may not, "under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." *Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975).

⁶⁷ *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1556 (2011).

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speech.⁶⁸ As a result, the Ninth Circuit analyzed these statutes using the *Central Hudson* test.⁶⁹ In reaching this conclusion, the court first stated that section 201.430(1) does not burden any significant amount of fully protected, noncommercial speech.⁷⁰ The court noted that because section 201.430(1) states that only brothel owners or persons acting on behalf of brothel owners are prohibited from advertising, publishers of news accounts could not be punished under this portion of the statute.⁷¹ Second, the Ninth Circuit reasoned that in Nevada, where laws contain statutory language making certain facts “prima facie evidence” of guilt, a judge could submit this presumption to the jury only if a “reasonable juror on the evidence as a whole . . . could find guilt or the presumed fact beyond a reasonable doubt.”⁷² Thus, the prima facie provision would have effect only if the evidence, viewed as a whole, would lead a reasonable juror to find that the material was “advertising.”⁷³ The Ninth Circuit presumed that a judge would not submit the prima facie presumption to the jury in a case involving a newspaper article, because a reasonable juror would not conclude that a newspaper article was advertising.⁷⁴ Therefore, the court concluded that section 201.430(1) would not apply to newspaper articles or postings on Internet message boards by individuals acting independently of brothels.⁷⁵

Since the Ninth Circuit found that Nevada Revised Statutes sections 201.430(1) and 201.440 regulated purely commercial speech, the court proceeded to analyze the restrictions using the *Central Hudson* test.⁷⁶ The Ninth Circuit first acknowledged that prostitution in some counties in Nevada was a legal activity and the speech was not misleading.⁷⁷ It then found that Nevada has a substantial state interest in support of advertising restrictions.⁷⁸ According to the Ninth Circuit, the deeply rooted notion that “[t]here are, in a civilized society, some things that

⁶⁸ *Id.* at 599.

⁶⁹ *Id.* at 602.

⁷⁰ *Id.* at 599.

⁷¹ *Id.*

⁷² *Id.* (quoting NEV. REV. STAT. § 47.230(2)).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 599 n.9.

⁷⁶ *Id.* at 599.

⁷⁷ *Id.* at 606. It should be noted that prostitution is legal only in designated counties in Nevada. See NEV. REV. STAT. ANN. § 244.345 (Westlaw 2011). In counties where prostitution is not legal, the First Amendment extends no protection and the analysis ends. See *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563-64 (1980); *Coyote Publ’g*, 598 F.3d at 606.

⁷⁸ *Coyote Publ’g*, 598 F.3d at 602-03.

money cannot buy,” coupled with the prevention of exploitation of women and children, justified Nevada’s advertising restrictions.⁷⁹ The court also noted that advertising restrictions “directly and materially advance” Nevada’s interest in limiting the commodification of sex because they eliminate the public’s exposure and reduce the market demand for it.⁸⁰ Finally, the court concluded that the restrictions on advertising were no more extensive than necessary to meet Nevada’s interest.⁸¹ Thus, the Ninth Circuit found that section 201.430(1) met the *Central Hudson* test and therefore did not violate the First Amendment.⁸² Although the Ninth Circuit reached a conclusion regarding the constitutionality of section 201.430(1), it did not address the constitutionality of section 201.430(2), which regulates advertising of unlicensed brothels, because the facts of the case pertained to advertising of licensed brothels.⁸³

II. ARGUMENT

Since Nevada Revised Statutes section 201.430(2) applies to unlicensed brothels, the Ninth Circuit did not address its constitutionality and instead held that section 201.430(1), as applied to the facts in *Coyote Publishing* pertaining to a licensed brothel, was constitutional.⁸⁴ Nevertheless, section 201.430(2) is overbroad because it restricts both commercial and noncommercial speech. If *High Desert Advocate* and *Las Vegas CityLife*, the two newspapers in *Coyote Publishing*, independently published an article that referenced unlicensed brothels as opposed to licensed brothels, section 201.430(1) would not apply.⁸⁵ Instead, these newspapers would face sanctions pursuant to section 201.430(2) even though they were not acting on behalf of a brothel.⁸⁶ Since Nevada Revised Statutes section 201.430(2) restricts both commercial and noncommercial speech, it is subject to a strict scrutiny analysis because fully protected speech is inhibited by the construction of the statute.⁸⁷ As a result, section 201.430(2) should be invalidated

⁷⁹ *Id.* at 602-05.

⁸⁰ *Id.* at 608.

⁸¹ *Id.* at 610.

⁸² *Id.* at 610-11.

⁸³ See generally NEV. REV. STAT. ANN. § 201.430(2) (Westlaw 2011).

⁸⁴ *Coyote Publ’g*, 598 F.3d at 602-03.

⁸⁵ See generally NEV. REV. STAT. ANN. § 201.430(1) (Westlaw 2011).

⁸⁶ See generally NEV. REV. STAT. ANN. § 201.430(2) (Westlaw 2011).

⁸⁷ See generally *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-97 (1982); *United States v. Wenger*, 292 F. Supp. 2d 1296, 1309 (D. Utah 2003).

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because the statute is not narrowly tailored and consequently cannot withstand a strict scrutiny analysis.

A. NEVADA REVISED STATUTES SECTION 201.430(2) SHOULD BE DEEMED INVALID BECAUSE IT IS UNCONSTITUTIONALLY OVERBROAD

Section 201.430(2) is unconstitutionally overbroad because it restricts both noncommercial speech as well as commercial speech. Restrictions that target unprotected speech are unconstitutionally overbroad if they also control types of protected speech or press activity.⁸⁸ Overbroad restrictions on speech that carry criminal sanctions are “particularly repugnant” unless they are drawn with narrow specificity.⁸⁹ The test is “whether the challenged provisions . . . burden no more speech than necessary to serve a significant government interest.”⁹⁰ Thus, statutes that criminalize a significant amount of constitutionally protected speech may be deemed unconstitutionally overbroad even if they carry some legitimate applications.⁹¹

1. *The Overbreadth Doctrine Is Appropriate*

The doctrine of overbreadth is usually inapplicable to statutes that regulate purely commercial speech.⁹² The rationale behind this is that commercial expression is less likely to be deterred by overbroad regulation and is “more hardy, less likely to be ‘chilled,’ and not in need of surrogate litigators.”⁹³ The exception to this rule applies to regulations of purely commercial speech that could potentially affect noncommercial speech.⁹⁴

⁸⁸ See generally *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

⁸⁹ *State v. Hauge*, 547 N.W.2d 173, 176 (S.D. 1996).

⁹⁰ *Id.* (quoting *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994)).

⁹¹ *State v. Kilburn*, 84 P.3d 1215, 1221 (Wash. 2004).

⁹² See generally *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-97 (1982); *United States v. Wenger*, 292 F. Supp. 2d 1296, 1309 (D. Utah 2003).

⁹³ *Desnick v. Dep’t of Prof’l Regulation*, 665 N.E.2d 1346, 1353 (Ill.1996) (quoting *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 481 (1989)).

⁹⁴ *State by Spannaus v. Century Camera, Inc.*, 309 N.W.2d 735, 740-41 (Minn. 1981); see also *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980) (holding that the rule that overbreadth challenges cannot be brought against commercial speech regulations was inapplicable when the issue was whether the manner in which an ordinance regulated solicitations also intruded upon the rights of fully protected speech).

Restrictions that target commercial speech but also inhibit noncommercial speech are subject to an overbreadth analysis.⁹⁵ For example, in *Spannaus v. Century Camera*, a Minnesota state law provided that “[n]o employer or agent thereof shall directly or indirectly solicit or require a polygraph.”⁹⁶ The Minnesota Supreme Court found that while this law targeted commercial speech, the terms “solicit or require” also had the potential to inhibit noncommercial speech, such as an employer’s letter to the editor of the local newspaper on the subject of polygraph testing.⁹⁷ Because of this potential danger, the court recognized that *Spannaus* was not a commercial speech case and found that the overbreadth doctrine was appropriate.⁹⁸

Likewise, Nevada Revised Statutes section 201.430(2) would inhibit a substantial portion of fully protected, noncommercial speech. Section 201.430(2) potentially prohibits news articles and Internet postings on message boards, both of which are noncommercial in nature.⁹⁹ The relevant portion of section 201.430(2) that affects noncommercial speech states, “[i]t is unlawful for any person knowingly to prepare or print an advertisement concerning a house of prostitution not licensed for that purpose”¹⁰⁰ Section 201.430(3) then states “[i]nclusion in any . . . publication of the address, location, or telephone number of a house of prostitution, constitutes prima facie evidence of advertising for purposes of this section.”¹⁰¹ Therefore, according to the statute, publications that include the location of an unlicensed brothel are considered to be forms of unlawful advertising.¹⁰²

As a result, the construction of Nevada Revised Statutes section 201.430(2) has the potential to inhibit noncommercial speech, such as a newspaper or magazine publication. For example, the statute would

⁹⁵ *State by Spannaus*, 309 N.W.2d at 740-41.

⁹⁶ *Id.* at 738 n.2 (citing MINN. STAT. § 181.75 (1980)).

⁹⁷ *Id.* at 740-41.

⁹⁸ *Id.* at 741.

⁹⁹ *See, e.g., Ad World, Inc. v. Twp. of Doylestown*, 672 F.2d 1136, 1139-40 (3d Cir. 1982); *S.N.J. Newspapers, Inc. v. State of N.J. Dep’t of Transp.*, 542 F. Supp. 173, 182-83 (D.N.J. 1982) (stating that the First Amendment guarantees of freedom of the press protect newspapers); *see also Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 114 (5th Cir. 1992) (holding that a free newspaper that dealt with environmental and social justice issues was fully constitutionally protected speech even though its publication expenses were covered in part by revenue derived from advertisers); *Too Much Media, LLC v. Hale*, 20 A.3d 364, 373 (N.J. 2011) (stating that defendant was protected by the First Amendment to post her thoughts online).

¹⁰⁰ NEV. REV. STAT. ANN. § 201.430(2) (Westlaw 2011).

¹⁰¹ NEV. REV. STAT. ANN. § 201.430(3) (Westlaw 2011).

¹⁰² *Compare* NEV. REV. STAT. ANN. § 201.430(2) (Westlaw 2011), *with* NEV. REV. STAT. ANN. § 201.430(3) (Westlaw 2011).

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affect a newspaper article that covers an unlicensed brothel. If that article mentioned the location or address of an unlicensed brothel, it would constitute prima facie evidence of an advertisement pursuant to Nevada Revised Statutes section 201.430(3).¹⁰³ Under Nevada Revised Statutes section 201.430(2), it is unlawful for any person to print an advertisement regarding unlicensed brothels.¹⁰⁴ The newspaper publisher that printed an article that mentioned an unlicensed brothel would therefore have to defend their free speech rights to avoid criminal sanctions. Similar to *Spannaus*,¹⁰⁵ because the language of the section 201.430(2) poses a potential danger of reaching noncommercial speech, the doctrine of overbreadth is applicable.

2. *The Doctrine of Overbreadth Applies to Statutes That Intertwine Both Commercial and Noncommercial Speech*

The doctrine of overbreadth applies to Nevada Revised Statutes section 201.430(2) because this section intertwines both commercial and noncommercial speech. A law or ordinance may be facially unconstitutional if it prohibits “such a broad range of protected conduct that it is unconstitutionally ‘overbroad.’”¹⁰⁶ In general, a party has standing to vindicate only his or her own constitutional rights.¹⁰⁷ However, the United States Supreme Court has recognized an exception to this general rule for laws that are written so broadly that they may affect the protected speech of third parties.¹⁰⁸

If commercial speech is “inextricably intertwined” with noncommercial speech, a court may not parse out the protected and unprotected parts of the speech.¹⁰⁹ In *S.O.C., Inc v. County of Clark*, the Ninth Circuit found that a county ordinance prohibiting off-premises canvassing in public streets and sidewalks within the Las Vegas resort district was overbroad because it restricted commercial speech that was intertwined with noncommercial speech.¹¹⁰ The ordinance did not

¹⁰³ NEV. REV. STAT. ANN. § 201.430(3) (Westlaw 2011).

¹⁰⁴ NEV. REV. STAT. ANN. § 201.430(2) (Westlaw 2011).

¹⁰⁵ *State by Spannaus v. Century Camera, Inc.*, 309 N.W.2d 735, 735 (Minn. 1981).

¹⁰⁶ *Members of the City Council of the City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984).

¹⁰⁷ *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1142 (9th Cir.1998); *Members of City Council of the City of L.A.*, 446 U.S. at 796.

¹⁰⁸ *S.O.C., Inc.*, 152 F.3d at 1142 (citing *Members of City Council of the City of L.A.*, 446 U.S. at 798).

¹⁰⁹ *Id.* at 1144 (citing *Perry v. L.A. Police Dep’t*, 121 F.3d 1365, 1368 (9th Cir. 1997)).

¹¹⁰ *Id.*

contain any limiting language such as “solely,” “exclusively,” or “primarily” to ensure that only purely commercial speech was hindered by the statute.¹¹¹ Absent these limitations in the statutory construction of the ordinance, the Ninth Circuit found that there was a substantial likelihood that the ordinance would inhibit the expression of fully protected speech intertwined with commercial speech.¹¹² The Ninth Circuit concluded that the term “off-premises canvassing” included fully protected expression and would have prohibited the distribution of newspapers, pamphlets, magazines, and other publications that contain some form of commercial advertising.¹¹³ Section 201.430(2) is unconstitutionally overbroad because the language of the statute intertwines both commercial and noncommercial speech.

3. *Nevada Revised Statutes Section 201.430(2) Is Unconstitutionally Overbroad*

Section 201.430(2) is overbroad because it encompasses newspaper articles and other fully protected types of speech.¹¹⁴ Speech that is noncommercial is generally entitled to full protection under the Constitution.¹¹⁵ Newspaper articles and reviews are usually not considered advertising for commercial speech purposes because they lack an economic incentive for engaging in the speech and do not propose a commercial transaction.¹¹⁶ Thus, such publications are granted full protection under the First Amendment, and any restriction that inhibits noncommercial speech is subject to strict scrutiny.¹¹⁷ While section 201.430(2) targets commercial speech, the restriction is

¹¹¹ *Id.* at 1143-44.

¹¹² *Id.* at 1144.

¹¹³ *Id.*

¹¹⁴ *See generally id.*

¹¹⁵ *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562-63 (1980) (stating that the Constitution provides lesser protections to commercial speech than other forms of expression); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (stating that the most exacting scrutiny standard applies to regulations that suppress speech because of its content).

¹¹⁶ *See, e.g., S.N.J. Newspapers, Inc. v. State of N.J. Dep’t of Transp.*, 542 F. Supp. 173, 182-83 (D.N.J. 1982) (stating that the First Amendment guarantees of freedom of the press protect newspapers); *Ad World, Inc. v. Twp. of Doylestown*, 672 F.2d 1136, 1139-40 (3d Cir. 1983); *see also Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 114 (5th Cir. 1992) (holding that a free newspaper that dealt with environmental and social justice issues was fully constitutionally protected speech even though its publication expenses were covered in part by revenue derived from advertisers).

¹¹⁷ *See Worrell Newspapers of Ind., Inc. v. Westhafer*, 739 F.2d 1219, 1221-22 (7th Cir. 1984).

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constitutionally overbroad because the statute also restricts noncommercial speech.¹¹⁸

As discussed above, section 201.430(2) contains language that inhibits certain types of noncommercial speech, such as newspaper articles that cover the brothel industry. In *Coyote Publishing*, the Ninth Circuit addressed a New York Times article used by the plaintiffs as an example where section 201.430(3) would inhibit noncommercial speech.¹¹⁹ The article featured a picture of a legal brothel and revealed the brothel's web address and phone number.¹²⁰ The court determined that section 201.430(3) did not burden any significant amount of fully protected speech because section 201.430(1) prohibits only brothel owners or persons acting on behalf of brothel owners from advertising.¹²¹ However, section 201.430(2), which regulates unlicensed brothels, does inhibit fully protected speech because it does not apply solely to brothel owners and those acting on behalf of brothels.¹²² If the New York Times article had instead featured an illegal brothel as opposed to a legal brothel, the article would be considered an unlawful advertisement under Nevada Revised Statutes section 201.430(2) because it publicizes the telephone number and identifies a way to obtain directions to the brothel.¹²³

Additionally, section 201.430(2) uses language insufficient to ensure that noncommercial speech, such as a newspaper publication, is not intertwined with commercial speech. Just as the ordinances in *S.O.C., Inc. v. County of Clark* did not ensure that only purely commercial speech was restricted, section 201.430(2) contains no

¹¹⁸ The Constitution gives substantial protection from overbroad laws that chill First Amendment speech. See *United States v. Schales*, 546 F.3d 965 (9th Cir. 2008) (stating that a statute is unconstitutional on its face if it prohibits a substantial amount of protected speech); see also *Hous. Balloons & Promotions, LLC v. City of Hous.*, 589 F. Supp. 2d 834, 847 (S.D. Tex. 2008) (holding that the overbreadth doctrine is not applicable to a commercial speech case unless the challenged regulation potentially inhibits noncommercial speech as well as commercial speech); *King Enters., Inc. v. Thomas Twp.*, 215 F. Supp. 2d 891 (E.D. Mich. 2002) (stating that for noncommercial speech, regulation is overbroad if it reaches a substantial amount of constitutionally protected speech).

¹¹⁹ *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 598 n.7 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1556 (2011).

¹²⁰ Steve Friess, *Brothels Ask to Be Taxed, But Official Sees a Catch*, N.Y. TIMES, Jan. 25, 2009, www.nytimes.com/2009/01/26/us/26brothel.html.

¹²¹ *Id.*; see NEV. REV. STAT. ANN. § 201.430(3) (Westlaw 2011). The relevant portion of the statute that inhibits this article states, "Inclusion . . . of the . . . location or telephone number of a house of prostitution . . . constitutes prima facie evidence of advertising for the purposes of this section."

¹²² See generally NEV. REV. STAT. ANN. § 201.430(2) (Westlaw 2011).

¹²³ See generally NEV. REV. STAT. ANN. § 201.430(2) (Westlaw 2011).

limiting language on its face.¹²⁴ Sections 201.430(2) and 201.430(3) provide that it is unlawful to print an advertisement concerning an unlicensed brothel and that inclusion in any publication of their address, location, or telephone number constitutes prima facie evidence of advertising.¹²⁵ These sections of the statute lack any phrases, such as “solely or exclusively commercial transactions” as the court articulated in *S.O.C., Inc.*, to ensure that the application of this statute does no more than restrict purely commercial transactions.¹²⁶ Absent these limitations in the construction of Nevada Revised Statutes section 201.430(2), the statute will encompass noncommercial speech, such as newspapers, pamphlets, magazines, Internet blogs, and other mediums of expression. Although statutes that regulate purely commercial speech are generally not subject to an overbreadth analysis, Nevada Revised Statutes section 201.430(2) also encompasses noncommercial speech.¹²⁷ Therefore, an overbreadth analysis should be applied to section 201.430(2) and the statute should be deemed unconstitutionally overbroad.

B. STRICT SCRUTINY SHOULD BE USED TO ANALYZE NEVADA REVISED STATUTES SECTION 201.430(2)

Section 201.430(2) inhibits more than just purely commercial speech and requires a strict scrutiny analysis as opposed to the *Central Hudson* standard. While the Ninth Circuit in *Coyote Publishing* refrained from analyzing section 201.430(2) since it did not apply to the facts of the case, the court determined that section 201.430(1) was subject to a modified intermediate level of scrutiny because the statute regulated only commercial speech.¹²⁸ Section 201.430(2) on the other hand restricts fully protected First Amendment speech, such as newspaper articles and Internet blogs, thus requiring a strict scrutiny analysis.

The Ninth Circuit in *Coyote Publishing* noted that section 201.430(1) prohibits only brothel owners, or persons “acting on behalf of” brothel owners, from advertising.¹²⁹ As a result, the Ninth Circuit

¹²⁴ *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1144 (9th Cir. 1998); NEV. REV. STAT. ANN. § 201.430 (Westlaw 2011).

¹²⁵ NEV. REV. STAT. ANN. § 201.430(2)-(3) (Westlaw 2011).

¹²⁶ *S.O.C., Inc.*, 152 F.3d at 1143-44.

¹²⁷ See generally *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-97 (1982); *United States v. Wenger*, 292 F. Supp. 2d 1296, 1309 (D. Utah 2003).

¹²⁸ *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 599 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1556 (2011).

¹²⁹ *Id.*

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held that a publisher of a news account would not be held liable under section 201.430(1).¹³⁰ While section 201.430(1) prohibits people acting on behalf of a brothel to advertise in public places,¹³¹ section 201.430(2) does not mention the words “acting on behalf of” a brothel owner because the statute regulates unlicensed brothels.¹³² Instead, section 201.430(2) inhibits any publisher, not just those acting on behalf of a brothel, from publishing articles about unlicensed brothels.¹³³ Based on the construction of this statute, newspapers and other publishers could be subject to criminal sanctions even though they were not acting on behalf of a legal brothel. The statute inhibits fully protected speech such as newspapers, Internet blogs and other mediums of news sources, and thus requires a strict scrutiny analysis.

1. *Nevada Revised Statutes Section 201.430(2) Should be Subject to Strict Scrutiny Analysis*

Section 201.430(2) inhibits noncommercial speech and should be analyzed under a strict scrutiny standard. Speech is “commercial” if it does no more than propose a commercial transaction.¹³⁴ When a law interferes with a fundamental right, such as free speech, the court must review the legislation with strict scrutiny.¹³⁵ Advertising regulations targeting commercial speech, but also interfering with fully protected types of speech, do not meet the “no more than” standard and should not be analyzed using the *Central Hudson* standard.¹³⁶

As discussed above, section 201.430(2) restricts noncommercial speech found in newspaper articles and Internet blogs. Such publications are not considered advertising for commercial speech purposes and are granted full First Amendment protections.¹³⁷ Since section 201.430(2)

¹³⁰ *Id.*

¹³¹ NEV. REV. STAT. ANN. § 201.430(1) (Westlaw 2011).

¹³² NEV. REV. STAT. ANN. § 201.430(1), (2) (Westlaw 2011).

¹³³ Compare NEV. REV. STAT. ANN. § 201.430(1) (Westlaw 2011), with NEV. REV. STAT. ANN. § 201.430(3) (Westlaw 2011).

¹³⁴ See generally *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1017 (9th Cir. 2004); *Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326, 1332 (M.D. Fla. 2009); *Volkswagen AG v. Dorling Kindersley Publ'g, Inc.*, 614 F. Supp. 2d 793, 809-10 (E.D. Mich. 2009); *Hous. Balloons & Promotions, LLC v. City of Hous.*, 589 F. Supp. 2d 834, 847 (S.D. Tex. 2008).

¹³⁵ See *Miller v. Murphy*, 191 Cal. Rptr. 740, 743-44 (Ct. App. 1983); *Harrold v. Collier*, 836 N.E.2d 1165, 1171 (Ohio 2005).

¹³⁶ *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002).

¹³⁷ See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 (1988) (stating that the economic motivation of a newspaper to sell copies does not render the article's commercial speech deserving of less stringent constitutional protection).

regulates types of noncommercial speech, it does not meet the “no more than” criteria accepted by the Ninth Circuit.¹³⁸ Consequently, Nevada Revised Statutes section 201.430(2) is subject to a strict scrutiny analysis as opposed to the *Central Hudson* test.

2. *Nevada Revised Statutes Section 201.430(2) Would Fail a Strict Scrutiny Analysis*

Nevada Revised Statutes section 201.430(2) would be invalid under a strict scrutiny analysis because it is not narrowly tailored to achieve a compelling state interest. It is substantially more difficult for a statute to be constitutionally valid when analyzed under strict scrutiny—the most exacting standard—than when analyzed under the *Central Hudson* test.¹³⁹ Under a strict scrutiny analysis, the government must demonstrate that the restriction is narrowly tailored to serve the compelling state interest in limiting the commodification of sex.¹⁴⁰

The government has the burden of proving that there is a compelling state interest, not just a substantial interest, to justify Nevada Revised Statutes section 201.430(2).¹⁴¹ To conclude that a compelling interest exists, a court must find a relatively high degree of government concern to justify the particular invasion of the constitutional right.¹⁴² Examples of compelling government interests include protecting the physical well being of minors and protecting national security.¹⁴³ The universe of interests a court can consider compelling to justify restrictions on free speech is extraordinarily limited.¹⁴⁴ Here, there are compelling interests to justify Nevada Revised Statutes section 201.430(2), including the protection of children from being exposed to advertisements for unlicensed brothels. Decreasing prostitution is also a compelling governmental interest.¹⁴⁵ However, even if the government could demonstrate a compelling state interest, section 201.430(2) would

¹³⁸ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

¹³⁹ *Students for Concealed Carry on Campus, LLC v. Regents of Univ. of Colo.*, No. 09CA1230, 2010 WL 1492308 (Colo. App. Apr. 15, 2010), *cert. granted*, 2010 WL 4159242 (Colo. Oct. 18, 2010).

¹⁴⁰ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

¹⁴¹ *Id.*

¹⁴² *Robinson v. City of Seattle*, 10 P.3d 452, 467 (Wash. Ct. App. 2000).

¹⁴³ *See Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Haig v. Agee*, 453 U.S. 280, 307 (1981).

¹⁴⁴ *See, e.g., Sable Commc’ns*, 492 U.S. at 126.

¹⁴⁵ *See, e.g., Frieling v. State*, 67 S.W.3d 462, 474 (Tex. App. 2002); *State v. Mueller*, 671 P.2d 1351, 1354 (Haw. 1983); *State v. Davis*, 623 So.2d 622, 624 (Fla. App. 1993).

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nevertheless fail a strict scrutiny analysis because it is not narrowly tailored.

Section 201.430(2) is not narrowly tailored to advance a compelling state interest because it restricts noncommercial speech protected by the First Amendment. If the law encompasses too much or too little to advance this compelling interest, it will fail the “narrowly tailored” requirement.¹⁴⁶ A regulation that infringes upon First Amendment rights will be sustained only if the regulation is narrowly tailored and if it does not excessively intrude upon the exercise of First Amendment freedoms.¹⁴⁷ In *Association of Community Organizations for Reform Now v. City of Frontenac*, a nonprofit organization brought suit claiming the city of Frontenac’s ordinance that restricted door-to-door solicitation was unconstitutional.¹⁴⁸ The city of Frontenac argued that the ordinance was necessary to protect the security and privacy of Frontenac residents.¹⁴⁹ The court held that although the city’s objectives to reduce crime were legitimate, the regulation was not sufficiently tailored to avoid conflict with the nonprofit organization’s First Amendment freedoms.¹⁵⁰ The court noted that the government failed to demonstrate that its objectives would not be served by less restrictive alternatives.¹⁵¹

Similar to *Frontenac*, Nevada Revised Statutes section 201.430(2) is not narrowly tailored because the government’s objectives should be reached by means that do not restrict noncommercial speech. Although there are compelling interests, such as eliminating illegal brothels and prostitution, section 201.430(2) encompasses too much speech because it also prohibits periodicals and articles that feature noncommercial speech protected by the First Amendment. As a result, Nevada Revised Statutes section 201.430(2) would fail a strict scrutiny analysis because it is not narrowly tailored to achieve a compelling governmental interest.

CONCLUSION

In *Coyote Publishing*, the Ninth Circuit was faced with a situation where newspaper publishers challenged the validity of statutes that regulated advertising of legal brothels.¹⁵² The court consequently held

¹⁴⁶ *Carey v. Wolnitzek*, 614 F.3d 189, 201 (6th Cir. 2010).

¹⁴⁷ *Ass’n of Cmty. Orgs. for Reform Now v. City of Frontenac*, 714 F.2d 813, 817 (8th Cir. 1983).

¹⁴⁸ *Id.* at 815-16.

¹⁴⁹ *Id.* at 816.

¹⁵⁰ *Id.* at 818.

¹⁵¹ *Id.*

¹⁵² *Coyote Publ’g, Inc. v. Miller*, 598 F.3d 592 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1556

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that Nevada Revised Statutes section 201.430(1), which restricts advertising of licensed brothels, was constitutional.¹⁵³ However, had the facts of the case pertained to publications of unlicensed brothels instead of licensed brothels, section 201.430(2) would have applied. Nevada Revised Statutes section 201.430(2) is an unconstitutional restriction on free speech because it regulates commercial as well as noncommercial speech. As a result, section 201.430(2) is overbroad and is subject to a strict scrutiny analysis as opposed to the more lenient *Central Hudson* test. Nevada Revised Statutes section 201.430(2) would consequently fail a strict scrutiny analysis and is therefore unconstitutional.

2011).

¹⁵³ *Id.* at 611.