

## AN UNCONSTITUTIONAL PROHIBITION ON TAKEOUT MENUS: NEW YORK'S LAWN LITTER LAW

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### I. INTRODUCTION

Nothing is more annoying than coming home and finding a pile of restaurant takeout menus on your doorstep. But that annoyance can soon fade to relief when you realize there is nothing to eat in your fridge and dinner is just a phone call away. Whether it is an enormous soda ad that blocks out the sun or an 8½ x 11-inch tri-fold pamphlet displaying a new restaurant's menu, Americans have a love-hate relationship with advertising. On the one hand, advertising is a driving force behind our capitalist economy. On the other, the country is saturated with it and longs to tune it out. Although appealing when entertaining, advertising at the same time is loathed for its omnipresence. So much, in fact, that people—annoyed citizens and lawmakers alike—tend to forget that advertising is protected under our Constitution.

Historically, a struggle has occurred between organizations asserting their First Amendment right to advertise and individuals claiming that their privacy interests protect them from unwanted distractions.<sup>1</sup> On a basic level, some citizens simply do not want to be bothered by the exposure to excess commercial information. But many businesses depend on advertising as an important method of attracting customers, and small businesses cannot always feasibly sell their products to the masses by large-scale means. Thus, businesses are constantly directing their marketing campaigns toward potential customers in budget-friendly ways. One cost-effective method that

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<sup>1</sup> See, e.g., *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

businesses use is circulating handbills or flyers.<sup>2</sup> This method is inexpensive; businesses generally only incur printing costs and the nominal expenses associated with hand delivery. Handbills in the form of takeout menus are especially prevalent in the restaurant business.

Unfortunately for these businesses, many citizens particularly dislike this method of advertising.<sup>3</sup> Instead of passively subjecting a television viewer or radio listener to an advertisement that the viewer or listener can simply tune out, a handbill's physical presence necessitates an active response. One must actually do something with the advertisement upon receipt. If the government has a duty to protect its citizens, the problem seems easy enough to fix—implement an outright prohibition of this type of business advertising. It would be logical to allow citizens to exclude these types of advertisements from their property. This is exactly what the City of New York (or the “City”) has done.

In 2007, the New York State Legislature passed a law that prohibits a person from placing advertising materials on private property if the owner of the property has posted a sign prohibiting such materials.<sup>4</sup> Although this legislation might have the effect of reducing litter, keeping our streets cleaner, and decreasing annoyance to citizens, it inescapably violates the First Amendment<sup>5</sup> rights of businesses. The State of New York completely disregards that the Constitution protects commercial speech almost to the same extent as it protects noncommercial speech.<sup>6</sup>

This Comment uses the example of takeout menus to argue that New York General Business Law § 397-a (“Lawn Litter Law”) violates

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<sup>2</sup> *Martin*, 319 U.S. at 146 (“Door to door distribution of circulars is essential to the poorly financed causes of little people.”).

<sup>3</sup> See John J. Doherty, *Lawn Litter Law*, QUEENS COURIER, Aug. 6, 2008, [http://www.queenscourier.com/articles/2008/08/06/news/opinion/op\\_ed/news01.txt](http://www.queenscourier.com/articles/2008/08/06/news/opinion/op_ed/news01.txt). John J. Doherty currently serves as the New York City Commissioner of Sanitation. *Id.*

<sup>4</sup> N.Y. GEN. BUS. LAW § 397-a(1) (Consol. 2007 & Supp. 2009). The law reads as follows:

In any city with a population of one million or more, no person shall place, or cause or permit to be placed on private property any unsolicited papers, fliers, pamphlets, handbills, circulars, or other materials advertising a business or soliciting business where the owner has posted, in a conspicuous location, a sign stating that the placement of such materials shall be prohibited.

*Id.*

<sup>5</sup> U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”).

<sup>6</sup> See *infra* Part 0.

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the principles of the commercial speech doctrine. Under the commercial speech doctrine, the *Central Hudson* test mandates that any regulation that limits nonmisleading commercial speech must be supported by a substantial governmental interest.<sup>7</sup> Furthermore, the regulation must directly advance this interest and must not be more extensive than necessary.<sup>8</sup> The City of New York has advanced five interests justifying the Lawn Litter Law: litter, crime, safety, nuisance, and privacy.<sup>9</sup> This Comment argues that although preventing crime, keeping citizens safe, and protecting citizens' privacy are substantial interests, keeping the streets free from litter and preventing nuisance are not substantial interests. Furthermore, even if all five of the City's interests could be considered substantial, the Lawn Litter Law is unconstitutional because it does not directly advance the stated interest, because it is more extensive than necessary, or because of both such reasons. That is, for each of its asserted interests, the City fails the *Central Hudson* test on at least one of the four prongs.

This Comment concludes that because the Lawn Litter Law does not withstand analysis under the relevant test, it is unconstitutional. Part II of this Comment discusses the history of the Lawn Litter Law from its passage by the New York State Legislature to its implementation by the City. This section also discusses the structure and meaning of the law. Part III outlines the development of the First Amendment jurisprudence relevant to commercial speech starting with the decision to extend free-speech protection to commercial speech. Part IV analyzes the Lawn Litter Law from the perspective of the commercial speech doctrine, discusses other implications of the law, and addresses some ways to advance the governmental interests that do not infringe on the commercial speech rights of businesses. Part V argues that the New York Legislature should amend the Lawn Litter Law to both serve the interests of the government and conform to the Constitution.

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<sup>7</sup> *Id.* This Comment assumes that the business advertisements at issue are not misleading.

<sup>8</sup> *Id.*

<sup>9</sup> DEP'T OF SANITATION, CITY OF N.Y., NOTICE OF ADOPTION OF FINAL RULES GOVERNING THE DISTRIB. OF ADVER. ON PRIVATE PROPERTY 4-5, *available at* [www.nyc.gov/html/dsny/downloads/pdf/rules/nea/llrule.pdf](http://www.nyc.gov/html/dsny/downloads/pdf/rules/nea/llrule.pdf).

## II. THE DEVELOPMENT OF NEW YORK'S LAWN LITTER LAW

A. *The Passage of the Lawn Litter Law*

On August 15, 2007, the representatives in New York's Senate and Assembly voted to amend the General Business Law through the addition of a new section.<sup>10</sup> The legislature passed this amendment to the General Business Law as Chapter 585 of the 2007 laws of New York State.<sup>11</sup> Assembly Members representing all five boroughs of New York City introduced this bill.<sup>12</sup> Both the Assembly and the Senate passed the bill, which the Governor subsequently signed into law; the Legislature later amended the law.<sup>13</sup>

The core addition to the General Business Law was that the new section prohibited the distribution of unsolicited business advertisements on private property; section 585 applied only to cities with a population of one million or more people and provided specifically that

no person shall place, or cause or permit to be placed on private property any papers, fliers, pamphlets, handbills, circulars, or other materials advertising a business or soliciting business where the owner has posted a sign stating that the placement of such materials shall be prohibited unless expressly permitted in writing by the owner of such private property.<sup>14</sup>

On the same day that the legislature passed the law, Governor Eliot Spitzer issued a memorandum that noted certain deficiencies in it.<sup>15</sup> Governor Spitzer observed that some property owners in New York City were "frustrated by the inconvenience, nuisance and litter caused by the repeated delivery of unwelcome advertising circulars to their property."<sup>16</sup> But the memorandum also suggested that some areas of the bill needed work to bring the bill in line with First Amendment jurisprudence.<sup>17</sup> These concerns included that the bill permitted landlords to "bar tenants from receiving advertising circu-

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<sup>10</sup> See 2007 N.Y. Laws 585, § 1.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* The members of the Assembly who introduced the bill were Mark Weprin (Queens County), James F. Brennan (Kings County), Barbara M. Clark (Queens County), Rory I. Lancman (Queens County), Andrew Hevesi (Queens County), Naomi Rivera (Bronx County), Aurelia Greene (Bronx County), and Keith L.T. Wright (New York County).

<sup>13</sup> See 2008 N.Y. Laws 3.

<sup>14</sup> *Id.*

<sup>15</sup> Governor's Approval Memorandum, 2007 N.Y. Laws 34.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

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lars,” placed small or new businesses at a financial disadvantage by requiring them to use other advertising means, failed to name an enforcement mechanism or enforcement agency, and lacked a standard for a property owner’s notice of prohibition.<sup>18</sup> The Governor signed the bill into law in spite of its deficiencies because of the legislature’s noted willingness to amend the law as soon as possible.<sup>19</sup>

As a result of the Governor’s memorandum, the legislature amended the law on January 28, 2008, to incorporate some of the proposed changes.<sup>20</sup> Senator Padavan of Queens County, a county purportedly plagued by advertising litter,<sup>21</sup> sponsored this amendment.<sup>22</sup> The changes to the law required a property owner to post the sign “in a conspicuous location” if he wished to prohibit the materials.<sup>23</sup> The amendment clarified the rights of owners as well as renters and established guidelines for the format of the sign.<sup>24</sup> Moreover, the amendment provided that the mayor of the city is to designate an enforcement agency to promulgate rules for the law’s implementation.<sup>25</sup> Finally, the amendment clarified the civil penalties for violations and the notice required for each violation.<sup>26</sup> The law took effect on November 15, 2007; ninety days after Governor Spitzer signed it.<sup>27</sup> Each city seeking to implement the law, however, is required to have the enforcement agency in place before issuing violations and collecting fines.<sup>28</sup>

#### B. *The Lawn Litter Law’s Statutory Structure*

Section 1 of the Lawn Litter Law sets out the prohibition of commercial advertising materials and establishes rights for property owners and lessees.<sup>29</sup> This law only applies to cities with a population of one million or more people.<sup>30</sup> The law provides that no one shall

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See 2008 N.Y. Laws 3, § 1.

<sup>21</sup> See Doherty, *supra* note 3.

<sup>22</sup> See S.B. 6477, 2008 Leg., 231st Sess. (N.Y. 2008).

<sup>23</sup> 2008 N.Y. Laws 3, § 1.

<sup>24</sup> See *id.*

<sup>25</sup> *Id.*

<sup>26</sup> See *id.*

<sup>27</sup> *Id.* § 2.

<sup>28</sup> *Id.*

<sup>29</sup> N.Y. GEN. BUS. LAW § 397-a(1) (Consol. 2007 & Supp. 2009).

<sup>30</sup> *Id.* As of July 1, 2006, the only city in New York State that meets this requirement is New York City. U.S. Census Bureau, New York—Place and County Subdivision, Population Estimates, <http://factfinder.census.gov/servlet/GCTTable?>

“place, or cause or permit to be placed on private property any materials advertising a business or soliciting business” if the owner has placed a sign on the property prohibiting such material.<sup>31</sup> The property owner or manager must place the sign in a “conspicuous location.”<sup>32</sup> If the property is owner occupied and is either a single-family home or is designed for and used by no more than three families, only the owner of the building has the authority to post the sign.<sup>33</sup> For all other multiple-family dwellings, the owner or manager has the authority to post the sign only if every owner or lessee in the building agrees to prohibit the specified materials.<sup>34</sup>

A sign is invalid under the law if one of the owners or lessees of a building fails to consent to its posting.<sup>35</sup> If at least one owner or lessee in the building does not wish to prohibit such material, the owner of the property may post a sign that designates a place for unsolicited advertising.<sup>36</sup> The sign must specify the number of owners or lessees who do not wish to prohibit the advertising, and the owner must permit the advertiser to leave only that number of copies in the designated receptacle.<sup>37</sup> The receptacle must be “reasonably accessible” to the owners or lessees and to the advertisers.<sup>38</sup> Notably, this law does not prohibit any materials that come through the United States Postal Service,<sup>39</sup> including “sample copies of newspapers regularly sold by the copy or by annual subscription or sale”<sup>40</sup> and “coupon newspapers and magazines containing more than a de minimus amount of news that are published at least weekly.”<sup>41</sup>

Section 2 describes the minimum requirements for the appearance of the sign.<sup>42</sup> The sign must be five inches tall and seven inches wide with the lettering on the sign at least one inch tall.<sup>43</sup> The sign

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ds\_name=PEP\_2006\_EST&-mt\_name=PEP\_2006\_EST\_GCTT1R\_ST9S&-geo\_id=04000US36&-format=ST-9&-tree\_id=806&-context=gct (last visited July 10, 2010).

<sup>31</sup> § 397-a(1).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> § 397-a(1).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> § 397-a(2).

<sup>43</sup> *Id.*

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must read, “Do Not Place Unsolicited Advertising Materials On This Property.”<sup>44</sup> Where a multiple-family building has owners who do not wish to prohibit the advertising, the sign (following the above specifications) must designate how much material the advertiser is permitted to leave and the particular location at which the advertiser may place it.<sup>45</sup>

Section 3 sets out a presumption for the violation of this law.<sup>46</sup> It creates a rebuttable presumption that the “person whose name, telephone number, or other identifying information appears on any unsolicited advertising materials” placed at two or more premises is liable for violating the Lawn Litter Law.<sup>47</sup>

Section 4 relates to penalties.<sup>48</sup> The mayor chooses the agency responsible for enforcing the law.<sup>49</sup> Section 4 imposes a civil penalty of no less than \$250 and not more than \$1000 for each violation, but the total amount of the penalty may not exceed \$5000 for one day.<sup>50</sup> Furthermore, “[e]ach unauthorized placement of materials at a single location where a sign is posted . . . shall be considered a separate violation of this section.”<sup>51</sup> The environmental control board of the city has the authority to impose the civil penalty provided that sufficient notice of the violation was given.<sup>52</sup> Moreover, Section 4 requires that all of the penalties collected be “paid into the general fund of [the] city.”<sup>53</sup>

Finally, Section 5 authorizes the mayor’s selected agency “to promulgate rules to effectuate these provisions.”<sup>54</sup>

### C. *Enacting the Lawn Litter Law in New York City*

On February 20, 2008, New York City Mayor Michael Bloomberg appointed the New York City Department of Sanitation (DSNY) as

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> § 397-a(3).

<sup>47</sup> *Id.* Currently, legislation is pending in the Senate that would delete this presumption’s requirement that the material be placed at two or more locations. A.B. 7862, 2009 Leg., 232nd Sess. (N.Y. 2009).

<sup>48</sup> § 397-a(4).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> § 397-a(5).

the enforcement agency for the Lawn Litter Law.<sup>55</sup> The DSNY then proposed a series of rules to implement the law<sup>56</sup> and set the penalty for each violation at \$250.<sup>57</sup> The original proposal for this law required owners who wished to report violations to provide a notarized affidavit with the complaint.<sup>58</sup> After receiving considerable negative feedback from the public, however, the DSNY decided to require only a signed affidavit.<sup>59</sup>

On August 5, 2008, the DSNY began enforcing the Lawn Litter Law. The public has reacted favorably to the law,<sup>60</sup> especially after the DSNY eliminated the notary requirement.<sup>61</sup> Although some believe that the law is an effective way to solve the litter problem, others doubt that the government will enforce it.<sup>62</sup> Clearly, many businesses are displeased with the law.<sup>63</sup> But some business owners maintain that

<sup>55</sup> DEP'T OF SANITATION, CITY OF N.Y., NOTICE OF PUB. HEARING AND OPPORTUNITY TO COMMENT ON: PROPOSED RULES GOVERNING THE DISTRIB. OF ADVER. ON PRIVATE PROPERTY 3 (June 4, 2008), *available at* [http://home2.nyc.gov/html/dsny/downloads/pdf/rules/lawn\\_litter/transcripts/transcript.pdf](http://home2.nyc.gov/html/dsny/downloads/pdf/rules/lawn_litter/transcripts/transcript.pdf).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 10:7.

<sup>58</sup> DEP'T OF SANITATION, CITY OF N.Y., NOTICE OF ADOPTION OF FINAL RULES GOVERNING THE DISTRIB. OF ADVER. ON PRIVATE PROPERTY 5, *available at* [www.nyc.gov/html/dsny/downloads/pdf/rules/noa/llrule.pdf](http://www.nyc.gov/html/dsny/downloads/pdf/rules/noa/llrule.pdf).

<sup>59</sup> *Id.*

<sup>60</sup> *See, e.g.,* Sue Wolfe, *Lawn Litter Be Gone*, N.Y. TIMES, Aug. 10, 2008, at 9 (“We are delighted that the city has started enforcing a recent state law that prohibits ‘lawn litter’ if a property owner has posted a sign saying such materials are not wanted.”).

<sup>61</sup> Frank Lombardi, *Li'l Lawn Litter Relief: Law Fines Advertisers for Unwanted Material*, N.Y. DAILY NEWS, Aug. 7, 2008, at 53 (“In a major regulatory change . . . property owners will not have to get their complaints notarized. That proposed rule was dropped by the Sanitation Department because it would have put an undue burden on property owners.”); *see also* ‘Lawn Litter Law’ Final Rules Established, 877 JUNK LAW, 2008, <http://www.877junklaw.org/lawn-litter-law-final-rules-established/> (quoting New York State Senator Frank Padavan as saying that “I commend the City and the Department of Sanitation for working in good faith and making the complaint and enforcement process of the ‘Lawn Litter Law’ easier for homeowners throughout the five boroughs”).

<sup>62</sup> Richard Gentilviso, *Lawn Litter Law Poses Enforcement Problems*, QUEENS GAZETTE, Sept. 24, 2008, at 22, *available at* <http://www.qgazette.com/news/2008-09-24/features/026.html> (“[Department of Sanitation] Assistant Chief for Enforcement Todd Kuznitz said there are still problems with the law. ‘It is a difficult law to enforce,’ he said at the September meeting of the Queens Borough Cabinet. ‘The problem is First Amendment rights.’”).

<sup>63</sup> Sewell Chan, *An Effort to Halt Unwanted Paper Deliveries*, N.Y. TIMES, Aug. 5, 2008, at B1 (“Business owners expressed displeasure with the law. ‘It’s not good,’ said Linda Chang, manager of the Hunan Wok, a Chinese restaurant in Park Slope [Brooklyn]. ‘I believe I lose something, and the customer loses something, too. Some people enjoy the fliers. Not many people complain to us.’”).



the law has not affected them because they have progressed from door-to-door advertising to advertising over the Internet.<sup>64</sup>

### III. THE FIRST AMENDMENT AND COMMERCIAL SPEECH

#### A. *The Origins of the Commercial Speech Doctrine*

In 1942, the Supreme Court of the United States held that the First Amendment did not protect commercial speech.<sup>65</sup> In *Valentine v. Chrestensen*, the Court upheld the constitutionality of a sanitation statute that prohibited “distribution in the streets of commercial and business advertising matter.”<sup>66</sup> The Court reasoned that the legislature could regulate commercial advertising because the Constitution does not specifically provide otherwise.<sup>67</sup> In *Chrestensen*, the legislature did not have to permit what it believed was the interference with and undesirable invasion of the people’s right to fully and freely use public roads for their intended purpose.<sup>68</sup>

The Supreme Court did not decide that the Constitution protects commercial speech until 1976. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court struck down a portion of the Virginia Code that deemed a licensed pharmacist as engaging in unprofessional conduct upon “publish[ing], advertis[ing] or promot[ing], directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription.”<sup>69</sup> If the Board found a licensed pharmacist guilty of unprofessional conduct, it could revoke the pharmacist’s license or impose a

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<sup>64</sup> Joyce Hanson, *New Leaflet Law No Big Deal, Say Restaurateurs*, CRAIN’S N.Y. BUSINESS, Aug. 8, 2008, <http://www.crainsnewyork.com/apps/pbcs.dll/article?AID=/20080808/FREE/126587351/1040/breaking>. The article explains,

But the restaurant industry, a target of the new law, is seemingly not worried. Many restaurateurs who do a lot of delivery business say the law won’t affect them because they stopped dropping leaflets years ago. “Today, it’s all on the Internet,” says Antonio Assenso, owner of midtown Manhattan trattoria La Cucina Di Antonio. “We don’t need to leave fliers.”

*Id.*

<sup>65</sup> *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“[T]he Constitution imposes no such restraint on government as respects purely commercial advertising.”).

<sup>66</sup> *Id.* at 53.

<sup>67</sup> *Id.* at 54.

<sup>68</sup> *Id.* at 54–55.

<sup>69</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 749–50 (1976) (citing VA. CODE ANN. § 54-524.35 (1974)).

civil monetary penalty.<sup>70</sup> Because only licensed pharmacists could lawfully dispense these drugs in Virginia, all pharmacist advertising was essentially prohibited.<sup>71</sup> Interestingly, this suit was brought not by pharmacists but by consumers suffering from diseases that required daily prescription drugs.<sup>72</sup>

The consumers claimed that the First Amendment entitled *consumers* of prescription drugs to obtain pricing information from pharmacists through advertising.<sup>73</sup> The Court acknowledged that the First Amendment protects the right to receive information.<sup>74</sup> Furthermore, the Court stated that “[i]f there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these [consumers].”<sup>75</sup> In arguing that commercial speech is outside the realm of First Amendment protection, the Board cited *Chrestensen*.<sup>76</sup> The Court recognized that commercial speech had traditionally been an exception to First Amendment protection, but it also suggested that more recent cases had not been faithful to this proposition.<sup>77</sup> The Court framed the issue as whether commercial speech falls outside of First Amendment protection.<sup>78</sup>

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<sup>70</sup> *Id.* at 752.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 753.

<sup>73</sup> *Id.* at 754.

<sup>74</sup> *Id.* at 757 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972)).

<sup>75</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 757.

<sup>76</sup> See *supra* notes 65–68 and accompanying text.

<sup>77</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 759–60. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Court explained,

[T]he holding [in *Chrestensen*] is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected per se. This Court’s cases decided since *Chrestensen* clearly demonstrate as untenable any reading of that case that would give it so broad an effect.

*Id.* at 819–20; see also *Lehman v. Shaker Heights*, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting) (“There is some doubt concerning whether the ‘commercial speech’ distinction announced in [*Chrestensen*] retains continuing validity.”) (citation omitted); *Cammarano v. United States*, 358 U.S. 498, 513–14 (1959) (Douglas, J., concurring) (“[*Chrestensen*] . . . held that business advertisements and commercial matters did not enjoy the protection of the First Amendment, made applicable to the States by the Fourteenth. The ruling was casual, almost offhand.”).

<sup>78</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 760–61.

The Court answered that commercial speech is not “so removed from any ‘exposition of ideas[]’ . . . that it lacks all protection.”<sup>79</sup> In addition, the Court stated that simply because an advertiser’s interest is economic does not mean its First Amendment protection is abrogated.<sup>80</sup> Furthermore, the Court found two additional factors that weighed in favor of allowing advertising: the consumers had a general interest in the free flow of commercial information, and the individuals most affected by the statute were the poor, sick, and elderly.<sup>81</sup> The Court also found that society has an “interest in the free flow of commercial information”<sup>82</sup> to facilitate “intelligent and well informed” decisions.<sup>83</sup>

On the other hand, the Court also acknowledged interests in favor of prohibiting this type of advertising. It noted that advertising might prevent pharmacists from giving professional services in the “compounding, handling, and dispensing of prescription drugs.”<sup>84</sup> Moreover, the Court hypothesized that advertising might lead to lower prices, which could run “the more painstaking and conscientious pharmacists” out of business.<sup>85</sup> The majority stated that advertising would lead to price shopping and result in a loss of “stable pharmacist-customer relationships.”<sup>86</sup> Finally, the Court suggested that advertising would damage the “professional image of the pharmacist.”<sup>87</sup>

Nevertheless, the Court concluded that the justifications for prohibiting advertising were based on “the advantages of [the consumers] being kept in ignorance.”<sup>88</sup> These justifications reinforced that the First Amendment protects the free flow of this type of information.<sup>89</sup> The Court, however, limited its holding by stating that it “[does] not hold that [commercial speech] can never be regulated in any way.”<sup>90</sup> That is, the government may still regulate commercial

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<sup>79</sup> *Id.* at 762 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 763.

<sup>82</sup> *Id.* at 764.

<sup>83</sup> *Id.* at 765.

<sup>84</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 767–68.

<sup>85</sup> *Id.* at 768.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 769.

<sup>89</sup> *Id.* at 770.

<sup>90</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

speech by time, place, and manner restrictions in addition to regulations based on whether the speech is in any way false or misleading.<sup>91</sup>

*B. The Modern Commercial Speech Doctrine Under Central Hudson*

The Supreme Court established the modern test for commercial speech protection in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>92</sup> This case arose out of an appeal of the New York Court of Appeals' decision to uphold a complete ban on advertisements of electricity services.<sup>93</sup> The Court began by addressing the protection of commercial speech generally as decided in *Virginia State Board of Pharmacy*.<sup>94</sup> It explained that the Constitution affords a "lesser protection to commercial speech than to other constitutionally guaranteed expression."<sup>95</sup> The *Central Hudson* Court stated that the First Amendment concern at issue involved the "informational function of advertising."<sup>96</sup> The Court established that as long as the commercial speech is not misleading or related to an unlawful activity, the power of the government to regulate that speech is limited.<sup>97</sup> A state seeking to regulate this speech must first "assert a substantial interest" for doing so.<sup>98</sup> The regulation "must be in proportion to that interest"<sup>99</sup> and "must be designed carefully to achieve the State's goal."<sup>100</sup> The Court established two criteria for this last requirement: "[T]he restriction must directly advance the state interest involved[,] . . . [and] if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."<sup>101</sup> Essentially, the Court set out a four-part test for commercial speech: (1) the speech "must concern lawful activity and not be misleading," (2) the governmental interest must be substantial, (3) the regulation must directly advance that go-

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<sup>91</sup> *Id.* at 771.

<sup>92</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 562; *see also* Part III.A.

<sup>95</sup> *Cent. Hudson*, 447 U.S. at 563.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 564.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Cent. Hudson*, 447 U.S. at 564.

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vernmental interest, and (4) the regulation must not be more extensive than necessary.<sup>102</sup>

The Court applied this test to the facts before it and established that no allegation was made that the speech was either misleading or that it related to unlawful activity.<sup>103</sup> The State asserted two interests for its ban on promotional advertising: energy conservation and a concern that rates be fair and efficient.<sup>104</sup> The Court concluded that both of these governmental interests were substantial.<sup>105</sup> The Court then turned to “the relationship between the State’s interests and the advertising ban.”<sup>106</sup> As to the second asserted interest, “the impact of promotional advertising on the equity of appellant’s rates [was] highly speculative,”<sup>107</sup> and this could not justify restricting the speech at issue.<sup>108</sup> On the other hand, the State’s interest in conserving energy was directly advanced by the ban<sup>109</sup> because “[t]here is an immediate connection between advertising and demand for electricity.”<sup>110</sup>

After suggesting that the fourth prong of the test was the most critical issue in the case, the Court concluded that the energy-conservation rationale did not justify the outright ban on all promotional advertising.<sup>111</sup> The ban prevented the advertisement of “electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources.”<sup>112</sup> Moreover, the government did not demonstrate that a more limited regulation was inadequate to protect its conservation interest.<sup>113</sup> The Court concluded that it was not overlooking the importance of energy conservation but that “the First and Fourteenth Amendments require that the restriction be no more extensive than is necessary to serve the state interest.”<sup>114</sup> Thus, the ban on commercial speech at issue was unconstitutional because it was more extensive than necessary.

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<sup>102</sup> *Id.* at 566.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 568–69.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 569.

<sup>107</sup> *Cent. Hudson*, 447 U.S. at 569.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 569–70.

<sup>112</sup> *Id.* at 570.

<sup>113</sup> *Cent. Hudson*, 447 U.S. at 570–71.

<sup>114</sup> *Id.* at 571–72.

*C. Cases Interpreting the Central Hudson Test*

Before *Central Hudson*, the concept of “commercial speech” was illustrated in *Virginia State Board of Pharmacy* by the following proposition: “I will sell you the X prescription drug at the Y price.”<sup>115</sup> The Court, also prior to *Central Hudson*, stated that it takes a “common-sense” view of commercial speech.<sup>116</sup> The decision in *Central Hudson* drastically broadened this viewpoint when the Court stated, “Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.”<sup>117</sup> A speaker, however, will not be able to circumvent commercial-speech status simply by including “advertising that links a product to a current public debate.”<sup>118</sup> In the years following *Central Hudson*, the Supreme Court has considered—on several occasions—the threshold question of what defines commercial speech.

In *Bolger v. Youngs Drug Products Corp.*, the Court rejected a challenge to the commercial-speech characterization of advertisements discussing venereal disease and family planning.<sup>119</sup> It quoted *Virginia State Board of Pharmacy* for the proposition that commercial speech is “speech which does no more than propose a commercial transaction.”<sup>120</sup> But some limitations are placed on this earlier definition; simply because material is conceded to be an advertisement does not mean that it is commercial speech.<sup>121</sup> Furthermore, an advertisement is not necessarily commercial just because it references a specific product<sup>122</sup> or because it was motivated by economic gains.<sup>123</sup> In *Bolger*, the combination of all three of these ideas convinced the Court that the advertising was commercial.<sup>124</sup>

Similarly, in *Board of Trustees of the State University of New York v. Fox*, the Court held that intertwining commercial speech with non-commercial speech did not afford commercial speech the same level

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<sup>115</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

<sup>116</sup> *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978).

<sup>117</sup> *Cent. Hudson*, 447 U.S. at 561–62.

<sup>118</sup> *Id.* at 563 n.5.

<sup>119</sup> *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67–68 (1983).

<sup>120</sup> *Id.* at 66 (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 762) (internal quotation marks omitted).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 67.

<sup>124</sup> *Id.*

of protection that noncommercial speech receives.<sup>125</sup> If nothing in the regulation at issue “prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages,” the *Central Hudson* test controls.<sup>126</sup>

In addition to interpreting this threshold question, courts have interpreted each of the four prongs of the *Central Hudson* test. As for the first prong, the commercial speech must concern lawful activity and must not be misleading. The *Central Hudson* Court noted that inaccurate messages are not constitutionally protected.<sup>127</sup> Courts may regulate advertising that is inherently likely to be deceptive or that has actually proved to deceive.<sup>128</sup>

The second prong of the test deals with the government’s asserted interest underlying the regulation; the governmental interest must be substantial.<sup>129</sup> At least one circuit court has held that to find an interest to be substantial the interest must be legitimate in theory and must remedy a problem that in fact exists.<sup>130</sup> Among those inter-

<sup>125</sup> *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989).

<sup>126</sup> *Id.* Some argue that the lower courts use the following three factors in deciding whether speech is commercial: (1) if the speech is an advertisement, (2) if the speech refers to a specific product, and (3) if there is an economic motivation behind the speech. Robert Sprague, *Business Blogs and Commercial Speech: A New Analytical Framework for the 21st Century*, 44 AM. BUS. L. J. 127, 144 (2007).

<sup>127</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980) (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”); see also *Edenfield v. Fane*, 507 U.S. 761, 768 (1993).

<sup>128</sup> *In re R.M.J.*, 455 U.S. 191, 202 (1982) (“[R]egulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive.”). See also *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), in which the Court explained,

The advertisement makes no mention of the distinction between “legal fees” and “costs,” and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge. The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as “fees” and “costs”[]

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*Id.* at 652.

<sup>129</sup> *Cent. Hudson*, 447 U.S. at 566.

<sup>130</sup> *Sciarrino v. City of Key West*, 83 F.3d 364, 367 (11th Cir. 1996) (“To find a ‘substantial interest,’ a court must conclude both that the interest advanced by the state is legitimate in theory, and that that interest is in remedying a problem that exists in fact (or probably would exist, but for the challenged legislation).”).

ests that the Court has found to be substantial are traffic regulations,<sup>131</sup> aesthetic improvement,<sup>132</sup> aesthetic preservation through the reduction of litter,<sup>133</sup> temperance,<sup>134</sup> and energy conservation.<sup>135</sup> When a state takes a paternalistic view of a particular activity (that is, when the government seeks to protect its citizens from something it deems “bad” or to keep consumers in ignorance), the Court will likely find no substantial interest.<sup>136</sup>

The third prong asks whether the regulation directly advances the governmental interest.<sup>137</sup> The regulation cannot advance the interest in an ineffective or remote way;<sup>138</sup> rather, the regulation must advance that interest in a direct and material way.<sup>139</sup> Moreover, the government must prove that the harms at issue are real and that the law will aid in alleviating those harms to a material degree.<sup>140</sup> The

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<sup>131</sup> *Supersign of Boca Raton, Inc. v. City of Ft. Lauderdale*, 766 F.2d 1528, 1530 (11th Cir. 1985) (“The objectives served by the ordinance, traffic regulation and aesthetic improvement, undoubtedly qualify as substantial governmental interests.”).

<sup>132</sup> *Id.*

<sup>133</sup> *Sciarrino*, 83 F.3d at 367–68 (holding states have a substantial interest in “preserving aesthetics through the reduction of litter”).

<sup>134</sup> *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996).

<sup>135</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 568 (1980).

<sup>136</sup> *See 44 Liquormart, Inc.*, 517 U.S. at 510 (“[A] state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes . . . .”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (holding that a state may not suppress lawful information because it fears the effect that this information will have on the public). *But see Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 344 (1986) (“The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct.”).

<sup>137</sup> *Cent. Hudson*, 447 U.S. at 566.

<sup>138</sup> *Id.* at 564 (“[T]he regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose.”); *see also 44 Liquormart, Inc.*, 517 U.S. at 504–05 (“In evaluating the ban’s effectiveness in advancing the State’s interest, we note that a commercial speech regulation ‘may not be sustained if it provides only ineffective or remote support for the government’s purpose.’” (quoting *Cent. Hudson*, 447 U.S. at 564)).

<sup>139</sup> *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (“[W]e must ask whether the State’s interests in proscribing [the speech] are substantial, whether the challenged regulation advances these interests in a direct and material way . . . .”); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quoting *Edenfield*, 507 U.S. at 767).

<sup>140</sup> *Edenfield*, 507 U.S. 761, 770–71 (1993) (“[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”); *see also 44 Liquormart, Inc.*, 517 U.S. at 505; *Rubin*, 514 U.S. at 486.



government can meet this burden by reference to studies and anecdotal evidence.<sup>141</sup>

Under the fourth prong of the *Central Hudson* test the regulation must not be more extensive than necessary to serve the asserted interest.<sup>142</sup> The Court has limited the fit not to one of perfection but to one of reasonableness and narrow tailoring.<sup>143</sup> Even though the least-restrictive-means test does not necessarily apply here,<sup>144</sup> finding means of achieving the same goal without limiting speech may serve as evidence that the restriction is more extensive than necessary.<sup>145</sup>

#### IV. THE LAWN LITTER LAW IS UNCONSTITUTIONAL

The Lawn Litter Law is unconstitutional under a *Central Hudson* analysis; thus, the court should strike it down if the legislature leaves it unamended. The speech that this law seeks to regulate is clearly commercial. This speech concerns lawful activity, which, under the first prong of the *Central Hudson* test, is subject to regulation. But although the City proposes five interests to justify its restriction of commercial speech, none of these interests satisfies all four prongs of

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<sup>141</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (“We have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether . . . .” (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995))).

<sup>142</sup> *Cent. Hudson*, 447 U.S. at 566.

<sup>143</sup> *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (“What our decisions require is a . . . fit that is not necessarily perfect, but reasonable; . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.”); see also *Lorillard Tobacco Co.*, 533 U.S. at 556.

<sup>144</sup> See *Went for It*, 515 U.S. at 632 (“[W]e made clear that the ‘least restrictive means’ test has no role in the commercial speech context.” (quoting *Fox*, 492 U.S. at 480)).

<sup>145</sup> See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002) (“In previous cases addressing this final prong of the *Central Hudson* test, we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.”); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993) (“[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable.”). Notably, the *Central Hudson* test, although instructive, is vague and leads to discrepancies in its results because the standard is applied differently. Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. REV. 1, 5 (2000); see also Emily Erickson, *Disfavored Advertising: Telemarketing, Junk Faxes and the Commercial Speech Doctrine*, 11 COMM. L. & POL’Y 589, 620 (2006). Furthermore, some have even suggested that the doctrine be eliminated entirely. See *Lorillard*, 533 U.S. at 554 (noting that several litigants have suggested to the Supreme Court that the *Central Hudson* standard be discarded in favor of applying strict scrutiny). Nonetheless, *Central Hudson* has never been overruled by a majority of the Court. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

the analysis; all fail at least one prong. For these reasons, the City may not regulate commercial speech as set out in current version of the Lawn Litter Law.

A. *The Speech that the Lawn Litter Law Seeks to Regulate Is Commercial*

The crux of the Lawn Litter Law is that “unsolicited papers, fliers, pamphlets, handbills, circulars, or other materials advertising a business or soliciting business” are unlawful when the owner of a private property has posted a sign prohibiting advertisers from distributing such materials on the property.<sup>146</sup> The materials that the Lawn Litter Law addresses have consistently been within First Amendment protection.<sup>147</sup> Handbills and fliers are essential to those businesses that lack the financial resources to conduct an advertising campaign on a grand scale.<sup>148</sup> This Comment will illustrate the unconstitutionality of the Lawn Litter Law by using the example of a takeout menu, which is a type of advertisement that businesses frequently leave on private property in New York City.<sup>149</sup> Takeout menus certainly come within the meaning of commercial speech as defined by the Supreme Court.<sup>150</sup> Although references to a product or an economic motivation are not conclusive proof that an advertisement constitutes commercial speech,<sup>151</sup> the Supreme Court has stated a common-sense approach must be used to determine commercial speech.<sup>152</sup> For example, a takeout menu is an advertisement that refers to specific products with an economic motivation behind the speech.<sup>153</sup> As long as the DSNY will interpret the Lawn Litter Law to apply to takeout menus, the speech in such a menu will come under the commercial speech protections as defined in *Central Hudson*.<sup>154</sup> This leads to the conclusion that takeout menus are examples of commercial speech and that any regulation prohibiting them is subject to analysis under *Central Hudson*.

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<sup>146</sup> N.Y. GEN. BUS. LAW § 397-a(1) (CONSOL. 2007 & SUPP. 2009).

<sup>147</sup> See, e.g., *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (noting that the distribution of literature consistently receives First Amendment protection).

<sup>148</sup> *Id.* at 146 (“Door to door distribution of circulars is essential to the poorly financed causes of little people.”).

<sup>149</sup> See Chan, *supra* note 63, at B1.

<sup>150</sup> See *supra* notes 115–124 and accompanying text.

<sup>151</sup> *Id.*

<sup>152</sup> *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978).

<sup>153</sup> See Sprague, *supra* note 126, at 144.

<sup>154</sup> See *supra* note 104 and accompanying text.

*B. Regulating Takeout Menus Satisfies the First Prong of the Central Hudson Test*

Takeout menus are examples of commercial speech subject to regulation under the first prong of the *Central Hudson* test that states that the regulated speech must concern lawful activity and must not be misleading.<sup>155</sup> A typical restaurant's takeout menu concerns lawful activity (selling food) and is likely not misleading (providing it gives accurate price and fee information).<sup>156</sup> Without question, states have the authority to regulate commercial speech that is misleading or fraudulent, and the aim of this Comment is not to suggest otherwise.<sup>157</sup> Any unsolicited advertising that is misleading or fraudulent, regardless of whether it violates the Lawn Litter Law, is not afforded First Amendment protection—no issue of constitutionality arises. New York is free to prohibit as it sees fit any unsolicited advertising that is misleading, fraudulent, or advertises an illegal activity. Because takeout menus concern lawful activity and are usually not misleading, the State and City of New York may regulate them. But before either the City or the State regulates these menus, it must satisfy all prongs of the *Central Hudson* test.

*C. The Government Has a Substantial Interest in Regulating Takeout Menus*

The second prong of the *Central Hudson* test requires that the governmental interest in regulating the commercial speech be substantial.<sup>158</sup> The Governor's Memorandum asserts two state interests for the Lawn Litter Law: protecting citizens against the annoyance and inconvenience of unsolicited advertisements and protecting the environment from litter caused by the distribution of materials that are either unwanted or unsecured.<sup>159</sup> In its proposal to adopt the law, the DSNY merged the Governor's interests with its own and set out in its Statement of Basis and Purpose five reasons for the law: reducing litter, preventing crime, securing its citizens' safety, protecting its citizens from nuisance, and protecting its citizens' privacy.<sup>160</sup> This Com-

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<sup>155</sup> Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

<sup>156</sup> See *id.*

<sup>157</sup> *Id.* at 563 (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”).

<sup>158</sup> *Id.* at 566.

<sup>159</sup> See *supra* note 16 and accompanying text.

<sup>160</sup> See DEP'T OF SANITATION, *supra* note 58, at 4–5.

ment proposes that the five interests set out in the DSNY's statement do not satisfy the *Central Hudson* test.

1. The City Does *Not* Have a Substantial Interest in Reducing Litter

The City asserts that unsolicited advertisements can blow away in the wind and accumulate as litter on streets and sidewalks.<sup>161</sup> Keeping the City clean is obviously an appropriate governmental interest, but the Court has held that protecting a city from litter is not a sufficient reason to abrogate First Amendment protection.<sup>162</sup> The Court established that “[t]he short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.”<sup>163</sup> Thus, the City's interest in reducing and preventing litter cannot be deemed substantial. The City, therefore, does not meet this prong of the *Central Hudson* test.

2. The City Has a Substantial Interest in Preventing Crime

The City's interest in protecting its citizens from crime satisfies the second prong of the *Central Hudson* test. Unsolicited materials can accumulate on private property when residents are away and create a potential for crime. The fear is that burglars will notice the buildup of unwanted advertisements on the property and realize that no one is at home, which will thus make the property an easy target for burglary.<sup>164</sup> Indeed, the DSNY concluded that the accumulation of unsolicited advertisements increases the potential for criminal ac-

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<sup>161</sup> See *id.* at 4.

<sup>162</sup> *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939). The Court explained its position as follows:

We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press.

*Id.* But see *Sciarrino v. City of Key West*, 83 F.3d 364, 367–68 (11th Cir. 1996) (“The state's interest here is in preserving aesthetics through the reduction of litter.”); *Supersign of Boca Raton, Inc. v. Fort Lauderdale*, 766 F.2d 1528, 1530 (11th Cir. 1985) (finding that aesthetic improvement is a substantial governmental interest). But the City, which bears the burden of proof, has not asserted aesthetics as a goal.

<sup>163</sup> *Lamont v. Comm'r of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y. 1967).

<sup>164</sup> See *Doherty*, *supra* note 3 (“As [unsolicited advertising material] piles up while the homeowner is away on vacation, this material does its job in an unexpected way, ‘advertising’ the fact that no one's home, giving would-be robbers the green light to come in and help themselves.”).

tivity.<sup>165</sup> Concededly, the state has a substantial interest in protecting its citizens from crime.<sup>166</sup>

### 3. The City Has a Substantial Interest in Securing its Citizens' Safety

Unsolicited advertisements can accumulate in front of homes and in the lobbies of apartment buildings. The DSNY suggests that this causes a safety hazard to the residents and visitors because “[t]he materials, when wet or covered with snow and ice, may cause a person to slip and fall.”<sup>167</sup> The state has a substantial interest in protecting the safety of its residents.<sup>168</sup>

### 4. The City Does *Not* Have a Substantial Interest in Protecting its Citizens from Nuisance

Unsolicited advertisements can be a nuisance for those who do not want them but still must dispose of them. “[T]he Court has consistently recognized a municipality’s power to protect its citizens from . . . undue annoyance by regulating soliciting and canvassing.”<sup>169</sup> But the fact that courts recognize a municipality’s power to protect its citizens does not necessarily mean that protecting citizens from nuisance is a *substantial* interest.<sup>170</sup> The Court has also held that disposing of an unwanted advertisement is a small, tolerable cost of protecting free speech.<sup>171</sup> Protecting citizens from nuisance resulting from the distribution of unsolicited advertisements is paternalistic; therefore,

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<sup>165</sup> See DEP’T OF SANITATION, *supra* note 58, at 4–5.

<sup>166</sup> *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 616–17 (1976) (“[T]he Court has consistently recognized a municipality’s power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing.”).

<sup>167</sup> See DEP’T OF SANITATION, *supra* note 58, at 5.

<sup>168</sup> See, e.g., *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986).

<sup>169</sup> *Hynes*, 425 U.S. at 616–17; see also *Pa. Alliance for Jobs & Energy v. Council of Munhall*, 743 F.2d 182, 187 (3d Cir. 1984). But see *Ohio Citizen Action v. City of Mentor-On-The-Lake*, 272 F. Supp. 2d 671, 685 (N.D. Ohio 2003) (“While the government’s interest in minimizing annoyance is legitimate, it is not, in and of itself, compelling enough to form the basis for a content-based restriction on free speech.”).

<sup>170</sup> See *Ohio Citizen Action*, 272 F. Supp. 2d at 685.

<sup>171</sup> *Consol. Edison v. Pub. Svc. Comm’n*, 447 U.S. 530, 542 (1980) (“The customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket.”); *Lamont v. Comm’r of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y. 1967) (“The short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.”); see also *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983).

the Court is not likely to uphold it as a substantial interest.<sup>172</sup> Thus, nuisance is not a substantial government interest and does not satisfy the second prong of the *Central Hudson* test.

5. The City Does *Not* Have a Substantial Interest in Protecting its Citizens' Privacy

The City proposes that unsolicited advertisements invade the privacy of those who do not wish to receive this commercial information.<sup>173</sup> But a *substantial invasion* of a citizen's privacy interest must exist before the government can intervene.<sup>174</sup> When the Court has held privacy to be a substantial state interest, the government sought to protect its citizens from *substantial harms* associated with the abridgment of privacy.<sup>175</sup> Nothing about the subject matter here (takeout food) would substantially harm the privacy of citizens. That is, business advertisements do not substantially interfere with the privacy rights of citizens—the burden imposed on the recipient is minimal, the advertiser takes away no personal information, and the advertisement is not even addressed to a specific person. The First Amendment right of businesses should not give way when the harm (if any) to citizens is minimal and fails to constitute a substantial invasion of their privacy.<sup>176</sup> Thus, although privacy can be a substantial governmental interest, in this context, it is not because business ad-

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<sup>172</sup> See *supra* note 136 and accompanying text.

<sup>173</sup> See DEP'T OF SANITATION, *supra* note 58, at 5.

<sup>174</sup> *Cohen v. California*, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.").

<sup>175</sup> See, e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620–25 (1995) (upholding thirty-day ban on attorneys contacting victims of accidents via direct-mail solicitation because it is an intrusion on privacy); *Edenfield v. Fane*, 507 U.S. 761, 767–69 (1993) (holding that protecting the privacy of potential accounting clients is a substantial interest); *Carey v. Brown* 447 U.S. 455, 457, 471 (1980) (holding that protecting the sanctity of the home is substantial interest where picketers were protesting in front of mayor's home); *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 730–31 (1970) (upholding statute that allows mail recipient to elect not to receive what he thinks of as "erotically arousing or sexually provocative" material because of privacy concerns (quoting 39 U.S.C. § 4009(a) (1964 Supp. IV))).

<sup>176</sup> *Consol. Edison v. Pub. Svc. Comm'n*, 447 U.S. 530, 542 (1980) ("The customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket."); *Lamont*, 269 F. Supp. at 883 ("The short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned."); see also *Bolger*, 463 U.S. at 72 ("[W]e have never held that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended.").

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vertisements are not harmful and do not substantially invade citizens' privacy interests.

*D. The Lawn Litter Law Does Not Directly Advance All of the City's Asserted Interests*

The *Central Hudson* test requires any law limiting commercial speech to directly advance the government's interest in regulating it. The Lawn Litter Law only directly advances the City's asserted interest in reducing litter. The law does not directly advance the asserted interests in preventing crime, securing its citizens' safety, protecting its Citizens from nuisance, or protecting its citizens' privacy and, therefore, fails the third prong of the *Central Hudson* test.

1. The Lawn Litter Law Directly Advances the City's Goal of Litter Reduction

The reduction of litter is not a substantial governmental interest.<sup>177</sup> But for purposes of argument, this Comment supposes that the government has a substantial interest in eliminating litter that the law may directly advance. The Lawn Litter Law may reduce the number of advertising materials that businesses distribute. This is best illustrated in the case of one-, two-, and three-family homes where the owner displays a "no solicitation" sign. In such a circumstance, the Lawn Litter Law mandates that no business may place unsolicited advertising materials at the residence; the owner has complete discretion to ban all advertising materials from the property. That is, the law does not require one-, two-, and three-family homes to provide a space for advertisers to leave materials if residents other than the owner wish to receive the materials. To conclude that that Lawn Litter Law has directly advanced the government's goal of reducing litter, it is necessary to assume that if such a sign is not posted by the owner of a one-, two-, or three-family home, any advertising left at that property will necessarily contribute to street litter.

The difficulty arises, however, with multiple-dwelling buildings to which a significant drop in the number of distributed advertising materials may not occur. The law requires that owners of multiple-unit buildings obtain permission from every single owner or lessee<sup>178</sup> to completely prohibit unsolicited advertisements on the property. If at least one owner or lessee does not agree to the prohibition, the

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<sup>177</sup> See *supra* Part IV.C.i.

<sup>178</sup> In New York City, apartment buildings may have different ownership structures, such as cooperatives, condominiums, or rentals. This Comment uses the term owner or lessee to refer to the inhabitants of apartments within multi-unit buildings.

owner or manager of the building is required to designate a place for these materials. While the designated location may be a place of temporary confinement for the materials, businesses may nonetheless deposit too many materials therein. If such documents are not frequently removed (whether by the owners who want this material or by the building's management), the risk of these advertisements becoming litter on the streets is just as high as if no regulation was in place at all. So in that respect, the law does not directly advance the government's interest. Moreover, the government must show that the placement of unsolicited materials on private property leads directly to litter.<sup>179</sup> The Lawn Litter Law aids in alleviating litter to a material degree but only to the extent that property owners elect to prohibit such materials.<sup>180</sup> Therefore, although the regulation directly advances the asserted interest because of the possibility that unwanted advertisements will blow away and contribute to street litter, this direct advancement is entirely dependent on citizens' decision to prohibit the advertising materials.

## 2. The Lawn Litter Law Does *Not* Directly Advance the City's Interest in Deterring Crime

To satisfy the *Central Hudson* test, the City must show that the Lawn Litter Law directly advances the deterrence of crime. Even though deterring crime is a substantial state interest, prohibiting unsolicited advertising materials does not directly advance it.<sup>181</sup> If the advancement of the interest is only remote, it does not comply with *Central Hudson*.<sup>182</sup> Allowing owners to prohibit takeout menus on their property only advances the goal of deterring crime in the most remote way. If the City can point to no evidence that the buildup of advertising materials leads to burglary,<sup>183</sup> a court will not find that the interest directly advances crime prevention.<sup>184</sup> Furthermore, the pro-

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<sup>179</sup> *Bolger*, 463 U.S. at 71 n.20 ("The party seeking to uphold a restriction on commercial speech carries the burden of justifying it."); *Carroll v. City of Detroit*, 410 F. Supp. 2d 615, 623 (E.D. Mich. 2006) ("Because the original ordinance contains no statement of purpose and the City has provided no extrinsic evidence of its substantial governmental interest in enacting the original ordinance, the ordinance fails to meet an essential element of the *Central Hudson* test and is, therefore, unconstitutional.").

<sup>180</sup> See *supra* note 140.

<sup>181</sup> Cf. *Pa. Alliance for Jobs & Energy v. Council of Munhall*, 743 F.2d 182, 187 (3d Cir. 1984) (holding that ban on door-to-door canvassing after dark directly advances interest in deterring crime).

<sup>182</sup> See *supra* note 138 and accompanying text.

<sup>183</sup> See *supra* note 179.

<sup>184</sup> *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 626 (1995).



hibition of advertisements does not deter burglary to a material degree, as the law requires.<sup>185</sup> If the City wants to deter crime, it should “vigorously enforce its criminal statutes”<sup>186</sup> instead of infringing on the constitutional right to free speech. Thus, the government’s asserted interest in deterring crime fails the third prong of the *Central Hudson* test.

### 3. The Lawn Litter Law Does *Not* Directly Advance the City’s Goal of Securing its Citizens’ Safety

As with deterring crime, only a weak connection exists between keeping citizens safe and allowing for the prohibition of unsolicited business advertisements. To withstand the *Central Hudson* analysis, the regulation must advance the interest in a material way. Here, prohibiting only *business* advertisements does not alleviate the harm to citizens’ safety to a material degree.<sup>187</sup> Although residents or visitors *might* slip and fall because of these unsolicited materials, the possibility of this occurring is too remote to entirely abridge the First Amendment right to commercial speech.<sup>188</sup> Furthermore, the law does not cover other forms of protected speech; businesses may still distribute handbills that can accumulate on private property and pose the same risk to safety as takeout menus. The law does not directly advance the safety interest because in singling out business advertising, it excludes all other forms of speech and the alleged danger such advertisements cause. An unsolicited pamphlet proposing a particular candidate for office poses the exact same threat to citizens’ safety as a takeout menu might. A citizen will be no safer simply because business advertisements are prohibited from private property. Nothing is inherently dangerous about business advertising distributed in this method when compared to all other forms of speech distributed in the same manner.

Thus, the evidence that business advertisements (as opposed to all other speech) place citizens in harm’s way is tenuous at best. This is critical to the third prong of the analysis because the regulation must *materially* advance the City’s interest in safety.<sup>189</sup> If only a remote chance exists for the Lawn Litter Law to protect citizens, the law must

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<sup>185</sup> See *supra* note 139.

<sup>186</sup> *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 356 (1986) (Brennan, J., dissenting).

<sup>187</sup> See *supra* note 140.

<sup>188</sup> See *supra* note 138 and accompanying text.

<sup>189</sup> See *supra* note 179 and accompanying text.

be struck down.<sup>190</sup> Prohibiting unsolicited business advertising from distribution on private property does not materially increase citizens' safety because other types of speech that businesses distribute in this manner are just as likely to pose a safety risk. Therefore, the regulation does not directly advance the government's interest in safety.

4. The Lawn Litter Law Does *Not* Directly Advance the City's Interest in Protecting Its Citizens from Nuisance

Even if protecting citizens from nuisance qualified as a substantial interest, the Lawn Litter Law does not directly advance it. Citizens will still be subject to the same "nuisance" from protected speech that businesses distribute by handbill or flier. Thus, the prohibition of business advertising does not materially advance the interest in eliminating nuisance because unsolicited advertisements that are not business related (like political fliers of campaign information or protest announcements) are just as likely to annoy citizens as are commercial advertisements. Moreover, nothing indicates that allowing citizens to prohibit business advertisements will alleviate nuisance in a material way.

For owners of one-, two-, or three-unit properties, the law advances to some degree the goal of eliminating nuisance to property owners. In these situations, the owner of the building has authority to prohibit the materials from the property and thus eliminate nuisance to all residents. But with respect to multi-unit residences, the law requires permission from all owners or lessees to prohibit these materials.<sup>191</sup> If an owner or lessee withholds permission, the owner of the building must designate a place for businesses to secure the desired materials.<sup>192</sup> Although the law specifies that advertisers must place materials in one spot, having the advertisements in the building is arguably still a nuisance to many residents; once the designated location is full of papers, someone must deal with it. Furthermore, if owners or lessees want to take materials out of the pile, they could inadvertently drop some of the ads—creating the exact problem that the Lawn Litter Law seeks to redress. It is probably more of a nuisance for the owner or manager of such properties to go door to door asking whether a specific tenant wishes to prohibit advertisements. It

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<sup>190</sup> Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980) ("[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."); see also 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996).

<sup>191</sup> See *supra* note 34 and accompanying text.

<sup>192</sup> See *supra* note 36 and accompanying text.

may also be an annoyance to update the sign each time a new tenant moves into the building. Finally, the procedures for reporting a violation of the Lawn Litter Law may be more trouble than they are worth even without the requirement that the application be notarized.<sup>193</sup> The Lawn Litter Law does not directly or materially advance the goal of reducing nuisance and thus does not satisfy the third prong of the *Central Hudson* test.

5. The Lawn Litter Law Does *Not* Directly Advance the City's Interest in Protecting Its Citizens' Privacy

Unsolicited advertising materials are not a substantial invasion of privacy, but even conceding that privacy in this instance could be a substantial state interest, allowing owners to prohibit unsolicited advertising materials does not directly advance the goal of protecting privacy. The law only prohibits business-advertising materials; it does nothing to prohibit other types of unsolicited speech from private property. Thus, the law does not materially advance the City's interest in protecting the privacy of its citizens. In terms of privacy, no material difference exists between commercial and non-commercial speech that is not inherently harmful. In sum, the prohibition on business advertising does not directly advance the City's asserted interest in protecting the privacy of its citizens.

Furthermore, there are ways to get around the law—business advertisers can simply place “more than a de minimus amount of news [and] publish[] [it] at least weekly”<sup>194</sup> for exemption from liability. For example, a restaurant could simply insert a short section at the top of its takeout menu that gives an account of the restaurant's previous week's activities or of events taking place in the community. As long as the restaurant publishes its takeout menu as modified on a weekly basis, it will be outside the purview of the Lawn Litter Law. As such, the menus could continue to be just as problematic (as defined by the City's interests) as they were before the law passed. The problem could actually become worse because to circumvent the law, restaurants would have to publish weekly; before, restaurants may have been publishing and delivering their menus less frequently. This is entirely contrary to the purpose of the Lawn Litter Law and is evidence that the law does not directly advance the City's goals.

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<sup>193</sup> See Lombardi, *supra* note 61, at 53.

<sup>194</sup> See *supra* note 41 and accompanying text. But the addition of this type of information would not necessarily bring the advertisement within the realm of full First Amendment protection. See *supra* note 125 and accompanying text.

*E. The Lawn Litter Law Is More Extensive than Necessary*

To satisfy the fourth and final prong of the *Central Hudson* test, the Lawn Litter Law must not be more extensive than necessary in advancing the interests of the government.<sup>195</sup> The Lawn Litter Law is, however, more extensive than necessary in advancing each of the City's five asserted interests, which are reducing litter, preventing crime, securing its citizens' safety, protecting its citizens from nuisance, and protecting its citizens' privacy. Thus, the Lawn Litter Law fails the *Central Hudson* test, and is unconstitutional.

1. The Lawn Litter Law Is More Extensive than Necessary  
in Reducing Litter

Obviously, not every single piece of business advertising becomes litter. By allowing property owners to ban the placement of all business advertisements, this law is much more extensive than necessary. A blanket prohibition on the distribution of all unsolicited business advertisements is not a narrowly tailored way to achieve a reduction in litter.<sup>196</sup> Although a showing of the least restrictive means is not the test, a court will consider in its analysis whether numerous less restrictive ways to accomplish the government's goal exist.<sup>197</sup> Methods unrelated to limiting speech can be used to achieve the government's interest in this scenario. First, the City could fine a business if its advertisements actually ended up on the streets as litter. This option would encourage businesses to be careful about how they distribute their fliers. Second, the City could require all property owners to designate and maintain a secure place for unsolicited advertising to assure that no materials become litter. This would both directly advance the interest of the government and not be more extensive than necessary. Finally, New York City already has litter laws that adequately address street litter. The City could put more effort into doing its job of maintaining a clean environment by enforcing its existing laws as opposed to passing new ones that restrict protected speech.<sup>198</sup> Whereas the Lawn Litter Law as it stands now only ad-

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<sup>195</sup> *Cent. Hudson*, 447 U.S. at 566.

<sup>196</sup> See *supra* note 143 and accompanying text.

<sup>197</sup> See *supra* note 145 and accompanying text.

<sup>198</sup> See N.Y. CITY CHARTER ch. 31, § 753(a)(1)–(2) (2004), available at <http://www.nyc.gov/html/charter/downloads/pdf/citycharter2004.pdf>. The law states that

the commissioner shall have charge and control of and be responsible for all those functions and operations of the city relating to the cleanliness of the streets and the disposal of waste, including, without limitation, the following: (1) the sweeping, cleaning . . . of the streets; (2) the

vances the City's interest if the property owner elects to prohibit the advertising materials, these less restrictive methods are not subject to an individual citizen's unilateral decision to prohibit the advertisements and, thereby, more directly advance the government's interest. Thus, because other ways to advance the government's goals of reducing litter without encroaching on a business's First Amendment rights exist, the regulation at issue is more extensive than necessary.

## 2. The Lawn Litter Law Is More Extensive than Necessary in Preventing Crime

Allowing property owners to elect to ban all business advertising is much more extensive than necessary because not all such material, when left on property, leads directly to crime, such as burglary.<sup>199</sup> No direct connection exists between business advertisements (as opposed to all other types of advertisements) and burglaries. Although the possibility of the law actually preventing burglaries is remote, the cost to hundreds of businesses is certain: their First Amendment rights will suffer, and they will sustain substantial economic losses. The law is overbroad because the connection between crime and business advertising accumulating on property is too attenuated. The Lawn Litter Law is more extensive than necessary because it prevents the distribution of many more advertisements than it prevents criminal activity.<sup>200</sup> Alternatively, requiring all property owners to designate a place for unsolicited advertisements will significantly reduce the possibility of piled-up materials causing a burglary. Also, the City could increase police patrols in areas where burglaries are likely to occur or even require those patrolling to pay special heed to the properties that have accumulated a significant number of unsolicited advertisements. With other options available<sup>201</sup> to protect citizens from crime without impinging on the First Amendment, the Lawn Litter Law is more extensive than necessary in advancing the City's asserted interest in preventing burglaries.

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removal and disposition of . . . street sweepings, garbage, refuse, rubbish and waste.

*Id.*

<sup>199</sup> See DEP'T OF SANITATION, *supra* note 58, at 4.

<sup>200</sup> See *supra* note 143 and accompanying text.

<sup>201</sup> See *supra* note 144 and accompanying text.

3. The Lawn Litter Law Is More Extensive than Necessary  
in Securing Citizens' Safety

Not every single business advertisement is a safety hazard. In fact, not more than a very small number of unsolicited business advertisements actually cause physical injury. Thus, prohibiting all such advertisements from private property is not a reasonable way of achieving the government's interest.<sup>202</sup> As the law is written, a reasonable requirement to promote safety is that owners of multi-unit buildings designate a special location for advertisements for the benefit of owners or lessees who do not want to prohibit such materials outright. But allowing owners to prohibit all or even a portion of these advertisements from their property to secure a minimal level of safety for the inhabitants is too restrictive. If in the name of safety, the government wants to require *some* owners to designate a place for the materials to go, it should require *all* owners to do the same. Requiring everyone to designate a place for advertisements would allow for a reasonable fit. Allowing the total prohibition of these materials is more restrictive than necessary and not a narrow fit in light of the fact that designating a place for them will eliminate the hazard that the government seeks to address.

4. The Lawn Litter Law Is More Extensive than Necessary  
in Protecting Citizens from Nuisance

Even if nuisance was a substantial governmental interest that this regulation directly advanced, the Lawn Litter Law is still problematic because it is more extensive than necessary. The law is narrowly tailored in terms of allowing those citizens who live in multi-unit dwellings to choose whether they want to receive unsolicited advertising. This means that residents who are annoyed by unsolicited advertisements can ban them, but those who are not annoyed by the advertisements still have the opportunity to receive them. Although it may still be a nuisance to those who want to prohibit unsolicited advertising to deal with the designated, conspicuous location where businesses will place the ads for the benefit of those who do want them, this part of the law is not more extensive than necessary. But in terms of reducing the nuisance of those people living in owner-occupied two- and three-family homes, this law is more extensive than necessary. In this case, the power to prohibit the advertising materials is vested solely in the owner of the building. The other families living in the building may not find unsolicited advertising a nuisance, but they

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<sup>202</sup> See *supra* note 145 and accompanying text.

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have no say in whether to prohibit such materials at their residence. Moreover, other families may find the advertisements to be a nuisance but have no power to prohibit them because the families do not own the building. In conclusion, for the asserted governmental interest in alleviating nuisance, this law is partially narrowly tailored and partially more extensive than necessary.

5. The Lawn Litter Law Is More Extensive than Necessary  
in Protecting Its Citizens' Privacy

Privacy only justifies prohibiting speech if the speech is harmful.<sup>203</sup> Here, arbitrarily prohibiting speech that is not necessarily harmful is more extensive than necessary. The law is not narrowly tailored because virtually all of these advertisements are not harmful; by definition, they simply propose a price for goods or services. The government cannot allow citizens to ban all commercial advertising simply because of the possibility that some of the advertisements will be harmful to citizens' privacy interests, which are already sufficiently protected; if a particular advertisement is harmful, the First Amendment will not impede citizens' efforts to ban it. But the fear of such harm cannot justify the abridgement of businesses' First Amendment right to advertise. This is a paternalistic view of the issue that a court will likely not accept.<sup>204</sup> As with nuisance, this law is more extensive than necessary in protecting the purported privacy interests of those who live in owner-occupied two- and three-family homes. Only the owner has the power to prohibit unsolicited advertising; if the owner does so, the other families in that building do not have the option of obtaining unsolicited advertisements. Thus, with respect to the City's interest in protecting its citizens' privacy, the Lawn Litter Law is more extensive than necessary.

V. AMENDING THE LAWN LITTER LAW

If New York City truly wants to reduce litter brought on by business advertising, it should amend the Lawn Litter Law to simply fine those businesses whose advertisements actually end up on the street as litter. For example, the amendment could read as follows:

It shall be unlawful for any representative of a business entity to cause or permit any unsolicited papers, fliers, pamphlets, handbills, circulars, or other materials advertising a business or soliciting business to become litter. Any instance of any unsolicited ad-

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<sup>203</sup> See *supra* note 174 and accompanying text.

<sup>204</sup> See *supra* note 136 and accompanying text.

vertising material becoming litter shall be punishable by a fine not to exceed \$100.

Amending the law in this way would allow it to survive a constitutional attack under *Central Hudson*. Moreover, the law would more directly serve the City's interest in reducing the amount of litter on the streets. By levying a fine against those businesses whose advertising materials actually become litter, the Lawn Litter Law as amended would deter businesses from carelessly distributing their advertisements.

At the outset, the City may regulate business advertising, such as takeout menus, because they are commercial in nature.<sup>205</sup> Thus, the *Central Hudson* framework applies and allows for the regulation of this speech if all four prongs of the test are met. Assuming that the takeout menus convey content that is lawful and not misleading, the first prong of *Central Hudson* is satisfied.<sup>206</sup>

For the purposes of argument, this Comment has assumed that the reduction of litter could be a substantial governmental interest.<sup>207</sup> Furthermore, if this interest in the reduction of litter were recharacterized as an interest in preserving aesthetics, the City would have an interest that would most likely withstand analysis under the first prong of the *Central Hudson* test.<sup>208</sup> Thus, as a starting proposition, the City may regulate business advertising, including takeout menus, based on its interest in reducing litter and preserving aesthetic appearances.

The next issue that the City faces is that any regulation that it imposes must directly advance its interest in preserving aesthetics.<sup>209</sup> If the Lawn Litter Law imposed a fine on any business whose advertisements actually became litter, the City would be able to directly advance its goal of preserving aesthetics. Everyone can agree that litter is not aesthetically pleasing. Imposing a fine on businesses that leave on private property unsolicited advertisements that then become litter would serve as a deterrent to those businesses. The fine would deter careless distribution of advertising materials while removing the

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<sup>205</sup> See *supra* part IV.A.

<sup>206</sup> See *supra* notes 155–57 and accompanying text.

<sup>207</sup> See *supra* part IV.D.i.

<sup>208</sup> *Sciarrino v. City of Key West*, 83 F.3d 364, 367–68 (11th Cir. 1996) (holding that states have a substantial interest in “preserving aesthetics through the reduction of litter”); *Supersign of Boca Raton, Inc. v. City of Fort Lauderdale*, 76 F.2d 1528, 1530 (11th Cir. 1985) (“The objectives served by the ordinance, traffic regulation and aesthetic improvement, undoubtedly qualify as substantial governmental interests.”).

<sup>209</sup> See *supra* notes 137–41 and accompanying text.



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prohibition on these materials that the current Lawn Litter Law allows. This deterrent would thus become an effective way to serve the interest in aesthetic preservation because it would target only those who actually litter.<sup>210</sup> Moreover, the regulation would not advance the goal in a remote way; a direct connection would exist between the litter on the ground and the business that is fined.<sup>211</sup> Thus, by fining based on actual litter, the amended regulation would directly advance the goal of aesthetic preservation.

Finally, the amendment to the Lawn Litter Law must not be more extensive than necessary in serving the interest in aesthetics.<sup>212</sup> By fining only those businesses whose advertisements actually become litter, the amendment would satisfy this standard. If the City were to use this deterrent method as opposed to the prohibition method currently in force, it could pinpoint exactly the problem that it faces. That is, by fining those businesses that actually litter, the City would be punishing only those businesses that are causing the problem. Of course, a recipient of an advertisement could inadvertently drop a properly secured advertisement on the ground. This may lead to inconsistent results, but to satisfy this prong of the *Central Hudson* test, the regulation need only be reasonable—not perfect—in addressing the solution the City desires.<sup>213</sup> Moreover, even if a fine arose because of a recipient rather than the business itself, it would further serve the City's goal in preserving aesthetics because that business would be even more careful in how and where it distributes its advertisements. Thus, this amendment would make the Lawn Litter Law not more extensive than necessary to achieve the City's goal of aesthetic preservation.

Amending the Lawn Litter Law to act as a deterrent instead of an outright prohibition would put the burden on businesses to ensure that their advertisements are not causing the problem that the law seeks to remedy. Furthermore, this amendment would take away the City's ability to allow residents to categorically exclude such advertising from their property. A law that acts as a deterrent instead of a prohibition would remind businesses that their right to freedom of speech is not absolute and would ensure that businesses remain responsible for their advertisements, but at the same time prevent the City from trammeling their free speech rights. It would then become the responsibility of the City rather than the residents to collect evi-

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<sup>210</sup> See *supra* note 138.

<sup>211</sup> *Id.*

<sup>212</sup> See *supra* note 142.

<sup>213</sup> See *supra* note 143.

dence of any violation. This is fair for two reasons. First, the City wants to restrict commercial speech, and as such, the City should have the burden to bring up violations. Second, the City has the responsibility to maintain “the cleanliness of the streets and the disposal of waste.”<sup>214</sup> Thus, not only would this amendment be fairer to businesses in terms of not categorically excluding this mode of speech, it would also be fairer in terms of allocating responsibility of enforcement to the government because the government is the one seeking to impose this regulation.

If the legislature amended the Lawn Litter Law to simply fine the businesses that actually litter, the law would pass muster under the *Central Hudson* test. The City has a substantial interest in preserving aesthetics, the amendment would directly advance this goal, and the amendment would not be more extensive than necessary in achieving this interest. Thus, although that Lawn Litter Law is likely unconstitutional, this recommended amendment would allow the City to regulate business advertising in a way that is fairer both to the government and to businesses.

## VI. CONCLUSION

The Lawn Litter Law seeks to prohibit unsolicited advertising from private property. This law, as adopted by New York City, is an unconstitutional abridgement of commercial speech in violation of the First Amendment that the legislature should amend lest the law fall under constitutional scrutiny. Advertising materials that are commonly distributed on private property in New York City, such as takeout menus, fall within the definition of commercial speech because they propose commercial transactions. Any restriction of commercial speech is subject to analysis within the framework set out in *Central Hudson*, which requires that for nonmisleading speech, the government must assert a substantial interest. Furthermore, the regulation at issue must directly advance the interest and must not be more extensive than necessary.

For each of its asserted interests (reducing litter, preventing crime, securing its citizens’ safety, protecting its citizens from nuisance, or protecting its citizens’ privacy), the City fails the *Central Hudson* test on at least one of the prongs. The City’s interest in keeping litter from the streets is not substantial. Even if it were, the Lawn Litter Law does not directly advance this interest and is more extensive than necessary. Although preventing crime is obviously a substantial

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<sup>214</sup> See *supra* note 196.

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City interest, the regulation does not directly advance this interest and is more extensive than necessary. Furthermore, while the City has a substantial interest in keeping its citizens safe, the Lawn Litter Law does not directly advance this interest and is more extensive than necessary. Preventing nuisance is not a substantial City interest. Even if it were, though, the law does not directly advance this interest, and it is only partially narrowly tailored. Finally, the City has a substantial interest in protecting the privacy of its citizens but only from substantial harm. The regulated speech here is not harmful. The law does not directly advance the City's interest in privacy and is only partially reasonably tailored. Thus, because each of the City's asserted interests fails on at least one of the test's prongs, the Lawn Litter Law is an unconstitutional restriction of commercial speech.

In conclusion, New York City's Lawn Litter Law is unconstitutional because it restricts constitutionally protected commercial speech. The City should not prohibit protected speech in this manner. The right to freedom of speech is a fundamental tenet of our democracy that the government cannot impede with impunity. In *Central Hudson*, the Supreme Court explicitly delineated the criteria that the government must meet before it can restrict commercial speech. The City does not meet all of these criteria; none of its five interests withstands scrutiny under all four prongs of the *Central Hudson* test. Therefore, the City of New York's regulation of business advertising as set out in the Lawn Litter Law is unconstitutional. The New York Legislature should amend the law. If left unamended, the law must be struck down.