



Past Bad Speakers, Performance Bonds & Unfree Speech: Lawfully Incentivizing “Good” Speech or Unlawfully Intruding on the First Amendment?

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ABSTRACT

Using the recent legal woes of television pitchman Kevin Trudeau as an analytical springboard, this article examines the multiple First Amendment issues and red flags raised by the imposition of performance bonds on “past bad speakers” as conditions precedent for their future speech. Performance bonds, the article argues, blur the traditional line that separates prior restraints from subsequent punishments in First Amendment jurisprudence. They also represent a form of government intrusion in the marketplace of ideas — a form of interventionism, premised on financial incentivism — that ostensibly discourages dangerous or otherwise unlawful speech from re-entering the speech market. This article also addresses the proper standard of judicial scrutiny that should be used to evaluate the validity of performance bonds. Furthermore, it considers whether the scope of performance bonds is necessarily limited to scenarios involving the Federal Trade Commission or whether such bonds can also be imposed in other contempt proceedings and/or by other federal agencies, such as the Federal Communications Commission.

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TABLE OF CONTENTS

INTRODUCTION	246
I. FEDERAL TRADE COMMISSION v. TRUDEAU: SACRIFICING FIRST AMENDMENT CONCERNS TO PURIFY THE MARKETPLACE OF IDEAS?	254
II. SPEAKER EQUALITY, PRIOR RESTRAINTS & PERFORMANCE BONDS: THE CITIZENS UNITED PERSPECTIVE AND BEYOND . . .	260
III. PERFORMANCE BONDS AND THE MARKETPLACE OF IDEAS: HOW TO DRIVE FALSEHOOD FROM THE FIELD?	263
IV. PERFORMANCE BONDS AND THE PARADE PERMIT ANALOGY: A DIFFERENCE WITHOUT IMPORTANCE?	267
V. ARE PERFORMANCE BONDS ON PAST BAD SPEAKERS VALID OUTSIDE THE REALM OF COMMERCIAL SPEECH?	270
VI. CONCLUSION	273

INTRODUCTION

In November 2011, the U.S. Court of Appeals for the Seventh Circuit upheld in *Federal Trade Commission v. Trudeau* the imposition of a judge-ordered, \$2 million performance bond¹ that television infomercialist² and

¹ Performance bonds are common in the construction industry when “a party known as a surety agrees to be responsible for the performance of a contractor on a project.” Cheryl S. Kniffen, *A Georgia Practitioner’s Guide to Construction Performance Bond Claims*, 60 *MERCER L. REV.* 509, 510 (2009) (discussing 40 U.S.C. § 3131(b)(2)). According to Kniffen,

the performance bond is essentially a guarantee that if the principal obligor (the contractor) fails or wrongfully refuses to perform the work governed by the construction contract, then the secondary obligor (the surety) will either perform in the principal’s place or pay damages to the obligee (the owner or general contractor) for the breach of its principal.

Id.

² An infomercial is “a longer than average advertisement that ranges in duration from 3 to 60 minutes” and that “may appear to the viewer initially as a program rather than a commercial.” Infomercials “usually consist of segments containing demonstrations, with testimonials by experts and satisfied users separated by two internal commercials.” Tom Agee & Brett A.S. Martin, *Planned or Impulse Purchases? How to Create Effective Infomercials*, *J. ADVER. RESEARCH.*, Nov.–Dec. 2001, at 35, 35 (citing GEORGE. E. BELCH & MICHAEL. A. BELCH, *ADVERTISING AND PROMOTION: AN INTEGRATED MARKETING COMMUNICATIONS PERSPECTIVE* (1993)). See generally REMY STERN, *BUT WAIT . . . THERE’S MORE!: TIGHTEN YOUR ABS, MAKE MILLIONS, AND LEARN HOW THE \$100 BILLION INFOMERCIAL INDUSTRY SOLD US EVERYTHING BUT THE KITCHEN SINK* (2009) (providing an in-depth

“master huckster”³ Kevin Trudeau⁴ must post if he ever wants to broadcast infomercials again.⁵ The bond, which Trudeau unsuccessfully argued violated his First Amendment⁶ right of free speech,⁷ was imposed as a coercive civil-contempt measure⁸ — one designed to deter him from making deceptive infomercials in the future,⁹ given Trudeau’s track record of televised

and entertaining examination of the business of television infomercials). In the 1980s, “the infomercial quickly became a fixture on the American pop culture landscape.” *Id.* at x.

³ Christopher Dreher, *What Kevin Trudeau Doesn’t Want You to Know*, SALON (July 29, 2005, 12:48 PM), http://www.salon.com/2005/07/29/trudeau_4 (describing the “paranoid world of master huckster Kevin Trudeau”).

⁴ “Trudeau has sought to portray himself as a consumer advocate fighting the establishment. He’s also a convicted felon who spent two years in prison in the 1990s for credit-card fraud.” Stephanie Zimmermann, *The Weight of the Word*, CHI. SUN-TIMES, Sept. 18, 2007, at News 17. See generally Catherine Bryant Bell, Comment, *The Curious Case of Kevin Trudeau, King Catch Me If You Can*, 79 MISS. L.J. 1043, 1044–74 (providing an excellent biography of Trudeau and tracing his legal woes).

⁵ *FTC v. Trudeau*, 662 F.3d 947, 953–54 (7th Cir. 2011).

⁶ The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁷ *Trudeau*, 662 F.3d at 949 (noting Trudeau argued that “the bond requirement violates the First Amendment”).

⁸ See *Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2011) (explaining that “[c]ivil contempt differs from criminal contempt in that it seeks only to ‘coerc[e] the defendant to do’ what a court had previously ordered him to do”) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911)); see generally Daxton R. “Chip” Stewart & Anthony L. Fargo, *Challenging Civil Contempt: The Limits of Judicial Power in Cases Involving Journalists*, 16 COMM. L. & POL’Y 425, 431 (2011) (observing that “[i]n American law, civil contempt is intended to provide a way for courts to coerce people to comply with their orders; civil contempt is distinguished from criminal contempt, which is for punitive purposes”).

⁹ See *Trudeau*, 662 F.3d at 953 (asserting that a performance bond “makes it less likely that there will be future violations because Trudeau will face a considerable financial loss if he is involved in a deceptive infomercial”).

deception that caused “such tremendous consumer harm in the past”¹⁰ and in light of his violation of at least one previous court order.¹¹

Trudeau, in fact, has been on the radar screen of the Federal Trade Commission (“FTC”) for more than a decade. A January 1998 *Federal Register* posting, for example, notes the FTC charging that a company called Tru-Vantage International, acting “in concert with Howard S. Berg and Kevin Trudeau, made a false and unsubstantiated claim that Howard Berg’s Mega Reading is successful in teaching anyone, including adults, children and disabled individuals, to significantly increase their reading speed while substantially comprehending and retaining the material.”¹² FTC Chair Deborah Platt Majoras, during a 2007 speech at the University of North Carolina, Chapel Hill, noted the FTC has charged Trudeau “with making false or deceptive claims in infomercials for various products or systems purported to cause significant weight loss, reverse hair loss, achieve a photographic memory, and cure addictions to food, alcohol, tobacco, or narcotics.”¹³

¹⁰ *Id.* at 953. As for Trudeau’s history of deception, the Seventh Circuit highlighted his 32,000-plus broadcasts of deceptive infomercials for a book called *The Weight Loss Cure ‘They’ Don’t Want You to Know About*. *Id.* at 949.

¹¹ See Order, FTC v. Trudeau, No. 03 C 3904 (N.D. Ill. June 29, 2004), available at <http://www.ftc.gov/os/caselist/0323064/040629contempt0323064.pdf> (finding Trudeau in contempt of court for violating part of a preliminary injunction relating to the marketing of a coral calcium supplement).

¹² Tru-Vantage Internat’l, L.L.C.; Analysis to Aid Public Comment, 63 Fed. Reg. 3131 (Jan. 21, 1998), available at <http://www.ftc.gov/os/fedreg/1998/january/980121truvantage.pdf>.

¹³ Deborah Platt Majoras, Chair, FTC, Roy H. Park Lecture at the University of North Carolina School of Journalism and Mass Communication: The Vital Role of Truthful Information in the Marketplace 10 (Oct. 11, 2007), available at http://www.ftc.gov/speeches/majoras/071011UNCspeech_DK.pdf. Majoras went on during the same speech to note other instances where the FTC disputed the veracity of Trudeau’s infomercials:

Trudeau claimed in subsequent infomercials that Coral Calcium Supreme, a dietary supplement purportedly made from marine coral, cured terminally ill cancer patients and enabled multiple sclerosis patients to get up out of their wheel chairs. In another infomercial, he claimed that Biotape, an adhesive strip, afforded permanent relief from severe pain. In 2003, Commission attorneys returned to court, filing a contempt action against Trudeau. In final settlement of that proceeding, Trudeau paid \$2,000,000 and agreed to another stipulated permanent injunction, this time banning him from appearing in, producing, or disseminating infomercials that advertise any product, service, or program.

Id. at 11.

Given this history of alleged deception, the logic of mandating a performance bond as an incentive for promoting truthful speech seems obvious — Trudeau only forfeits the \$2 million sum if he makes a deceptive infomercial, so he has a hefty monetary motivation not to produce misleading ones in the future.¹⁴ The constitutionality, however, of imposing such bonds on what this article dubs *past bad speakers*¹⁵ is far less apparent. The fact that the issue was given only cursory analysis by the three-judge panel of the Seventh Circuit in *Trudeau* is even more troubling.¹⁶ Furthermore, it has never been addressed by the U.S. Supreme Court, despite the fact that the FTC frequently requires performance bonds as conditions precedent for speech on repeat offenders of its rules.¹⁷ In fact, in a May 2010 statement before the U.S. Senate Special Committee on Aging, the FTC openly acknowledged it seeks performance bonds in cases involving repeated violations of its rules.¹⁸

¹⁴ *Trudeau*, 662 F.3d at 951 (noting that “[t]his sanction is purgeable because Trudeau’s bond is not forfeited to the FTC unless he makes a deceptive infomercial”).

¹⁵ Kevin Trudeau, of course, would not consider himself to be a member of this category. On his website, in fact, he describes himself as “fast becoming the world’s foremost consumer and natural cures advocate. A fearless whistleblower, Trudeau is the voice for the voiceless when it comes to exposing corruption and hypocrisy in the medical and corporate worlds.” About, KT Radio Network, <http://www.ktradio.com/about> (last visited Apr. 9, 2012).

¹⁶ See *infra* Part I.

¹⁷ See, e.g., Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief, *FTC v. Neiswonger*, No. 4:96 CV 02225 SNL (E.D. Mo. Feb. 28, 1997), available at <http://www.ftc.gov/os/caselist/9623134/970228neiswongerstipfnl.pdf> (providing, in relevant part, that the defendants are “hereby permanently restrained and enjoined from engaging, whether directly, in concert with others, or through any business entity, in the advertising, marketing, offering for sale or sale of any program *unless such defendant first obtains a performance bond in the principal sum of \$100,000*”) (emphasis added); Press Release, Fed. Trade Comm’n, Two Floridians Banned from Selling Business Opportunities; Two Others Must Post Performance Bonds (Jan. 27, 1999), available at <http://www.ftc.gov/opa/1999/01/hart2.shtm> (involving a fraudulent Internet kiosk business opportunity scheme, and requiring one individual to “post a \$1 million performance bond before engaging in telemarketing or business opportunity sales” and another individual “to post a \$500,000 performance bond before selling business opportunities”).

¹⁸ Prepared Statement of the Federal Trade Commission on Deceptive Marketing of Dietary Supplements FTC Enforcement Activities 7, Before U.S. Senate Special Committee on Aging (May 26, 2010), available at <http://www.ftc.gov/os/testimony/100526dietarysupplementstatement.pdf>.

The imposition of performance bonds on past bad speakers as conditions precedent for future expression raises a host of important queries with constitutional implications:

- Are performance bonds *de facto* prior restraints on expression¹⁹ that should be considered presumptively unconstitutional²⁰ or are they more akin to subsequent punishments²¹ for past bad speech that, like an award of punitive damages, are designed in part to deter such bad speech in the future?²²
- If performance bonds function as a *quasi* form of punitive damages, at least to the extent they are designed to deter future bad speech,²³ then what is the proper framework for determining when they become so grossly excessive in amount as to violate a past bad speaker's constitutional rights?²⁴
- Should the permissibility of performance bonds be evaluated under the strict scrutiny²⁵ standard of review that typically applies to content-based regulations of speech²⁶ or, as in the case of *Trudeau*, where the

¹⁹ See *Alexander v. United States*, 509 U.S. 544, 550, 553–54 (1993) (observing that “[t]emporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints,” and that “our decisions have steadfastly preserved the distinction between prior restraints and subsequent punishments”).

²⁰ See *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (observing that “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights”).

²¹ See *Alexander*, 509 U.S. at 550 (observing “the distinction, solidly grounded in our cases, between prior restraints and subsequent punishments”).

²² See *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 568 (1996) (observing that “[p]unitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition”).

²³ See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492–93 (2008) (remarking that “the consensus today is that punitives are aimed not at compensation but principally at retribution and *detering harmful conduct*” and that retribution and deterrence are generally accepted today as the “twin goals of punitive awards”) (emphasis added).

²⁴ See *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (observing that “this Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as ‘grossly excessive’”).

²⁵ See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (observing that to pass muster under strict scrutiny, a government entity must prove that the law in question “is justified by a compelling government interest and is narrowly drawn to serve that interest”).

²⁶ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (observing that “[o]ur precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content”).

goal was to prevent fraudulent commercial speech, should they be measured by a more relaxed standard, such as intermediate scrutiny?²⁷

- What does the use of performance bonds, as a government-imposed financial incentive for encouraging truthful and otherwise non-harmful expression, reveal about the functioning or failure of the marketplace of ideas?²⁸
- Is the use of performance bonds confined only to situations involving FTC actions against those who repeatedly engage in a pattern of deceptive speech or, alternatively, can and should they be deployed more widely in other scenarios involving speakers who previously have engaged in unlawful forms of expression, such as obscenity and libel?²⁹

All of these questions, remarkably, have been neither addressed nor resolved by the judiciary. This article's purpose is not to provide answers to them, but rather to problematize the difficulties surrounding the nexus between performance bonds and the First Amendment and, in turn, to highlight the constitutional red flags performance bonds raise.

Using *Trudeau* as an analytic springboard, this article examines the constitutionality of performance bonds imposed on past bad speakers as a condition precedent for engaging in future speech. Cases like that involving Kevin Trudeau implicate First Amendment concerns because, as the Seventh Circuit observed, "Trudeau is required to post a bond before he participates in an infomercial *regardless of whether it contains a misleading statement*. His bond will not be forfeited unless he makes a misrepresentation in violation of the court order, but that does not eliminate the need for First Amendment scrutiny."³⁰

The consequences of imposing performance bonds as a condition precedent on past bad speakers, of course, stretch far beyond the narrow realm of infomercials, which were once completely banned by the Federal Communications Commission ("FCC").³¹ Imagine, for instance, a court ordering the

²⁷ See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339 (2010) (noting that the Supreme Court has held "that restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny"). See generally Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298 (1998) (providing a comprehensive examination of the concept of intermediate scrutiny).

²⁸ See generally Nima Darouian, *Accessing Truth: Marketplaces of Ideas in the Information Age*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 1, 4-5 (2010) (providing a brief overview of the marketplace of ideas theory).

²⁹ See *infra* notes 33-36 and accompanying text (posing hypotheticals involving such situations).

³⁰ *FTC v. Trudeau*, 662 F.3d 947, 953 (7th Cir. 2011) (emphasis added).

³¹ See Jan LeBlanc Wicks & Avery M. Abernethy, *Effective Consumer Protection or Benign Neglect? A Model of Television Infomercial Clearance*, 30 J. ADVER. 41, 42

owner of an adult bookstore who was once convicted of selling an obscene³² DVD to first post a \$1 million performance bond before he could re-open the same bookstore, *regardless* of the fact that the books and DVDs he now wants to sell have never been deemed obscene in court. Or consider a scenario in which the FCC mandates performance bonds on television stations that have violated indecency regulations³³ in the past in order for them to maintain their licenses. Under principles of civil libel law,³⁴ could a court order one individual who has repeatedly defamed — and been found liable for libel — another individual to post a performance bond before the repeat defamer could ever say anything else, *regardless of whether it contains a misleading statement*, about the defamed individual in the future?³⁵

Such performance bond possibilities are no longer merely hypothetical, in light of cases like *Trudeau*. Despite this, the U. S. Supreme Court has never squarely addressed the First Amendment constitutionality of imposing a performance bond as a condition precedent for future expression on those who have engaged in false, misleading or otherwise unlawful speech in the past.³⁶ In fact, the Seventh Circuit in *Trudeau* cited only one 1995 district

(2001) (noting that “[t]he FCC banned infomercials in 1973” and “lifted the infomercial ban in 1984”).

³² Obscene expression is not protected by the First Amendment’s guarantee of free speech. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that “obscenity is not within the area of constitutionally protected speech or press”); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 124 (1989) (writing that “we have repeatedly held that the protection of the First Amendment does not extend to obscene speech”).

³³ See Guide: *Obscenity, Indecency, and Profanity Guide*, FEDERAL COMMUNICATIONS COMMISSION, <http://www.fcc.gov/guides/obscenity-indecency-and-profanity> (last visited Apr. 9, 2012) (setting forth the FCC’s definition of indecent broadcast content, as well as the FCC’s enforcement procedures and guidelines for filing complaints regarding allegedly indecent content).

³⁴ Libel involves “a false allegation of fact that is disseminated about a person and that tends to injure that person’s reputation.” JOHN D. ZELEZNY, *COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS AND THE MODERN MEDIA* 131 (6th ed. 2011). The basic six elements of a libel suit that a plaintiff has the burden of proving are defamatory content, falsity, publication, identification, fault and harm. *Id.*

³⁵ This is a different scenario from that in which courts have upheld injunctions prohibiting the repetition of statements that have previously been adjudicated to be defamatory. See *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 353 (Cal. 2007) (holding that “a properly limited injunction prohibiting defendant from repeating statements about plaintiff that were determined at trial to be defamatory would not violate defendant’s right to free speech”).

³⁶ A divided high court has stated, in the context of upholding a post-obscenity-conviction seizure of constitutionally protected expressive material under the Rack-

court opinion, *United States v. Vlahos*,³⁷ which upheld a \$75,000 performance bond — a far cry from the \$2 million bond figure approved in *Trudeau*.

In *Vlahos*, a federal district court granted summary judgment in favor of the FTC, holding that certain radio and television commercials used by the defendants to advertise methods of purchasing confiscated and repossessed cars were unfair and deceptive.³⁸ The court ordered the *Vlahos* defendants to post a \$75,000 bond before they could again engage in advertising of any automobile auction or credit card information service.³⁹ In upholding the performance bond, U.S. District Judge George M. Marovich opined that the bond “represented a reasonable means of remedying and preventing . . . further unlawful practices.”⁴⁰ The decision was upheld by the Seventh Circuit in 1996.⁴¹

To address the constitutionality of performance bonds imposed on past bad speakers as a condition precedent for future speech, Part I of this article examines the Seventh Circuit’s analysis in *Trudeau* in greater depth.⁴² Part II questions whether the status of an individual as a past bad speaker should affect the degree of First Amendment protection he or she receives for future

eteer Influenced and Corrupt Organizations Act (“RICO”), that “the threat of forfeiture has no more of a chilling effect on free expression than the threat of a prison term or a large fine.” *Alexander v. United States*, 509 U.S. 544, 556 (1993). In *Alexander*, “the assets in question were ordered forfeited not because they were believed to be obscene, but because they were directly related to petitioner’s past racketeering violations. The RICO forfeiture statute calls for the forfeiture of assets because of the financial role they play in the operation of the racketeering enterprise.” *Id.* at 551. Ultimately, *Alexander* involves a very different scenario — the post-trial forfeiture provisions of RICO that sweep up protected expression as assets associated with a racketeering enterprise — than *Trudeau*.

The majority’s conclusion in *Alexander* drew a vehement dissent from Justice Anthony Kennedy, who wrote that “[t]he fundamental defect in the majority’s reasoning is a failure to recognize that the forfeiture here cannot be equated with traditional punishments such as fines and jail terms.” *Id.* at 561 (Kennedy, J., dissenting). See generally Sean M. Douglass & Tyler Layne, *Racketeer Influenced and Corrupt Organizations*, 48 AM. CRIM. L. REV. 1075 (2011) (providing a current overview of the federal RICO provisions).

³⁷ 884 F. Supp. 261 (N.D. Ill. 1995), *aff’d*, No. 95-1484, 1996 U.S. App. LEXIS 20525 (7th Cir. Aug. 9, 1996).

³⁸ *Id.* at 263.

³⁹ *Id.*

⁴⁰ *Id.* at 266.

⁴¹ *United States v. Vlahos*, No. 95-1484, 1996 U.S. App. LEXIS 20525 (7th Cir. Aug. 9, 1996).

⁴² See *infra* Part I.

expression,⁴³ especially in light of the U.S. Supreme Court's 2010 ruling in *Citizens United v. Federal Election Commission*.⁴⁴ Part II also considers whether performance bonds are more like prior restraints on expression than subsequent punishments. Part III examines the performance bond issue through the lens of the venerable marketplace of ideas theory of freedom of expression, exploring bonds as a form of government-mandated marketplace manipulation.⁴⁵ Part IV analyzes the similarities and differences between imposing performance bonds on past bad speakers and requiring groups to post money before they can obtain permits to engage in speech-related activities such as marching or parading.⁴⁶ Part V explores the possibility of imposing bonds on past bad speakers in contexts other than FTC actions targeting deceptive advertising.⁴⁷ Finally, Part VI calls on courts to provide more rigorous scrutiny of performance bonds, akin to that used to analyze gag orders — prior restraints — on the press.⁴⁸

I. FEDERAL TRADE COMMISSION v. TRUDEAU: SACRIFICING FIRST AMENDMENT CONCERNS TO PURIFY THE MARKETPLACE OF IDEAS?

The \$2 million performance bond imposed on Kevin Trudeau was initially fashioned by U.S. District Judge Robert W. Gettleman in April 2010.⁴⁹ Gettleman's earlier attempt to ban Trudeau from producing any infomercials for three years in a civil contempt proceeding had been struck down by the Seventh Circuit less than a year before.⁵⁰ The problem with the infomercial ban, according to the Seventh Circuit, was that:

It lasts for three years no matter what Trudeau does. Trudeau could take all the steps in the world to convince the FTC and the district court that he will be truthful in his next infomercial, but even if he offers to read his book word-for-word and say nothing else, he cannot free himself of the court's sanction.⁵¹

⁴³ See *infra* Part II.

⁴⁴ 130 S. Ct. 876 (2010).

⁴⁵ See *infra* Part III.

⁴⁶ See *infra* Part IV.

⁴⁷ See *infra* Part V.

⁴⁸ See *infra* Part VI.

⁴⁹ *FTC v. Trudeau*, 708 F. Supp. 2d 711 (N.D. Ill. 2010).

⁵⁰ See *FTC v. Trudeau*, 579 F.3d 754, 779 (7th Cir. 2009) (holding that Judge Gettleman "cannot impose a non-purgeable, three-year penalty as a civil contempt sanction. Accordingly, we vacate the infomercial ban and remand").

⁵¹ *Id.* at 777.

What does this mean? Coercive civil contempt sanctions, as contrasted with compensatory civil contempt sanctions,⁵² must be purgeable, such that a contemnor like Kevin Trudeau has the opportunity, through some form of affirmative conduct, “to free himself of the sanction.”⁵³ The infomercial ban, however, was not purgeable because there was nothing Trudeau could do to relieve himself of the burden.⁵⁴

Rather than fashion its own coercive remedy for Trudeau, however, the Seventh Circuit remanded the case back to Judge Gettleman, reasoning that the “district court is in a better position to fashion an appropriate coercive remedy, should it choose to do so on remand. The court could also, of course, choose to impose a criminal sanction instead.”⁵⁵ The FTC raised the performance bond issue with Gettleman on remand, suggesting he require Trudeau to post a \$10 million bond for five years before Trudeau could engage in future infomercials involving books, newsletters or other informational publications touting the supposed benefits of products, programs or services.⁵⁶

Observing that “deceptive commercial speech is entitled to no constitutional protection”⁵⁷ and noting in his opinion the strong likelihood that Trudeau would repeat his deceptive conduct in marketing *The Weight Loss Cure ‘They’ Don’t Want You to Know About*,⁵⁸ Judge Gettleman concluded that

⁵² See *id.* (observing that “civil contempt sanctions come in two breeds, and two breeds only. They either *compensate* those harmed by the contemnor’s violative conduct or *coerce* the contemnor to cut it out”) (emphasis added).

⁵³ *Id.* See generally Linda S. Beres, *Civil Contempt and the Rational Contemnor*, 69 IND. L.J. 723, 726 (1994) (asserting that “[i]f the judge’s goal is to induce compliance, she must give the contemnor an incentive to obey the court order. Civil contempt, therefore, requires imposing an indeterminate or conditional sanction – one that ends if the contemnor complies”).

⁵⁴ See *Trudeau*, 579 F.3d at 777 (observing that “the infomercial ban is not purgeable and therefore not a proper coercive contempt sanction”).

⁵⁵ *Id.* at 779.

⁵⁶ *FTC v. Trudeau*, 708 F. Supp. 2d 711, 720 (N.D. Ill. 2010).

⁵⁷ *Id.* at 721.

⁵⁸ Judge Gettleman lambasted Trudeau on this point, opining:

The court has no faith in the notion that Trudeau has somehow been reformed by these proceedings or anything else that has happened since the publications of the offending infomercials in 2007. Indeed, Trudeau continues to deny that he did anything wrong, contends that his deceptive information is somehow protected by the Constitution, and pretends that he did not profit from the book or the infomercials and thus should not have to pay anything to the people he deceived.

Id.

“a performance bond in some amount does not violate Trudeau’s First Amendment rights and is part of an appropriate equitable remedy in this case.”⁵⁹ The judge pointed out that performance bonds were previously used in cases involving FTC actions against weight-loss product promoters⁶⁰ and a telemarketing college-scholarship search service.⁶¹ The only legal bone Gettleman threw to Kevin Trudeau was setting the bond at \$2 million instead of the \$10 million sum requested by the FTC.⁶² He added that the bond:

[S]hall be deemed continuous and remain in full force and effect so long as, and for at least five (5) years after: (a) Defendant Trudeau produces, disseminates, makes or assists others in making any such representation in an infomercial for any book, newsletter, or other informational publication; or (b) any infomercial containing any such representation is aired or played on any television or radio media (including but limited to network television, cable television, radio, and television or radio content that is disseminated on the Internet).⁶³

Kevin Trudeau, as noted earlier, argued to the Seventh Circuit that the imposition of the bond violated his First Amendment right of free speech.⁶⁴ The appellate court initially held that any First Amendment issues were decided under the test created by the U.S. Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*⁶⁵ for evaluating restrictions imposed on commercial speech.⁶⁶ *Central Hudson* established a multi-part test under which truthful advertising for lawful goods and activi-

⁵⁹ *Id.* at 720.

⁶⁰ See *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1277 (S.D. Fla. 1999) (requiring one defendant to “post a performance bond in the amount of \$5 million before engaging, directly or indirectly, in any business related to weight-loss products or services specifically, or in marketing of any product or services generally, anywhere in the United States,” and another defendant in the same case to “post a performance bond in the amount of \$1 million before engaging, directly or indirectly, in any business related to weight-loss products or services specifically, or in marketing of any product or services generally, anywhere in the United States”).

⁶¹ *FTC v. Career Assistance Planning, Inc.*, 1997 U.S. Dist. LEXIS 17191, at *18–19 (N.D. Ga. Sept. 19, 1997) (requiring the defendants to post performance bonds in the amount of \$6 million before they could engage in future telemarketing).

⁶² *FTC v. Trudeau*, 708 F. Supp. 2d 711, 724 (N.D. Ill. 2010).

⁶³ *Id.* at 724–25.

⁶⁴ See *supra* notes 7–8 and accompanying text.

⁶⁵ 447 U.S. 557 (1980).

⁶⁶ *FTC v. Trudeau*, 662 F.3d 947, 953 (7th Cir. 2011).

ties can only be regulated if the government proves it has a substantial interest that is directly advanced by a narrowly tailored regulation.⁶⁷ The high court in *Central Hudson* was explicit that speech relating to unlawful goods and activities or that is misleading receives no First Amendment protection.⁶⁸

This test, as Professor Michael Hoefges observes, “remains today as the means by which commercial speech regulations are tested for constitutionality under the First Amendment,”⁶⁹ despite the fact that it represents “a controversial form of intermediate scrutiny.”⁷⁰ Jennifer Pomeranz, director of legal initiatives at Yale University’s Rudd Center for Food Policy & Obesity, suggests that “the intermediate nature of the test reflects the subordinate position that commercial speech holds under the First Amendment.”⁷¹

The Seventh Circuit’s decision to use the *Central Hudson* test to measure the validity of the performance bond imposed on Kevin Trudeau is therefore crucial because it greatly enhanced the likelihood the decision would be upheld. Because Kevin Trudeau’s speech activity—namely, the production and broadcast of infomercials—amounts to advertising, it only receives a limited, intermediate level of protection under the First Amendment⁷² and can thus be regulated more easily under *Central Hudson*⁷³ than most content-based restrictions, which are subject to the more rigorous⁷⁴

⁶⁷ *Central Hudson*, 447 U.S. at 564–66.

⁶⁸ *Id.* at 566 (opining that “[a]t the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading”).

⁶⁹ R. Michael Hoefges, *Regulating Professional Services Advertising: Current Constitutional Parameters and Issues Under the First Amendment Commercial Speech Doctrine*, 24 CARDOZO ARTS & ENT. L.J. 953, 968 (2007).

⁷⁰ *Id.* at 956.

⁷¹ Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL’Y 159, 170–71 (2009).

⁷² See Tamara R. Piety, *Against Freedom Of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2586 (2008) (observing that the commercial speech doctrine extends only “a limited, intermediate level of protection for commercial speech”).

⁷³ *Contra* David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. 1049, 1059 (2004) (asserting that “[t]he *Central Hudson* test the Court now employs is a demanding one—a standard so rigorous that it results in the virtually automatic invalidation of laws restraining truthful commercial speech”).

⁷⁴ *Contra* Matthew D. Bunker et al., *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL’Y 349, 377

strict scrutiny standard of review.⁷⁵ Strict scrutiny requires the government to prove that it has a compelling interest—not merely a substantial one⁷⁶—to justify regulating speech⁷⁷ and that the means of regulation are the least restrictive way of serving that compelling interest.⁷⁸

Applying the *Central Hudson* test, the Seventh Circuit held—without any analysis and citing no precedent—that protection of consumers constitutes a substantial government interest, stating only that this prong of the test was “obviously met.”⁷⁹ The appellate court then concluded, within the space of the same paragraph, that this consumer-protection interest was directly and materially advanced by the performance bond in two ways, opining that “[i]t makes it more likely that consumers will be compensated for future violations and, more importantly, it makes it less likely that there will be future violations because Trudeau will face a considerable financial loss if he is involved in a deceptive infomercial.”⁸⁰ In other words, the ap-

(2011) (arguing that the strict scrutiny standard in First Amendment jurisprudence “is arguably a weaker judicial tool today for measuring the constitutionality of laws targeting speech than it was in the past. Although still strongly protective of expression, there is at least some evidence that the test lacks the rigor for which it once was noted”).

⁷⁵ Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 444 (1996) (observing that “in most contexts, a strict scrutiny standard applies to content-based action of all kinds”).

⁷⁶ See Matthew D. Bunker, *Adventures in the Copyright Zone: The Puzzling Absence of Independent First Amendment Defenses in Contemporary Copyright Disputes*, 14 COMM. L. & POL’Y 273, 293 (2009) (observing that “[i]n intermediate scrutiny, government need not demonstrate a compelling interest – only an ‘important’ or ‘substantial’ interest, which makes the government’s justification for its regulation significantly less taxing”).

⁷⁷ This step involves “a normative judgment about the ends: Is the interest important enough to justify a speech restriction?” Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418 (1996).

⁷⁸ See Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743, 745 (2003) (writing that “under the guise of strict scrutiny, the Supreme Court has interpreted the First Amendment to require that state actors imposing a content-based restriction on speech prove that the restriction (1) advances a compelling government interest, and (2) is narrowly tailored to achieve that end,” and adding that “[t]he Court includes under the latter prong an inquiry into whether the state action in question offers the least restrictive means of achieving the state’s allegedly compelling interest”).

⁷⁹ *FTC v. Trudeau*, 662 F.3d 947, 953 (7th Cir. 2011).

⁸⁰ *Id.*

pellate court recognized the financial incentivization that performance bonds carry for deterring “bad” speech and producing “good” speech.

The Seventh Circuit then turned to the final aspect of the *Central Hudson* test—the narrow tailoring prong.⁸¹ This was the only part of the test on which the appellate court lingered in its analysis before ultimately finding the bond was constitutional. It concluded as such for three reasons. First, the appellate court emphasized that the bond only applied to one narrow category of speech—infomercials—in which Trudeau might engage. It wrote that the bond:

[D]oes not limit Trudeau as an author; it does not curtail Trudeau’s attempt to pitch products in any print medium; it does not even apply if Trudeau makes a TV or radio ad under two minutes. Its application targets only the commercial conduct that has caused such tremendous consumer harm in the past—infomercials.⁸²

Put differently, there were ample alternative avenues and media of speech in which Trudeau could freely engage without needing to post a bond first.

Second, it found that the amount of the bond was reasonable. In particular, it noted that Judge Gettleman “took seriously Trudeau’s claim that it is beyond what he can afford by allowing him to file an audited financial statement and prove as much in a hearing.”⁸³

Third and finally, it determined the bond was “proportional to the amount of harm Trudeau caused by previous deceptive infomercials”⁸⁴ and, in fact, was actually low based upon the past damages to consumers Trudeau had caused.

The Seventh Circuit never considered the possibility that a performance bond imposed on a past bad speaker constitutes a presumptively unconstitutional prior restraint on expression,⁸⁵ a possibility explored later in this Article.⁸⁶ Furthermore, because it failed to apply strict scrutiny, the appellate court also never had to consider whether protecting consumers from the mere possibility—not a certainty—that Trudeau might produce false and misleading infomercials in the future constitutes a compelling interest.⁸⁷ In

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 953–54.

⁸⁴ *Id.* at 954.

⁸⁵ The phrase “prior restraint” is absent from the Seventh Circuit’s opinion. *FTC v. Trudeau*, 662 F.3d 947, 953 (7th Cir. 2011).

⁸⁶ See *infra* Part II and accompanying text.

⁸⁷ Speculation about the possible dangers or harms caused by speech that has yet to occur seems to be too tenuous of a relationship upon which to impose a monetary

addition, it did not examine whether a performance bond is the least restrictive method of serving this alleged interest or whether there are alternative, less restrictive ways of facilitating speech.

In the author's opinion, it comes as little surprise that the appellate court's analysis of Judge Gettleman's performance bond imposition as a coercive form of civil contempt was somewhat cursory. Attorney Lawrence N. Gray asserted in a 1998 law journal article that "[w]ith rare exception, appellate contempt law decisions are of extraordinarily poor quality. Bearing the marks of hurried carelessness and shockingly poor judgment, these decisions seem to mix and match truth with falsity and inaccurately cite or conveniently ignore precedent, resulting in a virtual jurisprudence by nomenclature."⁸⁸ While this characterization seems slightly over-the-top, it nonetheless indicates that perhaps appellate court jurists are disinclined to interfere extensively with the broad-based contempt power actions of their lower court brethren.⁸⁹

The bottom line is that the appellate court in *Trudeau* failed to explore the larger and more troubling First Amendment issues surrounding the imposition of performance bonds on past bad speakers. Part II of this article begins to undertake such an examination.

II. SPEAKER EQUALITY, PRIOR RESTRAINTS & PERFORMANCE BONDS: THE CITIZENS UNITED PERSPECTIVE AND BEYOND

In a 2003 law journal article examining the nexus between the First Amendment freedom of speech and the Fourteenth Amendment Equal Protection Clause, Professor Daniel P. Tokaji coined the term "First Amendment Equal Protection" to represent "the democratic ideal that all citizens should have an equal opportunity to participate in public discourse."⁹⁰ Per-

burden, especially because the performance bond is required on all future speech, whether it is lawful or not. *Cf.* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (observing that "the Government may not suppress lawful speech as the means to suppress unlawful speech" and stressing that the notion that "protected speech may be banned as a means to ban unprotected speech" is one that "turns the First Amendment upside down").

⁸⁸ Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 ST. JOHN'S L. REV. 337, 337-38 (1998).

⁸⁹ This is the case because "an appellate court reviews contempt orders for an abuse of discretion. The competency of the trial court's underlying findings will be reviewed under the clearly erroneous standard." Joel M. Androphy & Keith A. Byers, *Federal Contempt of Court*, 61 TEX. B.J. 16, 27 (1998).

⁹⁰ Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2410 (2003).

formance bonds, however, treat speakers unequally based upon their previous speech and thus conflict with this notion. This inequality, as the Supreme Court recently observed in *Citizens United v. Federal Election Commission*, is problematic.

Speech restrictions based on the identity of the speaker are all too often simply a means to control content,” opined Justice Anthony M. Kennedy in 2010 for a majority of the Supreme Court in *Citizens United*.⁹¹ He added that “the Government may commit a constitutional wrong when by law it identifies certain preferred speakers,”⁹² even emphasizing that “[t]he First Amendment protects speech and speaker, and the ideas that flow from each.”⁹³

Such robust language regarding equality of speaker status seems to militate strongly against imposing performance bonds on individuals (or on corporate entities or unions, in light of *Citizens United*) based upon their negative status of having previously engaged in unlawful or punishable expression. Cases like *Trudeau* treat differently, in dichotomized fashion, past “bad speakers” from “good speakers” (those who have not been adjudicated to have engaged in unlawful or otherwise harmful speech in the past). Put differently, performance bonds deployed in cases like *Trudeau* apply only to speakers of prior deception, not to those who have yet to engage in illicit speech. The inequality with performance bonds thus may be expressed, formulaically, as: *Past Bad Speakers ? Past Good Speakers*.

Yet language in *Citizens United* suggests that equality of speaker status may only exist when the government treats speakers differently in the realm of political expression. As Justice Kennedy wrote, “[w]e find no basis for the proposition that, *in the context of political speech*, the Government may impose restrictions on certain disfavored speakers.”⁹⁴ Of course, as the Seventh Circuit observed, *Trudeau* did not engage in political speech but rather, in commercial speech.⁹⁵

The relevance of *Citizens United* on the issue of imposing performance bonds on past bad speakers, however, stretches beyond the question of speaker equality. In particular, *Citizens United* lays the groundwork for making the argument that performance bonds should be treated as prior restraints. In particular, Justice Kennedy expressed a willingness to interpret broadly the meaning of prior restraints in First Amendment jurispru-

⁹¹ *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* (emphasis added).

⁹⁵ *Supra* Part I.

dence. Although acknowledging that the Federal Election Commission's "regulatory scheme may not be a prior restraint on speech in the strict sense of that term,"⁹⁶ Justice Kennedy determined that the "onerous restrictions . . . function as the *equivalent of prior restraint* by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit."⁹⁷

In other words, even if one determines that performance bonds imposed on past bad speakers are not technically prior restraints on speech, they nonetheless may be tantamount to them and, in turn, treated as their equivalent by the judiciary. In fact, Justice Kennedy made it clear nearly twenty years ago in *Alexander v. United States*⁹⁸ that First Amendment jurisprudence should not be bound to a rigid, categorical approach between prior restraints and subsequent punishments. *Alexander* involved the forfeiture of the expressive-material assets (namely, sexually-themed magazines and movies) of an adult bookstore and theatre owner who was convicted of violating the Racketeer Influenced and Corrupt Organizations Act.⁹⁹ The forfeited assets "were found to be related to his previous racketeering violations,"¹⁰⁰ and the *Alexander* majority determined that their forfeiture:

imposes no legal impediment to—*no prior restraint* on—petitioner's ability to engage in any expressive activity he chooses. He is perfectly free to open an adult bookstore or otherwise engage in the production and distribution of erotic materials; he just cannot finance these enterprises with assets derived from his prior racketeering offenses.¹⁰¹

Dissenting from the view that the forfeiture of speech assets did not constitute a prior restraint, Justice Kennedy reasoned that although "[o]ur cases do recognize a distinction between prior restraints and subsequent punishments,"¹⁰² this "distinction is neither so rigid nor so precise that it can bear the weight the Court places upon it to sustain the destruction of a speech business and its inventory as a punishment for past expression."¹⁰³ Importantly, Kennedy added, "the term 'prior restraint' is not self-defining. One

⁹⁶ *Citizens United*, 130 S. Ct. at 895-96.

⁹⁷ *Id.* at 896 (emphasis added).

⁹⁸ 509 U.S. 544 (1993).

⁹⁹ *Id.* at 546 (setting forth the relevant facts of the case).

¹⁰⁰ *Id.* at 551.

¹⁰¹ *Id.* (emphasis added).

¹⁰² *Id.* at 566 (Kennedy, J., dissenting).

¹⁰³ *Id.*

problem, of course, is that “some governmental actions may have the characteristics both of punishment and prior restraint.”¹⁰⁴ He emphasized that they may be intertwined, opining that “a prior restraint and a subsequent punishment may occur together.”¹⁰⁵

This, arguably, is exactly the case with performance bonds when they are imposed on past bad speakers as a government-mandated condition precedent for engaging in future speech. First, they represent subsequent punishments to the extent they are imposed only on an individual subsequent to his or her prior engagement in bad speech. The FTC, for instance, would not impose a performance bond on a person who never previously has made an infomercial. It would only impose such a surety on those who have made misleading ones in the past.

On the other hand, performance bonds also constitute prior restraints because the government—a judge—requires a speaker first to post what is similar to a refundable user fee before he can speak.¹⁰⁶ An apt analogy here is to the security fees that public universities today impose on controversial speakers in order to cover the costs of heightened security.¹⁰⁷ Likewise, the performance bond is an attempt to secure a safe and secure marketplace of ideas—one less likely to include misleading information because the potential loss of the bond incentivizes the production of lawful expression. The next part of the article explores further the relationship between performance bonds and the marketplace of ideas.

III. PERFORMANCE BONDS AND THE MARKETPLACE OF IDEAS: HOW TO DRIVE FALSEHOOD FROM THE FIELD?

Dissenting nearly 100 years ago in *Abrams v. United States*,¹⁰⁸ Justice Oliver Wendell Holmes, Jr. famously reasoned that:

[T]he ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted

¹⁰⁴ *Id.* at 567 (emphasis added).

¹⁰⁵ *Id.*

¹⁰⁶ See generally Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795 (1987) (providing an excellent overview of government-imposed user fees).

¹⁰⁷ See Erica Goldberg, *Must Universities “Subsidize” Controversial Ideas?: Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 GEO. MASON U. C.R. L.J. 349 (2011) (providing a current and comprehensive examination of the constitutionality of security fees on college campuses).

¹⁰⁸ 250 U.S. 616 (1919).

in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.¹⁰⁹

Holmes' economic metaphor for a free trade in views and opinions today is known as the marketplace of ideas, and it is linked squarely with much of modern free speech theory in the United States.¹¹⁰ Two of the core tenets of the marketplace theory, as Harvard Berkman Center for Internet and Society fellow Derek Bambauer observes, are that government regulation "is unnecessary, and undesirable"¹¹¹ and that "governmental limits on communication are inherently suspect because they restrict the flow of competitive products into the marketplace and undercut valuable self-expression."¹¹²

What is perhaps most striking about the notion of a government entity – in this case, the federal judiciary – imposing a performance-bond requirement on speakers of prior falsehoods is that such a mandate constitutes a tacit admission that the marketplace of ideas metaphor is fundamentally flawed. In particular, the imposition of a performance bond to try to ensure that only truthful speech is uttered by a previously duplicitous communicator amounts to a recognition that: 1) truth will not always drive falsehood from the field; and 2) some consumers simply lack the intellectual capacity to rationally determine for themselves, after weighing competing claims by the likes of Kevin Trudeau and others promoting similar products, programs or services, which ideas are true and which ideas are false. Some people, in other words, will always fall for falsity.

Put more bluntly, the FTC wants to drive what it asserts are Kevin Trudeau's falsehoods from the field of infomercials. Why? Because, in the FTC's view, consumers keep falling for falsity and, therefore, a government-imposed incentive on speakers like Trudeau is necessary to purify the speech marketplace and to help consumers. Performance bonds thus smack of the

¹⁰⁹ *Id.* at 630 (Holmes, J., dissenting).

¹¹⁰ See Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 823–25 (2008) (observing that Justice Holmes' passage in *Abrams* "conceptualized the purpose of free speech so powerfully that he revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech," and that "[n]ever before or since has a Justice conceived a metaphor that has done so much to change the way that courts, lawyers, and the public understand an entire area of constitutional law").

¹¹¹ Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 101, 106 (2006).

¹¹² *Id.*

brand of governmental paternalism¹¹³ that once justified so much of commercial speech regulation.¹¹⁴ Yet they are now being used in cases like *Trudeau* at a time when, as Furman University President Rodney Smolla observes, there is “growing hostility toward paternalism in commercial speech regulation.”¹¹⁵ It is a sentiment seconded by University of Florida Professor Lyrrisa Lidsky, who observed in 2010 that “the modern trend, even in commercial speech cases, is to give more credit to the targets of commercial speech.”¹¹⁶

Perhaps an appropriate variable or concept here to help to understand this situation is *trust*. In particular, performance bonds are imposed on a speaker like Kevin Trudeau because:

- *Trudeau cannot be trusted* to produce truthful and non-misleading infomercials in the future;
- *consumers cannot be trusted* to see through, as it were, any false and misleading infomercials that Trudeau might indeed produce in the future; and
- *the marketplace of ideas cannot be trusted* to adequately drive false infomercials from the field of speech.

That some consumers are duped again and again is not surprising to Bambauer, who asserts that:

The weakness of the marketplace of ideas is the consumers who shop within it. Our perceptual filters, cognitive biases, and heuristics mean

¹¹³ Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 650 (2004) (defining paternalism in the free-speech context as “a restriction on otherwise protected speech justified by the government’s belief that speaking or receiving the information in the speech is not in citizens’ own best interests”). See generally Matthew D. Bunker & Clay Calvert, *Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases*, 26 GA. ST. U. L. REV. 321, 335–41 (2010) (providing a brief overview of paternalism in First Amendment jurisprudence).

¹¹⁴ Professor Lyrrisa Lidsky explains:

In the realm of commercial and other non-core speech . . . the Court sometimes (though not consistently) applies a credulous consumer model of the implied audience. This alternate model, which posits that many audience members are naive and easily misled, provides justification for paternalistic governmental intervention in the realm of commercial speech.

Lyrrisa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 803–04 (2010).

¹¹⁵ Rodney A. Smolla, *Free the Fortune 500! The Debate Over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277, 1292 (2004).

¹¹⁶ Lidsky, *supra* note 114, at 823.

that we do not consistently discover truth and discard false information. Therefore, we should discard the theory as an approach to communications regulation and adopt a more realistic approach that expressly considers why we value free discourse.¹¹⁷

Performance bonds, however, do not represent complete abandonment of the marketplace of ideas metaphor but, rather, constitute a limited measure of governmental interventionism in the speech marketplace. In particular, they affect and limit access to the marketplace of ideas: in order to gain entry to the marketplace of TV infomercials, Kevin Trudeau must pony up cash, in the form of a performance bond. There is, in other words, a financial barrier imposed on some speakers – namely, those who have been adjudicated to have engaged in some form of undesirable, unlawful speech in the past – but not on others.

Performance bonds thus seem somewhat counterintuitive to free speech principles, at least to the extent they promote *inequality of access* to the marketplace of ideas. The usual concern among academics and government entities is promoting equality of access to speech marketplaces, not hindering it.¹¹⁸ As the U.S. Supreme Court observed in *Red Lion Broadcasting Co. v. Federal Communications Commission*¹¹⁹ in upholding the Fairness Doctrine, “[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”¹²⁰

But when it comes to performance bonds, the hindrance to access can be viewed both as a subsequent punishment for past bad behavior in the speech marketplace¹²¹ and as an incentive for providing better speech in the future. In line with *Red Lion's* fundamental premise in that “it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount,”¹²² performance bonds allow the speaker’s First Amendment rights – Kevin Trudeau’s rights – to be curtailed via a financial entry fee in order to supposedly benefit the audience’s right to receive truthful infomercials.

¹¹⁷ Bambauer, *supra* note 111, at 132–33.

¹¹⁸ See generally Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 49–71 (1984) (providing an overview of access reform notions in relationship to the marketplace of ideas).

¹¹⁹ 395 U.S. 367 (1969).

¹²⁰ *Id.* at 390.

¹²¹ See *supra* Part II (describing how performance bonds blur the distinction between prior restraints on speech and subsequent punishments for previous unlawful or otherwise undesirable expression).

¹²² *Red Lion*, 395 U.S. at 390.

IV. PERFORMANCE BONDS AND THE PARADE PERMIT ANALOGY: A DIFFERENCE WITHOUT IMPORTANCE?

Requiring a speaker to first post a performance bond before he or she can speak is, in some ways, analogous to permit schemes that mandate a group to first procure and pay for a government permit before it can engage in an activity such as a parade or a march. As Nathan Kellum, senior counsel for the Alliance Defense Fund, recently wrote, “[p]ermit schemes represent the most egregious, and perhaps the most popular, version of a prior restraint, whereby speakers are required to secure governmental permission in order to speak.”¹²³

Twenty years ago in *Forsyth County v. Nationalist Movement*,¹²⁴ the U.S. Supreme Court addressed the question of whether a parade ordinance in Forsyth County, Georgia that allowed local officials to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order violated the First Amendment.¹²⁵ The Court initially made it clear that requiring a fee before one could speak constitutes a prior restraint on speech.¹²⁶ This observation solidifies the argument made in Part II that performance bonds on past bad speakers constitute prior restraints.¹²⁷

Such fees, however, may be permissible “in order to regulate competing uses of public forums”¹²⁸ if several requirements are satisfied. First, the regulation must limit the discretion of the government official charged with enforcing it by articulating narrowly drawn and definite standards.¹²⁹ Second, the amount of the fee cannot vary or shift based upon the content of the permit-seeker’s speech or message.¹³⁰ Third, if the regulation is content-neutral, then, in accord with intermediate scrutiny, it “must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.”¹³¹

¹²³ Nathan W. Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits are Permitted?*, 56 *DRAKE L. REV.* 381, 388 (2008).

¹²⁴ 505 U.S. 123 (1992).

¹²⁵ *Id.* at 124.

¹²⁶ *Id.* at 130.

¹²⁷ See *supra* notes 96–107 and accompanying text.

¹²⁸ *Forsyth County*, 505 U.S. at 130.

¹²⁹ *Id.* at 130–32.

¹³⁰ See *id.* at 130 (opining that “any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message”).

¹³¹ *Id.*

What does all of this mean? As encapsulated by the Alliance Defense Fund's Nathan Kellum:

The Supreme Court recognizes that regulatory fees may be assessed as part of a system of prior restraint, but only if the system is content-neutral and serves a legitimate state interest. Such interests may include the protection of public safety and the maintenance of order. However, as with any system of prior restraint, the assessment of fees must be directed by definite, objective, and narrow standards.¹³²

Applying these standards, the Supreme Court struck down Forsyth County's variable user fee system because: 1) it provided too much discretion to the government official administering it such that the "decision how much to charge for police protection or administrative time – or even whether to charge at all – is left to the whim of the administrator;"¹³³ and 2) it was a content-based system that allowed an audience's potentially hostile reaction to dictate the financial burden imposed on the speaker.¹³⁴ As this second reason intimates, the case represents what Professor Erica Goldberg dubs a classic example of a heckler's veto decision under which courts "require the government to protect unpopular speakers from would-be citizen censors."¹³⁵ *Forsyth County* thus stands, in part, for the principle that "the burden of protecting unpopular speakers must rest with the whole community; otherwise, hecklers could make it financially unfeasible for those with unpopular views to assemble and demonstrate."¹³⁶

At minimum, *Forsyth County* suggests by analogy that judges who impose performance bonds must follow clear, narrow and definite guidelines when determining the amount. Although the bond imposed in *Trudeau* was under a judge's civil contempt power, that power is not absolute and should, in the context of performance bonds as a condition precedent for future speech, be confined by clearly articulated principles and factors that a judge must weigh and balance.

¹³² Kellum, *supra* note 123, at 408–09.

¹³³ *Forsyth County*, 505 U.S. at 133.

¹³⁴ *Id.* at 134–35. See Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 948 (1994) (observing that "[t]he specific licensing scheme at issue was invalidated because it conferred too much discretion on administrators in fixing the amount of the fee, and it impermissibly allowed applicants expressing unpopular messages to be charged higher fees because of the added costs of maintaining order at their events").

¹³⁵ Goldberg, *supra* note 107, at 358.

¹³⁶ *Id.* at 361.

Of course, there is a fundamental difference between imposing strict control over the amount of *administrative discretion* in considering permit and user fees in *Forsyth County* and imposing strict control over the amount of *judicial discretion* a judge has during civil contempt proceedings in *Trudeau*. The problem is, as attorney Jennifer Fleischer writes, that “[c]ivil contempt gives judges almost unlimited discretion to impose severe sanctions but provides a contemnor seemingly inadequate safeguards.”¹³⁷ As Professor Elizabeth Patterson points out, for many centuries, “courts have claimed inherent authority to protect the integrity of their proceedings and ensure compliance with their lawful orders by holding offending parties in contempt of court.”¹³⁸ Professors Stewart and Fargo add that “the limits of judicial power in regard to contempt and other discretionary decisions are not clearly defined.”¹³⁹ Even in the face of First Amendment concerns, journalists have been jailed as a coercive form of civil contempt.¹⁴⁰

In addition to the distinction between administrative discretion in the parade permit scenario and the judicial contempt discretion in the performance bond situation, performance bonds imposed on past bad speakers are inherently content-based measures and thus should always be subject to strict scrutiny, rather than the intermediate scrutiny to which content-neutral parade permits are subjected. This is the case for several reasons.

First, in Kevin Trudeau’s situation, the subject matter regulated is infomercials for books, newsletters and other information touting products, programs and services.¹⁴¹ Second, performance bonds are content-based measures because their initial imposition is triggered only by a specific type

¹³⁷ Jennifer Fleischer, *In Defense of Civil Contempt Sanctions*, 36 COLUM. J.L. & SOC. PROBS. 35, 35 (2002).

¹³⁸ Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor’s Prison*, 18 CORNELL J. L. & PUB. POL’Y 95, 101 (2008).

¹³⁹ Stewart & Fargo, *supra* note 8, at 456.

¹⁴⁰ As recently encapsulated by attorney Robert Held:
Judith Miller . . . was jailed while employed by the *New York Times* for refusing to reveal information about a leak from Vice President Cheney’s Chief of Staff concerning CIA operative Valerie Plame. Ms. Miller had been found in civil contempt but “held the keys to the jail” because when she determined to comply with the subpoena (her source released her from her promise of confidentiality), she was freed. The Special Prosecutor had threatened criminal contempt (in addition to her civil confinement) in an effort to punish Ms. Miller for her refusal to comply with the subpoena. Robert Held, *The Court’s Highest Power: Contempt*, 24 CHI. BAR ASS’N REC. 36, 37 (2010).

¹⁴¹ See *supra* notes 63–64 and accompanying text.

of content that the speaker has engaged in during the past (in Trudeau's case, false and misleading infomercials).

Finally, a performance bond is inherently content-based precisely because it is intended to reward a speaker like Kevin Trudeau for engaging in particular type of content. Specifically, if Trudeau produces only truthful and non-misleading infomercials, he is rewarded over time because: 1) he does not forfeit the bond; and 2) the judge's order imposing the bond sunsets and he recoups the bond. Conversely, if Trudeau's future infomercial content is false or misleading, he is penalized and pays the already-established price of the bond. In brief, the price paid – or not paid – hinges on the future content that Trudeau transmits on the infomercial medium.

With this comparison between performance bonds imposed on past bad speakers and permit schemes in parade and march scenarios in mind, the next part of the article teases out the possibility of courts and government bodies mandating performance bonds in situations beyond those of FTC actions against serial deceivers.

V. ARE PERFORMANCE BONDS ON PAST BAD SPEAKERS VALID OUTSIDE THE REALM OF COMMERCIAL SPEECH?

If the Seventh Circuit gives its blessing to the Federal Trade Commission's request to impose performance bonds on individuals who repeatedly violate its rules on deceptive marketing, it is possible to imagine another federal administrative agency in the speech-regulation business—the Federal Communications Commission—mandating that the operators of television stations that repeatedly violate its rules on either indecency¹⁴² or children's educational content¹⁴³ post performance bonds to maintain their licenses. Currently, the FCC may revoke a station's license, impose a monetary forfeiture or issue a warning for indecency violations.¹⁴⁴ The maximum forfeiture today for the broadcast of obscenity, indecency or profanity is

¹⁴² See *supra* note 33 and accompanying text (addressing the FCC's regulation of indecency).

¹⁴³ See Guide: Children's Educational Television, Federal Communications Commission, <http://www.fcc.gov/guides/childrens-educational-television> (last visited Apr. 9, 2012) (setting forth the FCC's rules and guidelines, adopted pursuant to the Children's Television Act of 1990, regarding mandatory educational programming for children and limiting the amount of commercial time during such programming).

¹⁴⁴ See Indecency and Obscenity, Federal Communications Commission, <http://www.fcc.gov/topic/indecency-and-obscenity> (last visited Apr. 9, 2012) (providing that "[i]n response to a complaint, the FCC may revoke a station license, impose a

“\$325,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$3,000,000 for any single act or failure to act.”¹⁴⁵

The imposition of a purgeable performance bond on a TV station that had been fined in the past for indecency violations would provide it with a financial incentive not to do so again, and, instead, to better serve the public interest, convenience, or necessity. The bond could be set at the same \$325,000 figure as a maximum monetary forfeiture, for example, and last for a period of eight years (the length of time that a broadcast license is valid).¹⁴⁶

Such a bond, of course, would be subject to strict scrutiny in this scenario, regardless of whether it is considered a prior restraint or a subsequent punishment. Why? Because indecency constitutes a specific type of content that not only triggers the initial imposition of the performance bond, but also its potential forfeiture. Assuming that shielding minors from indecent broadcast content is a compelling interest, the government nonetheless would need to prove that coercing non-indecency content through the financial incentivization mechanism of a performance bond is the least restrictive means of serving that interest. Given the current turmoil surrounding the FCC’s current indecency enforcement regime,¹⁴⁷ is far from clear the government could clear this least-restrictive-means hurdle.

Another potential scenario involving a disfavored form of expression in which a court could conceivably order a performance bond is defamation, in which a defendant has repeatedly defamed the same plaintiff over the course of several years, with the plaintiff winning libel lawsuits in each instance. Would a performance bond, imposed on the serial defamer as coercive measure to chill future libelous utterances against the plaintiff, pass constitutional muster?

monetary forfeiture or issue a warning if a station airs obscene, indecent or profane material”).

¹⁴⁵ 47 U.S.C.A. § 503 (2010).

¹⁴⁶ See 47 U.S.C. § 307(c)(1) (2011) (providing, in relevant part, that “[e]ach license granted for the operation of a broadcasting station shall be for a term of not to exceed 8 years” and that “a renewal of such license may be granted from time to time for a term of not to exceed 8 years from the date of expiration of the preceding license, if the Commission finds that public interest, convenience, and necessity would be served thereby”).

¹⁴⁷ The U.S. Supreme Court in January 2012 heard oral argument in the case of *FCC v. Fox Television Stations, Inc.*, 131 S. Ct. 3065 (2011). The case pivots on the issue of “[w]hether the Federal Communications Commission’s current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.” *Id.* at 3065–66.

The initial answer would appear to be no, especially if, as argued earlier,¹⁴⁸ performance bonds imposed by government entities — courts and/or administrative agencies — constitute prior restraints. De Paul University Professor Stephen A. Siegel observed in 2008 that “[a] half century ago enjoining defamatory speech was impermissible.”¹⁴⁹ That anti-injunction sentiment, however, is changing, with Professor Siegel noting that “[o]ver the past thirty years, several state courts of last resort have upheld injunctions restraining defamatory speech.”¹⁵⁰ Dean Erwin Chemerinsky concurs, observing in 2007 that while “the long-standing rule [is] that equity will not enjoin defamation and that such injunctions are prior restraints that inherently violate the First Amendment,”¹⁵¹ today “an increasing number of courts have imposed injunctions in defamation actions.”¹⁵²

In 2007, the Supreme Court of California upheld an injunction in a defamation case, but that injunction was limited to repeating speech that previously had been adjudicated as defamatory.¹⁵³ The California high courts held that “following a trial at which it is determined that the defendant defamed the plaintiff, the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory.”¹⁵⁴ A performance bond, however, would represent a more scatter-shot approach. Why? Because it could be imposed on a serial defamer to deter *any* future defamatory statements about the plaintiff — even statements that have not previously been adjudicated as defamatory. If performance bonds are akin to prior restraints, then the scope of the speech swept up by the performance bond would need to be much more narrow in order to possibly be constitutional.

Yet another scenario in which one could envision a court imposing a performance bond involves the operator of an adult bookstore who previously has been convicted of selling obscene material. In order to re-open his store, the operator might be forced by a court to post bond that he would relinquish were he to be convicted in the future of selling obscene materials. Certainly obscenity would seem to be equally objectionable to the allegedly

¹⁴⁸ *Supra* Part II.

¹⁴⁹ Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 *BUFF. L. REV.* 655, 657 (2008).

¹⁵⁰ *Id.*

¹⁵¹ Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 *SYRACUSE L. REV.* 157, 173 (2007).

¹⁵² *Id.* at 157–58.

¹⁵³ *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339 (Cal. 2007).

¹⁵⁴ *Id.* at 349.

false and misleading commercial speech trafficked in by Kevin Trudeau. For instance, U.S. Senator Orrin Hatch (R. — Utah) sent a letter signed by forty-two senators to U.S. Attorney General Eric Holder in April 2011 urging “the Department of Justice vigorously to enforce federal obscenity laws against major commercial distributors of hardcore adult pornography.”¹⁵⁵ Hatch added that “we know more than ever how illegal adult obscenity contributes to violence against women, addiction, harm to children, and sex trafficking.”¹⁵⁶ Performance bonds would seem to represent one step in the type of vigorous enforcement efforts called for by Senator Hatch, as they arguably would chill the future dissemination of obscene adult content. The chilling effect would likely be overwhelming, given that an adult bookstore may sell hundreds or even thousands of DVDs. In turn, the possibility that any one of those titles standing alone would be adjudicated obscene and cause the loss of the performance bond might be a risk the owner would not want to take.

Each of the above three scenarios involving the relationship among indecency, defamation, obscenity and performance bonds is hypothetical. They are used here to illustrate the potential scope with which such bonds might be used and, in turn, why the courts must in the future apply analytic rigor when considering their constitutionality.

VI. CONCLUSION

For Kevin Trudeau, free speech today is no longer free. He must, instead, secure his right to speak, within the realm of televised infomercials, by first posting a monetary bond.

Performance bonds, this article has argued, blur the traditional line that separates prior restraints from subsequent punishments in First Amendment jurisprudence.¹⁵⁷ They also represent a form of government intrusion in the marketplace of ideas – a form of interventionism that ostensibly is designed to discourage and dissuade dangerous or otherwise unlawful speech from entering the speech market in the future. It is the threat of financial loss – the forfeiture of the performance bond – that supposedly incentivizes the production of what, in common parlance, might be thought of simply as “good” speech.

¹⁵⁵ Letter from U.S. Senator Orrin Hatch to U.S. Attorney General Eric Holder (Apr. 4, 2011), *available at* http://www.politico.com/static/PPM153_obsc.html.

¹⁵⁶ *Id.*

¹⁵⁷ *Supra* Part II.

The U.S. Supreme Court, however, has yet to consider the constitutionality of performance bonds as a condition precedent imposed on past bad speakers. Even if the bonds are reimbursable based upon good performance and, in turn, even if they do lapse or sunset after a fixed period of years, it now is time for the Court to consider: (1) whether; (2) how much; and (3) under what circumstances, a judge can financially charge a past bad speaker to re-enter an idea marketplace, such as that of infomercials, he previously has sullied and tarnished. In addition, the Court must address another question: how much repetitive and duplicative flouting of the limits of free speech is necessary for an individual to constitute or rise to the level of a past bad speaker upon whom a performance bond can be imposed?

Adding to the jurisprudential mess is the fact that broadcasting – the realm in which Kevin Trudeau’s infomercials traditionally have proliferated and in which the FTC targeted him – traditionally is regulated much more closely by the government than other forms of media.¹⁵⁸ Does this mean, in turn, that performance bonds might be imposed more easily on past bad speakers in the broadcast medium as compared to either the print medium or on the Internet?

Until the Supreme Court resolves all of these constitutional issues, the FTC should, at the very least, articulate and define the precise criteria under which it seeks performance bonds. Lower court judges, in turn, would be wise to consider such requests as prior restraints on speech, especially given pivotal swing Justice Anthony Kennedy’s willingness to expansively interpret that concept,¹⁵⁹ and subject them to a higher standard of review than intermediate scrutiny or the *Central Hudson* test deployed in *Trudeau*.

In particular, prior restraints on speech can only be justified by a government interest of the highest order.¹⁶⁰ It will be recalled that the Seventh Circuit in *Trudeau*, which never even considered whether a performance bond constitutes a prior restraint, only asked if there was a substantial gov-

¹⁵⁸ See generally *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (remarking that “some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers”); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (observing that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection”).

¹⁵⁹ See *supra* notes 97–105 and accompanying text (describing Justice Kennedy’s views on prior restraints).

¹⁶⁰ See *People v. Bryant*, 94 P.3d 624, 628 (Colo. 2004) (observing that “to justify a prior restraint, the state must have an interest of the ‘highest order’ it seeks to protect”).

ernment interest.¹⁶¹ Furthermore, as a prior restraint, a performance bond should be narrowly tailored, both in terms of its amount and its duration,¹⁶² and courts must consider whether there are alternative, less speech-restrictive methods of trying to prevent the future “bad speech” than imposing a performance bond.

Another issue here that must be examined in the prior restraint context is the likelihood or certainty that someone like Kevin Trudeau really will engage in future speech that causes harm. In the context of prior restraints imposed on the press, the Supreme Court has noted that they “have imposed this ‘most extraordinary remed[y]’ only where the evil that would result from the reportage is both great and *certain* and cannot be mitigated by less intrusive measures.”¹⁶³ Just what does or should it take then, in terms of evidence and a factual record, for a court like the Seventh Circuit in *Trudeau* to convince itself that it is *certain* that Kevin Trudeau will engage in future deceptive and misleading infomercials unless a performance bond is imposed?

The bottom line is that, when it comes to his First Amendment speech rights, Kevin Trudeau amounts to a second-class citizen in the eyes of the FTC, the Seventh Circuit and District Judge Gettleman. Like a prison inmate who surrenders certain free speech rights that are possessed by the non-incarcerated because of the inmate’s past bad criminal acts,¹⁶⁴ Trudeau sacrifices the right to speak freely on infomercials without first posting a bond because of his past unlawful expression. Similarly, like a libel-proof plaintiff who has sacrificed his reputation by past bad acts of heinous magnitude,¹⁶⁵ Trudeau has lost his reputation – at least, in the eyes of the FTC and the

¹⁶¹ *Supra* note 76 (explaining that intermediate scrutiny requires a determination of whether there is a substantial interest).

¹⁶² *See Bryant*, 94 P.3d at 628 (observing that a prior restraint on speech “must be the narrowest available to protect that interest; and the restraint must be necessary to protect against an evil that is great and certain, would result from the reportage, and cannot be mitigated by less intrusive measures”).

¹⁶³ *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (emphasis added).

¹⁶⁴ *See Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (observing that “[m]any of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration.”).

¹⁶⁵ A plaintiff is considered libel proof if his “reputation is already so badly tarnished that he cannot be further injured by allegedly false statements on that subject.” *Lufti v. Spears*, 2010 Cal. App. LEXIS 9310, at *16 (Cal. Ct. App. Nov. 23, 2010). *See, e.g., Carpenter v. King*, 792 F. Supp. 2d 29, 34, n.2 (D.D.C. 2011) (offering a concise and current review of the libel-proof plaintiff doctrine); *Stern v. Cosby*, 645 F. Supp. 2d 258, 270–71 (S.D.N.Y. 2009) (providing a recent review of

judiciary – as a truthful product pitchman and now must pay a price for his future speech that simply cannot be trusted for its veracity.

The Supreme Court, in turn, must now decide whether that price, borne as a performance bond, comports with the free speech guarantee of the First Amendment. If it answers that query in the affirmative, it then must define the circumstances when performance bonds are permissible and the constraints that can be imposed on them. If and when these questions are resolved, the legal system likely will have Kevin Trudeau to thank, after all, for forcing their assessment and evaluation.

the libel-proof plaintiff doctrine and the inapplicability of it to Howard K. Stern in his libel action against journalist-author Rita Cosby and her book publisher).