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## **Condoms: The New Medium of Expression Protected by the First Amendment- People V. Andujar**

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**Condoms: The New Medium of Expression Protected by the First Amendment-  
People V. Andujar**

**Cover Page Footnote**

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**CONDOMS: THE NEW MEDIUM OF EXPRESSION  
PROTECTED BY THE FIRST AMENDMENT**

**CRIMINAL COURT OF NEW YORK  
NEW YORK CITY**

People v. Andujar<sup>1</sup>  
(decided February 28, 2011)

**A. PEOPLE V. ANDUJAR**

Defendant, Jose Andujar, was charged with unlicensed general vending in violation of Administrative Code (“AC”) section 20-453.<sup>2</sup> He was vending condoms bearing political messages.<sup>3</sup> Andujar sought dismissal of these charges contending that the items sold fall “within the written matter exception of AC section 20-453.”<sup>4</sup> By the City preventing the sale of the condoms with political messages, defendant argued that a violation existed under the First Amendment of the United States Constitution for freedom of speech.<sup>5</sup> The court

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<sup>1</sup> 917 N.Y.S.2d 848 (Crim. Ct. 2011).

<sup>2</sup> *Id.* at 849; N.Y. CITY COMP. CODES R. & REGS. tit. 20, § 20-453 (2009) (stating that it is “unlawful for any individual to act as a general vendor without having first obtained a license . . .”).

<sup>3</sup> *Andujar*, 917 N.Y.S.2d at 849.

<sup>4</sup> *Id.* at 850. The written matter exception provides:

[T]hat it shall be lawful for a general vendor who hawks, peddles, sells or offers to sell, at retail, only newspapers, periodicals, books, pamphlets or other similar written matter, but no other items required to be licensed by any other provision of this code, to vend such without obtaining a license therefor.

N.Y. CITY COMP. CODES R. & REGS. tit. 20, § 20-453 (2009).

<sup>5</sup> *Andujar*, 917 N.Y.S.2d at 850-51; U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech.”). *See also* N.Y. CONST. art. 1 § 8 (“Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech . . .”).

held that the condoms fell within the written matter exception contained in AC section 20-453 because they were political messages and therefore, defendant's motion to dismiss for facial insufficiency was granted.<sup>6</sup>

On September 2, 2010, defendant was found displaying and selling condoms without a license as required by the Department of Consumer Affairs ("DCA") on the streets of Manhattan.<sup>7</sup> The condoms presented political messages of some popular governmental officers: President Barack Obama, Senator John McCain, and Governor Sarah Palin.<sup>8</sup> The condoms bearing President Obama's image showed him smiling in front of an American flag.<sup>9</sup> There were three sets of captions on the Obama packaging: "THE ULTIMATE STIMULUS PACKAGE," "HOPE IS NOT A FORM OF PROTECTION," and " 'USE WITH GOOD JUDGMENT' with a footnote 'Smaller Sizes Available.' "<sup>10</sup> The purpose of using the phrase "Use with Good Judgment," derived from Obama's campaign, was to encourage sexual responsibility in the youth of the nation.<sup>11</sup> The Senator McCain condoms had the caption " 'OLD BUT NOT EXPIRED,' with a footnote 'Wrinkled for her pleasure.' "<sup>12</sup> He was drawn as a caricature, smiling in front of the presidential seal.<sup>13</sup> The political message was an attempt to remind youth that older people are usually in power and if the youth wanted change, they needed to go to the polls and vote.<sup>14</sup> Also, it was to serve as a reminder that just because people are old, it does not make them impotent and that they should continue to wear condoms.<sup>15</sup> The Sarah Palin condom pack-

<sup>6</sup> *Andujar*, 917 N.Y.S.2d at 850-51, 853.

<sup>7</sup> *Id.* at 849; see N.Y. CITY COMP. CODES R. & REGS. tit. 20, § 20-453 (2009).

<sup>8</sup> *Andujar*, 917 N.Y.S.2d at 849.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (The condom "portray[s] [Obama's] message that there can be the right experience and the wrong experience, and experience does not necessarily mean sound judgment. Our aim in the promotion of the catchphrase, . . . is to instill social, political and sexual responsibility to America's youth through the medium of condoms.").

<sup>12</sup> *Id.*

<sup>13</sup> *Andujar*, 917 N.Y.S.2d at 849.

<sup>14</sup> *Id.* at 849-50 ("Many of those in political power are many generations beyond youth, yet they hold the ultimate power to affect our nation and the world. As young Americans, we need to realize that our power is in our ability to maintain political awareness and show up at the polls.").

<sup>15</sup> *Id.* at 849.

aging had a caricature of her with a moose in front of an Alaskan landscape.<sup>16</sup> Her condom was captioned “WHEN ABORTION IS NOT AN OPTION” with a footnote saying “ ‘Experience Not Necessary For Use’ and a banner reading ‘Limited Edition.’ ”<sup>17</sup> The slogan depicted on the condom that if women do not have the right to choose, then condoms are always available for use.<sup>18</sup>

The court was faced with the issue of whether these condoms fell within the category of “other similar written matter” of the written matter exception of AC section 20-453.<sup>19</sup> The court addressed the fact that the burden was on the prosecution to prove that the instrument, in question, does not fall within the written matter exception.<sup>20</sup> Because the prosecution failed to do so, the court held that the claim was insufficient.<sup>21</sup> The court held the items at issue present political messages, which are protected under the written matter exception.<sup>22</sup> Although the messages were portrayed on a condom, an atypical method for bearing political messages, the condoms did not stray to the extent as to fall outside the scope of the category.<sup>23</sup> The court reasoned that the individuals purchasing these condoms would not be buying them for the sole purpose of owning or using the condom, but actually for the political messages.<sup>24</sup>

## B. WHAT CONSTITUTES WRITTEN MATTER?

The written matter exception was enacted to protect speech and to prevent “unconstitutional restrictions to the sales of written

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<sup>16</sup> *Id.* at 850.

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

<sup>18</sup> *Andujar*, 917 N.Y.S.2d at 850 (“If a woman would not be granted the right to choose, as is suggested, then condoms become of the utmost importance. Palin’s condoms are always ‘ready, willing, and able’ despite Sarah Palin’s inability to finish; they’re able to handle the load.”).

<sup>19</sup> *Id.* at 850-51.

<sup>20</sup> *Id.* at 851.

<sup>21</sup> *Id.* at 850-51.

<sup>22</sup> *Id.* at 853.

<sup>23</sup> *Andujar*, 917 N.Y.S.2d at 851. “T-shirts, buttons and flags” tend to be items that bear political messages. *Id.*

<sup>24</sup> *See id.* (stating that the market defendant targeted is relevant).

matter.”<sup>25</sup> When AC section 20-453 was enacted, “[t]he New York City Council declared: It is consistent with the principles of free speech and freedom of press to eliminate as many restrictions on the vending of written matter as consistent with the public health, safety and welfare.”<sup>26</sup> Although the statute specified some materials which constituted written matter, there was a catch all provision containing “other similar written matter.”<sup>27</sup> Based on the subject matter of these novelty condoms, the court in *Andujar* found that they were able to, reasonably, be categorized as written matter.<sup>28</sup>

There have been constant discussions regarding what constitutes written matter under AC section 20-453.<sup>29</sup> In *People v. Shapiro*,<sup>30</sup> defendants argued that their selling of calendars and datebooks fell within the written matter exception of AC section 20-453.<sup>31</sup> Defendant Shapiro argued that the calendars were periodicals and defendant Sutton claimed that his datebooks were books.<sup>32</sup> The prosecution argued that the items were not exceptions to written matter just because they were printed on paper.<sup>33</sup> The court held that the items were merely, as they presented themselves to be on their face, datebooks and calendars.<sup>34</sup> The court concluded that for items to be categorized as “other written matter” under AC section 20-453, the items needed to contribute to or generate ideas, which ordinarily would require constitutional protection.<sup>35</sup>

Understandably, there is confusion regarding the statute because, on its face, it is not explicitly clear.<sup>36</sup> In response to an inquiry regarding when General Vendor licenses are required, the DCA in-

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

<sup>26</sup> *Id.* at 850; *People v. Balmuth*, 681 N.Y.S.2d 439, 445 (Crim. Ct. 1998) (citation omitted).

<sup>27</sup> N.Y. CITY COMP. CODES R. & REGS. tit. 20, § 20-453 (2009).

<sup>28</sup> *Andujar*, 917 N.Y.S.2d at 850-51.

<sup>29</sup> See *Andujar*, 917 N.Y.S.2d at 852; *People v. Larsen*, 906 N.Y.S.2d 709, 718 (Crim. Ct. 2010); *Shapiro*, 527 N.Y.S.2d at 338-40.

<sup>30</sup> 527 N.Y.S.2d 337.

<sup>31</sup> *Id.* at 338.

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

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

<sup>34</sup> *Id.* at 339.

<sup>35</sup> *Shapiro*, 527 N.Y.S.2d at 339.

<sup>36</sup> *Andujar*, 917 N.Y.S.2d at 851.

terpreted what items were to be considered written matter.<sup>37</sup> The DCA unambiguously interpreted the legislature's intent and notified the general public of what is considered written matter, theoretically preventing arbitrary enforcement of the rule.<sup>38</sup> It was made clear by the DCA that "items bearing political messages" are matters within the exception.<sup>39</sup> Courts have held that not all merchandise is guaranteed free speech protection by the First Amendment and should be taken as a case-by-case basis.<sup>40</sup> However, political messages have been lumped into the category of "other written matter" and individuals should be on notice that this speech is protected.<sup>41</sup>

### C. NEW YORK'S CONSTANT DEBATE OF POLITICAL MESSAGES AND THE WRITTEN MATTER EXCEPTION

The prosecution in *Andujar* relied upon *People v. Larsen*,<sup>42</sup> a 2010 case decided with a similar fact pattern, which favored the prosecution.<sup>43</sup> The prosecution argued that *Larsen*'s holding should be followed in this case, however the court disagreed.<sup>44</sup> In *Larsen*, defendants Larsen and Wardle were observed "displaying and offering for sale 'Obama Condoms' and 'Palin Condoms,' " without a license.<sup>45</sup> The condoms were not name brands, such as Trojan, Durex, or Lifestyles, but contained a Practice Safe Policy ("PSP") logo.<sup>46</sup>

<sup>37</sup> *Id.* The Department of Consumer Affairs stated:

While the meaning of the term 'other similar written matter' contained in AC § 20-453 is not immediately clear on its face, it is black letter law that 'the construction given statutes and regulations by the agency responsible for their administration will, if not irrational or unreasonable, be upheld.'

*Id.* (quoting *Matter of Johnson v. Joy*, 397 N.E.2d 746, 748 (N.Y. 1979) (citation omitted)).

<sup>38</sup> *Id.* at 851.

<sup>39</sup> *Id.* ("[T]he Department of Consumer Affairs ('DCA'), the agency in charge of administering the ordinance, has construed the written matter exception to apply to 'items bearing political messages.'").

<sup>40</sup> *Mastrovincenzo v. City of New York*, 435 F.3d 78, 95-96 (2d Cir. 2006).

<sup>41</sup> *Id.* at 96.

<sup>42</sup> 906 N.Y.S.2d 709 (Crim. Ct. 2010).

<sup>43</sup> *Andujar*, 917 N.Y.S.2d at 851; *Larsen*, 906 N.Y.S.2d at 718.

<sup>44</sup> *Andujar*, 917 N.Y.S.2d at 851.

<sup>45</sup> *Larsen*, 606 N.Y.S.2d at 710.

<sup>46</sup> *Id.* ("PSP is the 'nation's first brand devoted to showcasing the indecent relations be-

The defendants were ultimately charged with violating AC section 20-453.<sup>47</sup>

The defendants argued that the condoms were protected speech under the ‘written matter’ exception of AC section 20-453.<sup>48</sup> However, the court in *Larsen* determined that the circumstances amounted to commercial speech and therefore, could not fall within the written matter exception.<sup>49</sup> By concluding that the condoms were commercial speech, the court analyzed that held the sale of the condoms, “furthered a ‘significant’ governmental interest, was narrowly tailored as to time, place and manner, and did not cut off alternative channels of communication.”<sup>50</sup>

The court in *Andujar* declined to follow the *Larsen* decision for numerous reasons.<sup>51</sup> First, the decision in *Larsen* was not binding because it was decided by a court of coordinate jurisdiction.<sup>52</sup> Second, *Larsen* viewed the sale of condoms as being “clever marketing” and not “informative or persuasive,” which *Andujar* held to the contrary.<sup>53</sup> The court also disagreed with the conclusion in *Larsen*, that allowing the condoms to display political messages, would deem the exception meaningless.<sup>54</sup> *Andujar* stated that the phrase “other similar written matter” included all items that exchanged ideas and were not limited to newspapers, periodicals and other similar form of publications.<sup>55</sup> Furthermore, the court in *Andujar* did not agree with

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tween politics and sex’ . . . . PSP wants to turns people’s attention from ‘minor concerns like the war, the economy or healthcare and instead focus on the truly important issue of the day: Practicing Safe Policy in the bedroom.’ ”). *Id.* at 711. The court held that based on PSP’s website, the company was more focused on marketing and selling than protecting speech. *Id.* at 717.

<sup>47</sup> *Id.* at 710.

<sup>48</sup> *Larsen*, 906 N.Y.S.2d at 711.

<sup>49</sup> *Id.* at 717-18.

<sup>50</sup> *Id.* at 718; *see also Andujar*, 917 N.Y.S.2d at 852.

<sup>51</sup> *Andujar*, 917 N.Y.S.2d at 851-52.

<sup>52</sup> *Id.* at 852.

<sup>53</sup> *Id.* at 851-852. If the condoms were clever marketing, they would be characterized as commercial speech, which is afforded less protection under the First Amendment. *Larsen*, 906 N.Y.S.2d at 716-17.

<sup>54</sup> *Andujar*, 917 N.Y.S.2d at 852; *Larsen*, 906 N.Y.S.2d at 718.

<sup>55</sup> *Andujar*, 917 N.Y.S.2d at 852. *See also* *People v. Shapiro*, 527 N.Y.S.2d 337, 346-47 (Crim. Ct. 1988) (“The common characteristic of ‘newspapers,’ ‘periodicals,’ ‘books’ and ‘pamphlets,’ which are set forth in the statute as exempt, is the ability to communicate in a manner that contributes to or generates the exchange of ideas that trigger constitutional protection and are fundamental to a democratic society.”).

*Larsen* that the condoms were of commercial speech.<sup>56</sup> According to the court in *Andujar*, the fact that the items were sold did not have an effect on the protections of the First Amendment.<sup>57</sup>

New York courts have previously discussed whether certain “political” items were protected under the written matter exception.<sup>58</sup> The court in *Larsen* discussed two analogous cases dealing with distinct types of merchandise, which each defendant purported to be politically expressive in nature.<sup>59</sup> In *People v. Saul*,<sup>60</sup> the defendant was selling playing cards, which displayed military and political personnel who were involved in the war in Iraq.<sup>61</sup> The court applied a test from *Bery v. City of New York*,<sup>62</sup> and determined that the artwork depicted no form of political expression.<sup>63</sup> The court concluded that there was no attempt to display opinions, ideas, or concerns regarding the war.<sup>64</sup> The court reasoned that the items did “not glorify or condemn the war, demonize the characters, honor the Coalition forces, hail war heroes or memorialize the fallen” and therefore could not be afforded constitutional protection.<sup>65</sup> Unlike *Saul*, the condoms in *Andujar* are arguably highly expressive.<sup>66</sup>

The *Andujar* decision is comparable to the decision in *People v. Krebs*.<sup>67</sup> In *Krebs*, defendant was found to be selling pamphlets, flags, and buttons regarding the Vietnam War.<sup>68</sup> The buttons contained the following: “ ‘BRING PEACE TO VIETNAM,’

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<sup>56</sup> *Andujar*, 917 N.Y.S.2d at 852.

<sup>57</sup> *Id.*

<sup>58</sup> *People v. Saul*, 776 N.Y.S.2d 189, 190-91 (Crim. Ct. 2004); *People v. Krebs*, 282 N.Y.S.2d 996, 999 (Crim. Ct. 1967).

<sup>59</sup> *Saul*, 776 N.Y.S.2d at 190; *Krebs*, 282 N.Y.S.2d at 997.

<sup>60</sup> 776 N.Y.S.2d 189 (Crim. Ct. 2004).

<sup>61</sup> *Saul*, 776 N.Y.S.2d at 190.

<sup>62</sup> 97 F.3d 689 (2d Cir. 1996).

<sup>63</sup> *Saul*, 776 N.Y.S.2d at 192-93. *See also* *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) (“Courts must determine what constitutes expression within the ambit of the First Amendment and what does not.”); *Saul*, 776 N.Y.S.2d at 193 (“Applying the guideposts set out in *Bery*, the court has also assessed whether the visual images on the cards constitute a form of non-verbal expression which, like books, pamphlets or other writings, effectively communicate ideas, concepts or emotions.”).

<sup>64</sup> *Saul*, 776 N.Y.S.2d at 193.

<sup>65</sup> *Id.*

<sup>66</sup> *Andujar*, 917 N.Y.S.2d at 849-50.

<sup>67</sup> 282 N.Y.S.2d 996 (Crim. Ct. 1967).

<sup>68</sup> *Krebs*, 282 N.Y.S.2d at 997.

‘SUPPORT THE NATIONAL LIBERATION FRONT,’ ‘VIETNAM-WATTS-GUATEMALA SUPPORT LIBERATION STRUGGLES,’ ‘AMERICAN LIBERATION LEAGUE,’ and ‘VIETNAM-WE WON’T GO.’ ”<sup>69</sup> The court in *Krebs* found defendant’s act of selling these items was constitutionally protected because she was expressing her political views, which is afforded First Amendment protection.<sup>70</sup> Likewise, the court in *Andujar* vehemently disagreed with the idea that the condoms depicted no expression and that because of their utility, they could fall within the written matter exception.<sup>71</sup>

#### D. ARE THE CONDOMS COMMERCIAL SPEECH?

The court in *Andujar* had to determine what constitutes expressive speech, which is afforded protection under the First Amendment and exempt from the licensing statute.<sup>72</sup> In *Andujar*, the condoms likely had non-expressive purposes attached to them.<sup>73</sup> The court compared those purposes with the expression sought to be delivered and held that the condoms alone had expressive speech, which was protected under the First Amendment.<sup>74</sup> Furthermore, the court stated that although there may be other motives attached to the sale of these condoms, they are less significant because of the political message behind the condoms.<sup>75</sup> Once the political message is “inextricably intertwined” into an item, First Amendment protection is triggered.<sup>76</sup>

Since the items were deemed expressive, the court had to determine whether they were commercial speech.<sup>77</sup> Commercial speech

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<sup>69</sup> *Id.*; see also *Andujar*, 917 N.Y.S.2d at 849 (stating that the phrases on the condoms depicted issues of social and political concern that could be prevented or expressed through condom use).

<sup>70</sup> *Krebs*, 282 N.Y.S.2d at 1001.

<sup>71</sup> *Andujar*, 917 N.Y.S.2d at 851; see also *Larsen*, 906 N.Y.S.2d at 717.

<sup>72</sup> *Andujar*, 917 N.Y.S.2d at 852.

<sup>73</sup> *Id.* at 851-52.

<sup>74</sup> *Id.*; see also *White*, 500 F.3d at 956; *Mastrovincenzo*, 435 F.3d at 78, 95; *Larsen*, 906 N.Y.S.2d at 717.

<sup>75</sup> *Andujar*, 917 N.Y.S.2d at 852 (citations omitted).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

is expression that serves “the economic interests of the speaker and its audience.”<sup>78</sup> Commercial speech is afforded less protection under the First Amendment.<sup>79</sup> The court in *Andujar* disagreed with the prosecution that the condoms amounted to commercial speech.<sup>80</sup> The court stated that even if the items were commercial speech, “First Amendment protection is not diminished by the fact that speech is ‘sold rather than given away.’”<sup>81</sup>

Although the court in *Andujar* concluded that the condoms were not commercial speech, they did not analyze the four part commercial speech test provided in *Central Hudson Gas and Elec. Corp. v. Public Serv. Comm’n*.<sup>82</sup> Had they done so, the conclusion would have been the same.<sup>83</sup> Under the test in *Central Hudson*, the court must also look at whether there is a substantial governmental interest.<sup>84</sup> Here, the governmental interest is preventing commercial

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<sup>78</sup> *Central Hudson Gas and Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561 (1980).

<sup>79</sup> *Id.* at 562-63 (“The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”); U.S. CONST. amend. I.

<sup>80</sup> *Andujar*, 917 N.Y.S.2d at 852.

<sup>81</sup> *Id.*; see also *Larsen*, 906 N.Y.S.2d at 711.

[C]ourts have struck down laws enacted to control or suppress speech at different points in the speech process: restrictions requiring a permit at the outset, imposing a burden by impounding proceeds on receipts or royalties, seeking to exact a cost after the speech occurs, and subjecting the speaker to criminal penalties.

*Id.* (citations omitted).

<sup>82</sup> 447 U.S. 557, 556 (1980). This case followed the decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976), in which the Court held that commercial transactions are not excluded from protection under the First Amendment.

[Courts] 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. Next, [courts] ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [courts] must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

*Central Hudson Gas and Elec. Corp.*, 447 U.S. at 566.

<sup>83</sup> *Id.* at 567-68 (“In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.”).

<sup>84</sup> *Id.* at 566.

speech.<sup>85</sup> It has been held that preventing commercial speech is a legitimate governmental interest.<sup>86</sup> Even assuming the governmental interest was substantial, the test would likely fail. Although the regulation directly advances the governmental interest, the suppression of speech is very extensive because the city is attempting to prohibit the sale of the condoms all together, not allowing for the messages to be shared.<sup>87</sup> This systematic method in *Central Hudson* has been constantly scrutinized.<sup>88</sup> The concern with this test is that it does not allow for legislative intent to be properly analyzed.<sup>89</sup> In numerous cases following *Central Hudson*, courts have reached inconsistent conclusions because of its faulty framework, which suggests that the conclusion in *Larsen*, based on this test, is problematic.<sup>90</sup> This may be the reasoning the court in *Andujar* declined to adopt the conclusion in reaching its decision.<sup>91</sup>

The Second Circuit takes a similar approach to the Ninth Circuit when dealing with expressive merchandise.<sup>92</sup> According to precedent cases, the main concern in determining commercial speech is whether the dominant purpose of the item is more than transaction-

<sup>85</sup> *Andujar*, 917 N.Y.S.2d at 852.

<sup>86</sup> *See Central Hudson Gas and Elec. Corp.*, 447 U.S. at 569 (stating that there is a substantial governmental interest in banning useless advertisement that would increase the sale of a product in an effort to have fair and efficient rates of merchandise).

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

<sup>88</sup> *See* Scott Joachim, *Seeing Beyond the Smoke and Mirrors: A Proposal for the Abandonment of the Commercial Speech Doctrine and an Analysis of Recent Tobacco Advertising Regulations*, 19 HASTINGS COMM. & ENT. L.J. 517, 521, 541-50 (1997) (distinguishing between commercial and noncommercial speech); *see also* *Thompson v. Western States Medical Center*, 535 U.S. 357, 377 (2002) (Thomas, J., concurring) (stating that he does not think court's should apply the test set forth in *Central Hudson* even though he found the conclusion of the analysis in the *Thompson* case to be correct).

<sup>89</sup> Shannon M. Hinegardner, *Abrogating the Supreme Court's De Facto Rational Basis Standard for Commercial Speech: A Survey and Proposed Revision of the Third Central Hudson Prong*, 43 NEW ENG. L. REV. 523, 528 (2009) (analyzing how the third prong of the *Central Hudson* test requires revising).

<sup>90</sup> *See Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995) (stating that the standard to be used is common sense in determining commercial speech); *see also Andujar*, 917 N.Y.S.2d at 852; *Larsen*, 906 N.Y.S.2d at 717-18.

<sup>91</sup> *See Andujar*, 917 N.Y.S. at 852 (declining to adopt the conclusion in *Larsen* that the condoms amounted to commercial speech).

<sup>92</sup> *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (holding that "even purely commercial speech is entitled to significant First Amendment protection"); *Mastrovincenzo*, 435 F.3d at 81-82; *Larsen*, 906 N.Y.S.2d at 712.

al.<sup>93</sup> The Ninth Circuit does not preclude merchandise that is purely commercial from First Amendment protection.<sup>94</sup> This is consistent with the Supreme Court's decision *City of Lakewood v. Plain Dealer Publishing Co.*,<sup>95</sup> which dealt with the issue of determining when items are not commonly associated with expression and how they differ when applying constitutional protections.<sup>96</sup>

In *Lakewood*, the city of Lakewood did not permit the Plain Dealer Publishing Co. ("Newspaper") to have a coin-operated newspaper stand.<sup>97</sup> The city created an ordinance, which controlled who could have such equipment on a public street.<sup>98</sup> The Supreme Court decided whether Newspaper was allowed to facially challenge that ordinance.<sup>99</sup> The Court held that Newspaper was able to bring a First Amendment challenge and that the cause of action was implicated by the city's attempt to restrict circulation.<sup>100</sup> The Court criticized the dissent's attempt to compare newspapers and soda vending machines, with the majority arguing that speech cannot be attached to the vending of sodas.<sup>101</sup> The majority stated that vendors of soda cannot engage in speech related to the product and instead suggested that a better comparison would be between leaflets and newspapers.<sup>102</sup> Simply because the newspapers were distributed from a vending machine, the commercial nature of the act did not prevent it from being constitutionally protected.<sup>103</sup>

## E. CONCLUSION

New York does not yet have a truly objective way to deter-

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<sup>93</sup> *White*, 500 F.3d at 957; *Mastrovincenzo*, 435 F.3d at 95, 97; *Larsen*, 906 N.Y.S.2d at 714.

<sup>94</sup> *White*, 500 F.3d at 956-57 (defining purely commercial speech as "speech which does 'no more than propose a commercial transaction' ") (citations omitted).

<sup>95</sup> 486 U.S. 750 (1988).

<sup>96</sup> *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759-61 (1988).

<sup>97</sup> *Id.* at 753.

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

<sup>99</sup> *Id.* at 755.

<sup>100</sup> *Id.* at 769.

<sup>101</sup> *City of Lakewood*, 486 U.S. at 761.

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

<sup>103</sup> *Id.* at 761-62.

mine what constitutes written matter under the AC section 20-453 exception.<sup>104</sup> The court in *Andujar* had to decide whether condoms conveying political messages constituted written matter, without any binding authority from New York courts.<sup>105</sup> Many courts have struggled with determining what falls within the “other written matter” exception.<sup>106</sup> Written matter is easily recognizable when it is depicted in the form of newspaper articles, pamphlets, books, periodicals, buttons, or t-shirts.<sup>107</sup> However, condoms are not easily recognizable as other written matter.<sup>108</sup> According to the court in *Andujar*, condoms or any items conveying political messages do not need to be similar to the exact items listed in the statute, rather they need to be illustrative of some expressive material.<sup>109</sup>

The court in *Larsen* held that expressive items needed to be similar in nature because of the “catch all” phrase at the end of the statute.<sup>110</sup> Items falling within the categories listed at the end of the statute would invariably be easier to determine as other written matter within the exception because of their appearance.

To read the term ‘other similar written matter’ to mean written materials physically similar to ‘newspapers, periodicals, books, pamphlets,’ i.e. printed materials, would not serve the legislature’s intent to promote free speech and freedom of press and otherwise prevent AC section 20-453 from unconstitutionally restricting expression. Rather, the term ‘other similar written matter’ must mean similar insofar as it is a vehicle for speech and expression akin to a newspaper, periodical,

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<sup>104</sup> See *Andujar*, 917 N.Y.S.2d at 852.

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

<sup>106</sup> *Gaudiya*, 952 F.2d at 1065 (stating that written matter needed to be “inextricably intertwined” to fall under the written matter exception).

<sup>107</sup> *Ayres*, 125 F.3d at 1014 (“On the one hand, there is no question that the T-shirts are a medium of expression prima facie protected by the free-speech clause of the First Amendment, and they do not lose their protection by being sold rather than given away.”).

<sup>108</sup> *Larsen*, 906 N.Y.S.2d at 717.

<sup>109</sup> *Andujar*, 917 N.Y.S.2d at 852 (“The determination of whether an item falls within the written matter exception does not rest on its similarity to the items specifically referenced in that statute.”).

<sup>110</sup> *Larsen*, 906 N.Y.S.2d at 718.

book or pamphlet.<sup>111</sup>

The First Amendment provides invaluable protections and a technicality of restrictive statutory interpretation should not limit its protections.<sup>112</sup>

The condoms at issue in *Andujar* serve a purpose greater than the condom use itself.<sup>113</sup> This purported to be the most practical way to get across messages relating to sexual protection.<sup>114</sup> Condoms are one of the most used forms of protection.<sup>115</sup> If the items were name-brand there would have been no discussion because they would have been viewed as popular commercial items, bought for the purpose of their brands and not for any other significant message attached to it.<sup>116</sup> However, these condoms were generic.<sup>117</sup> Although they were distributed in conjunction with a company,<sup>118</sup> it was unlikely that anyone purchasing the item did so for that specific company. The court concluded that the political messages displayed attracted the consumers.<sup>119</sup>

The court in *Larsen* was not far reaching when it determined that the condoms were commercial speech and that the condoms themselves were the purpose of the vendor selling the merchandise.<sup>120</sup> However, this conclusion would be more logical if the context of the wrappers were not so overpowering.<sup>121</sup> Because of the wrappers, the condoms were being sold for a higher market price than the average condom.<sup>122</sup> It is likely that an individual were purchasing condoms

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<sup>111</sup> *Andujar*, 917 N.Y.S.2d at 852.

<sup>112</sup> See U.S. CONST. amend I.

<sup>113</sup> *Andujar*, 917 N.Y.S.2d at 851.

<sup>114</sup> See, e.g., *id.*

<sup>115</sup> Dr. Omania M. Samra, BIRTH CONTROL BARRIER METHODS, emedicine health [http://www.emedicinehealth.com/birth\\_control\\_barrier\\_methods/article\\_em.htm](http://www.emedicinehealth.com/birth_control_barrier_methods/article_em.htm) (last visited Mar. 26, 2012).

<sup>116</sup> *Andujar*, 917 N.Y.S.2d at 852 (“If the defendant was selling a name-brand condom such as Trojan, Lifestyles, Durex, etc., there would be no question that the items do not fall within the written matter exception because their sale would not be ‘inexplicably intertwined’ with First Amendment protected speech.”); see also *Gaudiya Vaishnava Soc.*, 952 F.2d at 1065.

<sup>117</sup> *Andujar*, 917 N.Y.S.2d at 852.

<sup>118</sup> *Id.* at 851-52 (stating that PSP is on the label of the condoms).

<sup>119</sup> *Id.* at 851.

<sup>120</sup> *Larsen*, 906 N.Y.S.2d at 717.

<sup>121</sup> *Andujar*, 917 N.Y.S.2d at 849-50.

<sup>122</sup> *Obama Condoms*, Practice Safe Policy, <http://www.obamacondoms.com/> (last viewed

for the sole purpose of having the condoms, would go for a regular and undoubtedly cheaper condom. The condom would provide the necessary equipment for protection and be more cost effective. Even the name brand condoms cost significantly less than these political condoms.<sup>123</sup> In a news piece conducted by “My 9 News” about the condoms, individuals who were interviewed stated that they were interested in the political messages that the package presented.<sup>124</sup> It was even stated by the maker of the condom<sup>125</sup> that many people kept the condoms as a keepsake for the wrapper.<sup>126</sup>

A few months after the *Andujar* decision, Andujar was again charged for violating AC section 20-453.<sup>127</sup> *People v. Andujar* (“*Andujar II*”)<sup>128</sup> did not overrule the *Andujar* decision, but the court stated that they disagreed with the holding and declined to follow the decision.<sup>129</sup> *Andujar II* is not bound by the decision of *Andujar* because the cases were heard by courts of concurrent jurisdiction.<sup>130</sup> It has yet to decide the merits of the case, but the court did not dismiss the claim for facial insufficiency as the court in *Andujar* had.<sup>131</sup>

The court in *Andujar* correctly concluded that these condoms should fall under the written matter exception. Therefore, the condoms were afforded protection under the First Amendment.<sup>132</sup> Although defendant Andujar may have profited from the sale of the condoms,<sup>133</sup> people purchased them based on the political messages on the condoms and not for the condoms themselves.<sup>134</sup> Also, nothing explicitly excluded condoms from being a form of expression un-

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Mar. 11, 2012) (stating that one Obama Condom is sold for five dollars).

<sup>123</sup> Condoms Dept, <http://www.condomdepot.com/product/catalog.cfm/nid/200> (last viewed Mar. 11, 2012) (stating that a box of twelve Trojan condoms was \$7.99).

<sup>124</sup> MY 9 NEWS INTERVIEW, Practice Safe Policy, [http://www.youtube.com/watch?v=KM87CVEJWWc&feature=player\\_embedded#!](http://www.youtube.com/watch?v=KM87CVEJWWc&feature=player_embedded#!) (last viewed Apr. 2, 2012) (discussing the trend of the political condoms sold by Practice Safe Policy).

<sup>125</sup> Benjamin Sherman, creator of and manufacturer of political condoms.

<sup>126</sup> MY 9 NEWS INTERVIEW, *supra* note 124.

<sup>127</sup> *People v. Andujar*, 931 N.Y.S.2d 472, 473 (Crim. Ct. 2011) (“*Andujar I*”).

<sup>128</sup> 931 N.Y.S.2d 472 (Crim. Ct. 2011).

<sup>129</sup> *Andujar II*, 931 N.Y.S.2d at 473.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 473-74.

<sup>132</sup> *Andujar*, 917 N.Y.S.2d at 853.

<sup>133</sup> *Id.* at 852.

<sup>134</sup> *Id.* at 851.

der the written matter exception.<sup>135</sup> The statute only suggested items that could be regarded as written matter, but never declared what the statute would limit.<sup>136</sup> The headings and footnotes in the condoms clearly made statements that were controversial in nature as the candidates advocated for different political views. If written on paper, these messages would have been easily considered to be a form of protected speech.<sup>137</sup> Regardless of their form, the messages are still the same and essentially seek to promote the same type of political awareness, just in an extraordinary fashion. Therefore, under the rationale of *Andujar*, when a political message dominates a piece of merchandise, the First Amendment should automatically protect the defendant, regardless of any other general law.<sup>138</sup>

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<sup>135</sup> See N.Y. CITY COMP. CODES R. & REGS. tit. 20, § 20-453 (2009).

<sup>136</sup> See *id.*

<sup>137</sup> *Andujar*, 917 N.Y.S.2d at 852.

<sup>138</sup> See *Larsen*, 906 N.Y.S.2d at 714 (citation omitted) (“Since *Gaudiya*, the Ninth Circuit has consistently held that the sale of merchandise inextricably intertwined with a religious, political, ideological or philosophical message is fully protected by the First Amendment.”).

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