

International Business Communication and Free Speech: *Briggs & Stratton Corp. v. Baldrige*

I. INTRODUCTION

Since 1945, Arab states¹ have refused to trade with Israel.² In addition to this primary boycott, Arab states have also refused to trade with foreign companies doing business with Israel.³ Arab states enforce this secondary boycott by requiring such companies to certify that they have no business relationships with Israel.⁴

To oppose these trade practices, the United States enacted legislation⁵ prohibiting U.S. persons⁶ from complying with the Arab boycott. Currently, the Export Administration Amendments Act of 1985 (EAA)⁷ prohibits U.S. firms from disclosing to boycotting states their business relationships with a boycotted state friendly to the U.S.⁸ In particular, Commerce Department regulations prohibit U.S. firms from responding to an Arab state's questionnaire regarding the firm's business relationships with Israel.⁹

In 1982, a U.S. corporation challenged the constitutionality of these antiboycott laws.¹⁰ The Briggs and Stratton Corporation¹¹ argued that regulations enacted pursuant to the EAA's antiboycott provisions violated its first amendment right to free speech.¹² The Federal District Court for the Eastern District

¹ This Comment focuses on those states which are members of the Arab League. See *infra* note 15.

² See A. LOWENFELD, *TRADE CONTROLS FOR POLITICAL ENDS* 1, 313 (1983).

³ *Id.* at 314.

⁴ *Id.* at 315-17.

⁵ See, e.g., The Export Administration Amendments of 1979, § 8(a), 50 U.S.C. § 2407(a) (1982) [hereinafter cited as EAA]. For a history of U.S. antiboycott legislation, see *infra* text accompanying notes 35-58.

⁶ Regulations enacted pursuant to the EAA define "U.S. persons" as "any person who is a United States resident or national, including individuals, domestic concerns, and controlled in fact foreign subsidiaries, affiliates, or other permanent foreign establishments of domestic concerns." 15 C.F.R. § 369.1(b)(1) (1984) [hereinafter U.S. persons referred to are cited as U.S. firms].

⁷ The Export Administration Amendments Act of 1985, Pub. L. No. 99-64, 99 Stat. 120 (1985). This law reenacted verbatim the antiboycott provisions of the EAA. The current EAA is set to expire on September 30, 1989.

⁸ 50 U.S.C. § 2407(a)(1)(D).

⁹ See 15 C.F.R. § 369.2(d)(5)(iii) (1984).

¹⁰ See *Briggs & Stratton Corp. v. Baldrige*, 539 F. Supp. 1307 (E.D. Wis. 1982). For a discussion of legal challenges to the EAA, see *infra* text accompanying notes 78-101.

¹¹ Hereinafter referred to as Briggs. For additional information about the corporation, see *infra* note 102.

¹² *Briggs & Stratton*, 539 F. Supp. at 1317. Briggs argued initially that the regulations violated its commercial speech rights. Three months later, Briggs moved for reconsideration, arguing that the

of Wisconsin, however, granted summary judgment against the company.¹³ In 1984, the Court of Appeals for the Seventh Circuit affirmed the decision of the district court.¹⁴ This Comment examines those decisions.

This Comment begins by reviewing the Arab boycott against Israel. Next, the Comment discusses the U.S. government's response. The Comment then summarizes the facts, arguments, and holdings in the *Briggs* cases. Finally, the Comment analyzes the *Briggs* decisions, suggesting that the corporation's proposed communication should not have been judged by commercial speech standards. The Comment notes that, even if commercial speech standards were appropriate, they were incorrectly applied in the *Briggs* cases. The Comment concludes that a more precise definition of commercial speech is necessary to preserve full first amendment protection for conventional speech by commercial speakers.

II. HISTORY: THE ARAB BOYCOTT OF ISRAEL, THE U.S. LEGISLATIVE RESPONSE, AND LEGAL CHALLENGES TO THE EAA

A. *The Arab Boycott of Israel*

As early as 1945, the League of Arab States¹⁵ recommended that its members refuse to import "Zionist" products.¹⁶ A December 1945 resolution of the Arab

regulations violated its conventional speech rights. See *Briggs & Stratton Corp.*, 544 F. Supp. 667, 668 (E.D. Wis. 1982). The district court held that Briggs' communication involved commercial speech, making it "unnecessary to resolve whether the plaintiff's conventional speech rights were abridged." *Id.* at 668. Further, the court held that, if conventional speech rights were an issue, it would find "no constitutional intrusion." *Id.* The following year, the Trane Company unsuccessfully challenged the same regulations on conventional speech grounds. See *Trane Co. v. Baldrige*, 552 F. Supp. 1378 (W.D. Wis. 1983). Appeals by Trane and Briggs were consolidated and heard by the United States Court of Appeals for the Seventh Circuit. See *Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915 (7th Cir. 1984), *cert. denied* 105 S.Ct. 105, 106 (1984).

¹³ *Briggs & Stratton*, 539 F. Supp. at 1307.

¹⁴ *Briggs & Stratton*, 728 F.2d 915, 916 (7th Cir. 1984).

¹⁵ Syria, Transjordan, Iraq, Lebanon, and Egypt agreed in 1944 to form a league of independent Arab states (hereinafter referred to as Arab League). A. LOWENFELD, *supra* note 2, at 310. The purpose of the League was "to strengthen and consolidate the ties which bind all Arab countries." *Id.* (citing Alexandria Protocol of October 7, 1944, INDEX TO MULTILATERAL TREATIES 105 (V. Mostecky, Ed.)(1965)). See also H. HASSOVNA, THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES (1975). These five Arab nations also agreed to establish a permanent Council. A. LOWENFELD, *supra* note 2, at 310.

In 1945, a General Arab Conference was held in Cairo where the Pact of the League of Arab States was signed on behalf of the Alexandria Protocol nations plus Saudi Arabia and Yemen. A. LOWENFELD, *supra* note 2, at 311. Under the Pact, any independent Arab state had the right to become a League member. *Id.*

By the Summer of 1982, 20 states had joined the Arab League (in order of ratification): Transjordan, Egypt, Saudi Arabia, Iraq, Lebanon, Yemen Arab Republic, Syria, Libya, Sudan, Morocco, Tunisia, Kuwait, Algeria, People's Democratic Republic of Yemen, Bahrain, Qatar, Oman, United Arab Emirates, Mauritania, and Somalia. *Id.* at 311 n.g. The Palestine Liberation Organization (PLO) was given

League Council¹⁷ stated that Jewish products manufactured in Palestine were undesirable because their importation would further Zionist political objectives.¹⁸ This resolution, along with other Council recommendations,¹⁹ comprised the primary boycott of Israel, banning Arab trade with Israel, Israeli companies, and Israeli nationals.²⁰

In the 1950s, the Arab League extended this boycott, banning trade with non-Israeli companies and individuals who advanced the economic or military strength of Israel.²¹ To enforce this secondary boycott, the Arab League developed a blacklist of these Israeli supporters.²² The League's secondary boycott was followed by a tertiary boycott, prohibiting trade with companies doing business with those subject to the secondary boycott.²³

full voting status in 1976. *Id.* Egypt's membership was suspended in March, 1979, after the signing of the Egyptian-Israeli peace treaty modeled on the Camp David accords. *Id.*

¹⁶ A. LOWENFELD, *supra* note 2, at 313.

¹⁷ Arab League Council, Resolution No. 16, December 16, 1945, *quoted in* A. LOWENFELD, *supra* note 2, at 313. *See also* M. KHALIL, 2 *THE ARAB STATES AND THE ARAB LEAGUE, A DOCUMENTARY RECORD* (1962).

¹⁸ *See* A. LOWENFELD, *supra* note 2, at 313.

¹⁹ For example, in June 1976, the Council advised that the trade ban include "Zionist" services, and that each Arab state create its own boycott office. *Id.*

²⁰ Hirschhorn & Fenton, *States' Rights and the Antiboycott Provisions of the Export Administration Act*, 20 *COLUM. J. TRANSN'T'L L.* 517, 518 (1981).

²¹ *Id.*

²² Williams, *U.S. Regulation of Arab Boycott Practices*, 10 *LAW & POL'Y INT'L BUS.* 815, 818 (1978). A firm may be blacklisted for conducting any of the following business activities: maintaining manufacturing or assembly plants in Israel, or licensing arrangements with Israeli companies; exploring for natural resources in Israel; making substantial investments in Israeli concerns or conducting joint ventures with Israeli partners; lending money for Israeli industrial, military or agricultural projects; insuring commercial or industrial Israeli companies; making routine stops at Israeli ports. Ludwig & Smith, *The Business Effects of the Antiboycott Provisions of the Export Administration Act Amendments of 1977 — Morality Plus Pragmatism Equals Complexity*, 8 *GA. J. INT'L & COMP. L.* 581, 582 n.2 (1978).

Grounds for blacklisting foreign companies originated in the Arab League's Central Boycott Office (CBO). *See infra* notes 29–31 and accompanying text. One commentator has noted that current grounds for blacklisting include the failure to reply to a CBO questionnaire asking a firm about its business relationships with Israel. Williams, *supra*, at 819. Briggs believes it was blacklisted for this reason. *See* text accompanying notes 115 and 116.

While estimates of the total number of firms on the blacklist vary widely, one commentator has noted that as many as 15,000 enterprises may have been on Arab blacklists, including 1,500 firms based in the United States. *See* A. LOWENFELD, *supra* note 2, at 318–19. A sample of U.S.-based firms as compiled by Guzzardi, *That Curious Barrier on the Arab Frontiers*, 92 *FORTUNE*, 82, 85 (1975), showed Coca-Cola, Ford Motor, Monsanto, Sears, Roebuck, United Artists, and Xerox as among those boycotted by Arab nations. *Id.*

²³ Hirschhorn & Fenton, *supra* note 20, at 518. For example, an Arab nation would be prohibited from dealing with a non-Israeli firm (the secondary level) which had subcontracted with a blacklisted firm (the tertiary level). Ludwig & Smith, *supra* note 22, at 582 n.2. For a discussion of tertiary boycott practices, *see also* Williams, *supra* note 22, at 820–21. Williams notes the problems faced by a non-blacklisted American bus manufacturer (secondary level) whose contract to sell buses to Saudi Arabia was jeopardized by its use of bus seats produced by a blacklisted firm (tertiary level). *Id.*

In the *Briggs* case, Syria refused a non-blacklisted Syrian distributor's request for an import license because the distributor was supplied by Briggs whose name appeared on a blacklist. *See* Briggs &

In May 1951, the Arab League established a Central Boycott Office (CBO) in Damascus to coordinate administration of the boycott.²⁴ Currently, the CBO serves as headquarters for the boycott offices of Arab League members, and holds meetings for blacklist changes.²⁵ The CBO also circulates questionnaires and gathers information to determine whether to blacklist foreign firms.²⁶ The CBO blacklist names companies with whom Arab states should not do business.²⁷ In order to maintain and enforce the blacklist, Arab countries routinely require firms seeking to do business in Arab countries to furnish relevant information.²⁸

Arab states boycotting Israel assert that their boycott activities are governed by the CBOs "General Principles."²⁹ League members are free, however, to select their own boycott principles.³⁰ Further, the CBO's own recommendations for blacklisting do not always conform to the published principles.³¹

The 1973-74 Arab oil embargo heightened the significance of the Arab boycott of Israel.³² Arab nations spent much of their new oil profits on internal

Stratton, 539 F. Supp. at 1310. For additional facts of the *Briggs* case, see *infra* notes 102-115 and accompanying text.

²⁴ Arab League Council Resolution No. 357, May 19, 1951, cited in A. LOWENFELD, *supra* note 2, at 313.

²⁵ See Williams, *supra* note 22, at 818.

²⁶ *Id.* at 819.

²⁷ Hirschhorn & Fenton, *supra* note 20, at 518.

²⁸ Ludwig & Smith, *supra* note 22, at 582 n.2. Briggs supplied the Syrian distributor with replacement parts for Briggs engines. Accordingly, the Syrian government asked the distributor to forward a questionnaire that inquired as to Briggs' business ties to Israel. For additional facts, see *infra* text accompanying notes 104-16.

²⁹ See *Trane Co. v. Baldrige*, 552 F. Supp. 1378, 1381 (W.D. Wis. 1983). These principles have been codified as HEAD OFFICE FOR BOYCOTT OF ISRAEL, GENERAL SECRETARIAT, LEAGUE OF ARAB COUNTRIES, GENERAL PRINCIPLES FOR BOYCOTT OF ISRAEL (June 1972) reprinted in 2 CONFERENCE ON TRANSNATIONAL ECONOMIC BOYCOTTS AND COERCION, MATERIALS ON THE ARAB OIL-PRODUCING NATIONS BOYCOTT I, 17 (1978) [hereinafter cited as General Principles]. The Arab League first codified principles for the boycott of Israel in 1954. Williams, *supra* note 22, at 819.

³⁰ *Id.* at 820. For example, Algeria, Mauritania, Morocco, Somalia, Sudan, and Tunisia are only involved in the primary boycott and do not blacklist foreign companies. *Id.* This fragmented response means that some corporations are able to continue trading with both Israel and various Arab nations. This explains why Briggs and the government stipulated that Briggs "has in the past and intends in the future to trade with persons in Israel and in all other respects [to] conduct its business without regard to [the Arab League's] 'General Principles.'" See Brief In Support Of Plaintiffs Motion For Summary Judgment at 12, *Briggs & Stratton Corp. v. Baldrige*, 539 F. Supp. 1307 (E.D. Wis. 1982).

³¹ *Id.* at 819. For example, Xerox Corporation was blacklisted for sponsoring a television series which featured an episode considered too sympathetic to Israel. *Id.*

³² Hirschhorn & Fenton, *supra* note 20, at 518. One commentator, however, has noted that the impact of the Arab boycott is difficult to gauge. See A. LOWENFELD, *supra* note 2, at 335. Regarding its impact on Israel, "much of it rests on the 'might have been.'" *Id.* Regarding U.S. firms, while 1,500 are believed to be on blacklists, it is not precisely known how many more firms have refused to trade with Israel in order to avoid being blacklisted and to maintain commercial relationships with Arab nations. *Id.* at 318-19.

One example of a company that appears to have been influenced by the Arab boycott is Kleinwort Benson, an English underwriter. Lowenfeld noted that this firm excluded blacklisted underwriters from participating in the underwriting of a major Japanese trading corporation. *Id.* at 325-26 (citing

development, creating intense competition among Western firms for Arab business, thereby increasing the leverage of Arab nations to enforce the boycott.³³ These developments led to lobbying in the United States for stronger legislation against the Arab boycott.³⁴

B. *The U.S. Legislative Response*

The 1965 amendments³⁵ to the Export Control Act of 1949³⁶ marked the first official U.S. response to the Arab boycott of Israel.³⁷ The 1965 legislation established a policy of opposition to boycotts of countries friendly to the United States.³⁸ Additionally, the new law required exporters to inform the Commerce Department of any requests they received to comply with a foreign boycott.³⁹ Although the Commerce Department required U.S. firms to report receipt of these boycott-related requests, it did not prohibit firms from furnishing information pursuant to such requests.⁴⁰

For the next ten years, the U.S. antiboycott policy received little further attention from Congress or the Administration.⁴¹ In early 1975, however, Congress began to investigate various aspects of the Arab boycott.⁴² Simultaneously, Jewish organizations filed lawsuits against executive agencies for failing to im-

The Arabs blacklist some Jewish banks, 2368 Bus. Wk., February 17, 1975, at 26,27; *The broad dimensions of the Arab blacklist*, 2369 Bus. Wk. February 24, 1975, at 25, 26).

³³ *Id.* at 518-19.

³⁴ See text accompanying notes 42-43.

³⁵ Act of June 30, 1965, Pub. L. No. 89-63, 79 Stat. 209 (1965) (amending 50 U.S.C. app. §§ 2021-32) [hereinafter cited as 1965 amendments].

³⁶ The Export Control Act of 1949, ch. 11, 63 Stat. 7 (1949) (as amended, 50 U.S.C. app. §§ 2021-32 (1964) (expired 1969)). This act was replaced by the Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (codified at 50 U.S.C. app §§ 2401-13 (1976) (expired 1979)).

³⁷ Hirshhorn & Fenton, *supra* note 20, at 519.

³⁸ See § 3(a), Act of June 30, 1965, Pub. L. No. 89-63, 79 Stat. 209 (1965) (amending U.S.C. app §§ 2021-32).

³⁹ See *id.* at § 4.

⁴⁰ Hirshhorn & Fenton, *supra* note 20, at 520.

⁴¹ Williams, *supra* note 22, at 825.

⁴² On July 10, 1975, Representative John E. Moss, asked the director of the Office of Export Administration for copies of boycott-request reports filed by U.S. firms. A. LOWENFELD, *supra* note 2, at 336. The director and Secretary of Commerce Rogers Morton denied the request. *Id.* By a vote of ten to five, the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce held the Secretary in contempt of Congress. *Id.* Prior to a vote before the full House committee, an accommodation was reached, and the subcommittee was allowed to examine the reports. *Id.* at 337.

This controversy was significant in bringing two ideas to public and congressional attention. First, it became clear that many U.S. firms were not revealing in the reports whether they had complied with the Arab boycott. *Id.* Second, it became known that the Commerce Department was promoting commercial opportunities with Arab nations in circulars which did not mention the 1965 antiboycott policy. *Id.*

plement congressional antiboycott policy.⁴³ Responding to President Ford's public statements attacking religious discrimination,⁴⁴ the Commerce Department revised the Export Administration Regulations.⁴⁵

The new regulations were the first U.S. laws actually prohibiting U.S. firms from supporting boycotts against friendly nations.⁴⁶ Yet the regulations only prohibited support of foreign trade practices that discriminated against U.S. citizens on the basis of race, color, religion, sex, or national origin.⁴⁷ The regulations did not prohibit U.S. firms from supporting boycotts which asked questions concerning their business relationships with Israel.⁴⁸

Anticipating the expiration of the Export Administration Act of 1969,⁴⁹ Congress began to rewrite the legislation in 1976.⁵⁰ The House and Senate passed separate bills,⁵¹ but the Senate failed to call for a conference.⁵² While no new law was passed, the 1969 Act was extended by executive order.⁵³ In 1977, a new, compromise version of the EAA was introduced.⁵⁴ The bill passed both

⁴³ Williams, *supra* note 22, at 825-26.

⁴⁴ On March 4, 1975, President Ford became the first U.S. president to issue a statement on the Arab boycott of Israel. The President stated:

I am exercising my discretionary authority under the Export Administration Act to direct the Secretary of Commerce to issue amended regulations to: 1. prohibit U.S. exporters and related service organizations from answering or complying in any way with boycott requests that would cause discrimination against U.S. citizens or firms on the basis of race, color, religion, sex or national origin

See 2 CONFERENCE ON TRANSNATIONAL ECONOMIC BOYCOTTS AND COERCION, MATERIALS ON THE ARAB OIL-PRODUCING NATIONS BOYCOTT 1, 136 (1978).

⁴⁵ See 15 C.F.R. § 369.2(a) (1976).

⁴⁶ See Hirschhorn & Fenton, *supra* note 20, at 520.

⁴⁷ See generally 15 C.F.R. § 369.2 (1977). For example, "exporters and related service organizations" (§ 369.2(a)) could not answer a questionnaire as to whether a U.S. firm was owned or controlled by Jews, or whether Jews served on its board of directors (§ 369.2(b)).

⁴⁸ See 15 C.F.R. § 369.3 (1977). Exporters & related service organizations were "encouraged and requested" to refuse to answer questions regarding an exporter's business affairs with a boycotted country. *Id.* at § 369.3(b) (1977).

⁴⁹ See *supra* note 31.

⁵⁰ Hirschhorn & Fenton, *supra* note 20, at 520-21. See also Extension of the Export Administration Act of 1969, Part 1: Hearings Before the Subcommittee on International Trade & Commerce, House Committee on International Relations, 94th Congress, 1st Session (1976); Extension of the Export Administration Act of 1969, Part 2: Hearings Before the Subcommittee on International Trade & Commerce, House Comm. on Int'l Rela., 94th Cong., 1st Sess. (1976).

⁵¹ The House passed H.R. 15377 by a vote of 318-63 on September 22, 1976, while the Senate passed a companion bill, S. 3084. House Comm. on Int'l Rela., Export Administration Amendments of 1977, H.R. Rep. No. 95-190, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S. Code Cong. & Ad. News 362-63.

⁵² *Id.*

⁵³ In order to maintain authority to regulate exports, the President extended the 1969 Act by executive order on September 30, 1976. Exec. Order No. 11940. 3 C.F.R. 150 (1976), reprinted in 50 U.S.C. § 2403 (1976) (revoked by Exec. Order No. 12002, 3 C.F.R. 133 (1978)).

⁵⁴ H.R. Rep. No. 95-190, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S. Code Cong. & Ad. News 363. The compromise was written primarily in a series of negotiations between a subcommittee of the Business Roundtable, composed of the chief executives of 180 major U.S. corporations, and the

houses in June, 1977,⁵⁵ and was enacted as the Export Administration Amendments of 1977.⁵⁶ Implementing regulations were promulgated by the Commerce Department in 1978.⁵⁷ The 1977 legislation was subsequently reenacted verbatim by the EAA of 1979.⁵⁸

The current antiboycott provisions of the EAA instruct the President to issue regulations prohibiting any U.S. firm in interstate or foreign commerce from taking actions with the intent to comply with, further, or support any boycott imposed by a foreign country against a country friendly to the United States.⁵⁹ As implemented by the Commerce Department, six general categories of actions are prohibited: refusals to do business; discriminatory actions; furnishing information about race, religion, sex, or national origin; furnishing information about business relationships; furnishing information about associations with charitable organizations; and implementing letters of credit with prohibited conditions or requirements.⁶⁰

The Commerce Department regulations, enacted pursuant to the 1979 EAA, prohibit U.S. firms from furnishing information about their business relationships with or in a boycotted country.⁶¹ This prohibition includes information regarding business relationships with any business concerns organized under the laws of the boycotted country, any national or resident of the boycotted country, or any person known or believed to be blacklisted by the boycotting country.⁶² The prohibition applies to any type of business relationship or trans-

representatives of the Anti-Defamation League of B'nai B'rith, a Jewish organization dedicated to combatting anti-semitism. See A. LOWENFELD, *supra* note 2, at 345.

⁵⁵ The agreement between the two groups was subsequently accepted by both the Carter administration and the relevant Congressional committees. The Senate Banking Currency and Housing Committee adopted the bill 90-1 (123 Cong. Rec. 13812 (May 5, 1977)), while the appropriate House Committee adopted the bill by a vote of 364-43 (123 Cong. Rec. 11450 (April 20, 1977)). The Conference Report was adopted by voice vote of the Senate (123 Cong. Rec. 17832 (June 7, 1977)) and by a vote of 306-41 in the House (123 Cong. Rec. 18382 (June 10, 1977)).

⁵⁶ Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977) (amending the Export Administration Act of 1969, current version at 50 U.S.C. app. §§ 2401-20 (1982)).

⁵⁷ See 15 C.F.R. § 369 (1978). The regulations begin by defining key terms in the statutory language including "U.S. person," "Activities in the Interstate or Foreign Commerce of the U.S.," and "Intent." *Id.* at § 369.1(b), (d) and (e). Next, the regulations set out six general categories of prohibited actions. *Id.* at § 369.2(a)-(f)(i); see *infra* text accompanying note 60. The regulations also provide for exceptions to the prohibitions, such as allowing a U.S. firm to comply with the import requirements of a boycotting country. *Id.* at § 369.3(a-1). The regulations establish a prohibition against evasion (§ 369.4) and require U.S. firms to report receipt of a request to take action which furthers a boycott (§ 369.6).

⁵⁸ The Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (codified at 50 U.S.C. app. §§ 2401-20 (1982)).

⁵⁹ 50 U.S.C. § 2407(a)(1) (1979).

⁶⁰ 15 C.F.R. § 369.2(a)-(f) (1979).

⁶¹ *Id.* at § 369.2(d)(1).

⁶² *Id.* The prohibition does not apply to the furnishing of "normal business information in a commercial context." *Id.* at § 369.2(d)(3). The regulations describe this type of information as relating to "financial fitness, technical competence, or professional experience." *Id.* Such information can be

action, including sale, purchase, supply or transportation transactions, legal or commercial representations, insurance, and investment.⁶³ Such information cannot be furnished either upon the direct or indirect request of another person or upon the initiative of the U.S. firm.⁶⁴

The prohibitions only apply to acts undertaken with intent to comply with, further, or support an unsanctioned foreign boycott.⁶⁵ Such intent exists when the boycott is one of the reasons for the decision to furnish the information.⁶⁶ The reason or purpose for furnishing the information can be proved by circumstantial evidence.⁶⁷ For example, if a U.S. firm receives a request to supply boycott information, and then knowingly supplies it, that firm "clearly intends to comply with that boycott request."⁶⁸ If the U.S. person knows information is sought for boycott purposes, the requisite intent is presumed.⁶⁹

The Commerce Department provides hypothetical examples of conduct prohibited under the regulations.⁷⁰ Some examples describe situations where the communication does not disclose a firm's business relationships, but is prohibited because the underlying motivation was boycott-related. In one scenario, even though a firm has merely furnished normal business information, such activity is prohibited because the request for information was accompanied by a questionnaire from a boycott office.⁷¹ In another situation, furnishing normal busi-

found in publicly available documents including annual reports, disclosure statements concerning securities, catalogs, promotional brochures, and trade and business handbooks. *Id.* This type of information may be furnished even if it could be used for boycott purposes. *Id.* at § 369.2(d)(4). For example, an Arab nation could decide to prevent the flow to Israel of some particular technical expertise. The Arab nation would then ask all U.S. firms who wish to do business in the country to declare to customs officials the nature of their expertise. Under the regulations, U.S. firms may furnish "technical competence" information as long as they have no reason to know the request is not boycott-based. *Id.* at § 369.2(d)(2); see also text accompanying notes 64–69. The customs officials could then forward the information to the boycott office, who in turn would blacklist U.S. firms who had the technical expertise essential to Israel. See also § 369.2(d)(5)(xiii).

⁶³ *Id.* at § 369.2(d)2.

⁶⁴ *Id.* at § 369.2(d)(2).

⁶⁵ *Id.* at § 369.1(e)(3).

⁶⁶ *Id.* at § 369.1(e)2. The fact that other legitimate business reasons for the action are also present will not preclude a finding of intent. *Id.*

⁶⁷ *Id.* at § 369.1(e)(5).

⁶⁸ *Id.* at § 369.2(e)(5).

⁶⁹ *Id.*

⁷⁰ See *id.* at §§ 369.2(d)(5)(i)–(xviii).

⁷¹ 15 C.F.R. § 369.2(d)(5)(iii).

U.S. contractor A is considering bidding for a contract to construct a school in boycotting country Y. Each bidder is required to submit copies of its annual report with its bid. Since A's annual report describes A's worldwide operations, including the countries in which it does business, it necessarily discloses whether A has business relations with boycotted country X. A has no reason to know that its report is being sought for boycott purposes [A]ccompanying the invitation to bid is a questionnaire from country Y's boycott office asking each bidder to supply a copy of its annual report. A may not furnish the report despite its

ness information is prohibited because the U.S. firm "kn[ew] that it would be responding to a boycott-based request for information about its business relationships"⁷² Other examples describe situations where the communication discloses a firm's business relationships but is not prohibited because the motivation was not boycott-related. In one such example, furnishing information about business relationships with a boycotted country is allowed because it is being furnished in a normal business context and the U.S. firm does not have reason to know that the information is sought for boycott reasons.⁷³

A U.S. firm which knowingly violates any provision of the EAA or any regulation issued thereunder may be subject to civil and criminal penalties.⁷⁴ The Commerce Department usually handles violations as administrative matters, aiming at consent agreements.⁷⁵ In fiscal year 1983, the Office of Antiboycott Compliance⁷⁶ issued the most severe administrative penalties to date.⁷⁷

public availability because it would be furnishing information in response to a questionnaire from a boycott office.

Id.

⁷² 15 C.F.R. § 369.2(d)(5)(viii).

U.S. company A is asked by boycotting country Y to furnish information concerning its business relationships with boycotted country X. A, knowing that Y is seeking the information for boycott purposes, refuses to furnish the information asked for directly, but proposes to respond by supplying a copy of its annual report which lists the countries with which A is presently doing business. A does not happen to be doing business with X. A may not respond to Y's request by supplying its annual report, because A knows that it would be responding to a boycott-based request for information about its business relationships with X.

Id.

⁷³ 15 C.F.R. § 369.2(d)(5)(xii).

U.S. architectural firm A responds to an invitation to submit designs for an office complex in boycotting country Y. The invitation states that all bidders must include information concerning similar types of buildings they have designed. A has not designed such buildings in boycotted country X. Clients frequently seek information of this type before engaging an architect. A may furnish this information, because this is furnishing normal business information, in a normal context, relating to A's technical competence and professional experience.

Id.

⁷⁴ The Export Administration Act of 1979, Section 11(a)(2410(a)). *See also* 15 C.F.R. § 387.1 ("Enforcement") and 15 C.F.R. § 388.1 ("Administrative Proceedings"). The regulations provide that knowing-violations of any EAA provision are punishable by a fine of five times the exports' value or \$50,000, or by five years imprisonment or both. *Id.* at § 387.1(a)(1)(i). One who willfully exports anything in violation of the EAA knowing that such exports will benefit a country to which exports are restricted will be fined up to five times the value of the exports or \$1 million, whichever ever is greater. *Id.* at § 387.1(a)(1)(ii).

⁷⁵ A. LOWENFELD, *supra* note 2, at 373. Violations may result in administrative sanctions, including denial of export privileges, exclusion from practice before the International Trade Administration, civil penalties, and seizure of commodities or technical data. *Id.* at § 387.1(b)(1)-(4).

⁷⁶ The Office of Antiboycott Compliance (OAC), acting under the Department of Commerce, enforces the provisions of the EAA prohibiting U.S. firms from complying with foreign boycotts. OFFICE OF EXPORT ADMIN., INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, EXPORT ADMIN. ANNUAL REPORT FISCAL YEAR 1983, 71 (1984) [hereinafter Export Admin. Annual Report].

⁷⁷ The Office Export Administration's annual report states that the OAC issued the two largest fines in the history of the program. *Id.* at 73. Philadelphia International Bank was fined \$189,000 for failing to report boycott-based requests for information. *Id.* at 75. In addition, the OAC denied export

C. *Legal Challenges to the EAA*

Legal challenges⁷⁸ have been raised against the EAA.⁷⁹ One type of legal attack concerns the proper interpretation of the EAA's statutory language. In *Dresser Industries, Inc., v. Baldridge*,⁸⁰ a U.S. corporation challenged the extraterritorial application of export controls.⁸¹ Commentators have suggested that the EAA could be challenged on two other statutory grounds: the President's authority to issue a blanket freeze of export licenses, and his authority to control international payments and financial transactions.⁸²

Constitutional attacks have also been raised against the EAA.⁸³ In *United States v. Brumage*,⁸⁴ a defendant charged with exporting without having first obtained

privileges for the first time, including denials of privileges to The Xerox Corporation and Columbia Pictures Industries. *Id.* at 74.

⁷⁸ Such challenges have been primarily made by defendants charged with violating the EAA. *See, e.g., U.S. v. Moller-Butcher*, 560 F. Supp. 550 (D. Mass. 1983) (government charged company with export of technological equipment without a validated license); *U.S. v. Brumage*, 377 F. Supp. 144 (E.D. N.Y. 1974) (government charged company with export of electrical and technological equipment without a validated license).

⁷⁹ Section 13(a) of the EAA generally exempts actions taken under the Act from compliance with portions of the Administrative Procedures Act (APA), 5 U.S.C. § 551-706, including the APA section which provides for judicial review. *See Moyer & Mabry, Export Controls As Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of 3 Recent Cases*, 15 LAW & POL'Y INT'L BUS. 1, 132-36 (1983). The EAA exemption includes 5 U.S.C. § 551 (definitions), §§ 553-59 (agency actions), and §§ 701-06 (judicial review). Arguably, the EAA exemption prevents a private plaintiff from challenging an agency's decision granting or denying an export license. *See, e.g., Memorandum of Points & Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction* at 25-27, *Dresser Industries, Inc., v. Baldridge*, No. 82-2385 (D.D.C. filed October 20, 1982), cited in *Moyer & Mabry, supra*, at 100 n.617. For facts of *Dresser*, see *infra* note 80. It is unclear, however, whether the exemption from judicial review prohibits constitutional challenges to statutory or regulatory provisions.

⁸⁰ 549 F.Supp. 108 (D.D.C. 1982). *Dresser Industries*, a U.S. corporation, manufactures machinery for the exploration of oil and gas. *Id.* at 109. *Dresser France*, a wholly owned subsidiary of *Dresser U.S.A.*, had a contract with the Soviet Union to supply gas compressors for use on the pipeline. *Moyer & Mabry, supra* note 79, at 71 n.461. The gas compressors were built in France using *Dresser U.S.A.* technology. *Id.* On June 22, 1982, the Commerce Department enacted regulations pursuant to section 6 of the EAA that restricted U.S. firms' foreign subsidiaries from exporting wholly foreign-origin equipment and technology. *Id.* at 70. The restrictions included compressors built by European countries under licensing agreements with U.S. companies. *Id.* Despite these measures, companies such as *Dresser France* continued to ship goods to the Soviet Union. *Id.* In response, the United States temporarily denied these companies trade privileges. *Id.* Subsequently, *Dresser U.S.A.* and *Dresser France* filed a complaint for declaratory and injunctive relief and a motion for a temporary restraining order. *Id.* at 72-73 nn.467-68.

⁸¹ *See Moyer & Mabry, supra* note 79, at 73 (citing Motion for Temporary Restraining Order at 20-24, *Dresser Industries, Inc., v. Baldridge*, No. 82-2385 (D.D.C. filed August 23, 1982)). One commentator has suggested that extraterritorial application of the EAA would require statutory language "so clear, strong, and imperative that no other meaning can be annexed to them or . . . the intention of the legislature cannot otherwise be satisfied." *See Vance*, 18 TEX. INT'L L. J. 203, 211 (1983) (quoting *Matter of District of Columbia Workmen's Comp. Act*, 554 F.2d 1075 (D.C. Cir. 1976)). The author argues that the EAA contains no such language authorizing extraterritorial application of its provisions or implementing regulations. *Id.*

⁸² *Moyer & Mabry, supra* note 79, at 100-08.

⁸³ *See infra* notes 84-99 and accompanying text.

⁸⁴ 377 F. Supp. 144 (E.D.N.Y. 1974). In *Brumage*, defendants exported electronic and technical

a validated license argued unsuccessfully that the EAA was void for vagueness.⁸⁵ In *Dresser Industries*, the plaintiff argued that the imposition of export controls violated its right to due process.⁸⁶ Additionally, commentators have suggested that the EAA might be subject to constitutional attack under the "export clause."⁸⁷

While no free speech challenge was raised against the EAA prior to *Briggs*, such a challenge was raised against a similar statute in 1978.⁸⁸ In *United States*

equipment to Belgium without a validated license, knowing that the items were ultimately destined for East Germany and Hungary in violation of § 2405(b) and regulations in 15 C.F.R. §§ 370.3, 371.3, 372.1, 387.6, 399.1.

⁸⁵ *Id.* Brumage argued that the prohibition against exports that are to be used "for the benefit of any Communist-dominated nation" was overly vague. *Id.* at 147. Brumage argued that this language failed reasonably to inform individuals what conduct might be criminal under the act. *Id.* The court noted that the modern "void for vagueness" doctrine stressed two aspects of due process: fair warning to potential criminal offenders and sufficiently precise standards to assist a court in determining when a crime has been committed. *Id.* at 147-48. The court held that the statute was "neither vague on its face nor as applied in this case . . ." *Id.* at 150-51. The court's reasoning included the presumptive validity of congressional statutes, Congress' broad power to regulate foreign commerce, the court's narrower scope of review when a party has no independent constitutional guarantee, and the willful nature of defendant's violation. *Id.* at 148-49. The court concluded that defendant's claim was essentially an attack on the level of discretion Congress granted the President to regulate foreign affairs. *Id.* at 150. As to this contention, the court, quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) noted that Congress "must of necessity paint with a brush broader than it customarily wields in domestic areas . . ." *Id.*

⁸⁶ See *Moyer & Mabry*, *supra* note 79 at 126 (citing Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order, *Dresser Industries, Inc. v. Baldrige*, No. 82-2385, 20-24 (D.D.C. filed August 24, 1982)). *Dresser* first argued that the retroactive nature of the controls violated its due process rights. *Id.* The retroactivity stemmed from the Commerce Department's revocation of *Dresser's* existing license to export to *Dresser France*. *Id.* at 72. *Dresser* next argued that the Commerce Department controls placed it in the dilemma of either violating existing French law requiring companies to honor existing contracts with the Soviet Union or violating the U.S. regulations. *Id.* 82, 128.

A due process challenge to the EAA was also raised by *Briggs*. See *Briggs & Stratton*, 539 F. Supp. at 1316-17 (E.D. Wis. 1982). *Briggs* argued that the Commerce Department regulations were not reasonably related to the purposes of the EAA, and thus violated the due process rationality requirement. *Id.*

⁸⁷ *Moyer & Mabry*, *supra* note 79, at 129-32. Article I, Section 9 of the U.S. Constitution states simply that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. CONST., art. I, § 9, cl. 5. One commentator has argued that the clause was not directed exclusively at taxes, but embodied a larger free trade principle. See Note, *Constitutionality of Export Controls*, 76 YALE L. J. 200 (1966). He argues further that the Constitutional Convention "reached a deliberate decision to prohibit the government from burdening the export trade in any way." *Id.* at 203. The Supreme Court's construction of the clause is consistent with this view. See, e.g., *Fairbank v. United States*, 181 U.S. 283, 290 (1901) ("[t]he requirement of the Constitution is that exports should be free from any governmental burden"); *United States v. Hvoslef*, 237 U.S. 1, 13 (1915) ("[t]his constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves"). But cf. *U.S. v. Yoshida Int'l Inc.*, 526 F.2d 560, 580 (C.C.P.A. 1975) ("[n]o one has a vested right to trade with foreign nations") *Yoshida*, however, is based upon Supreme Court cases dealing with the regulation of imports. *Moyer & Mabry*, *supra* note 79, at 131 n.791.

⁸⁸ *United States v. Edler Industries*, 579 F.2d 516 (9th Cir. 1978).

v. Edler Industries, Inc.,⁸⁹ the defendant argued that provisions of the Mutual Security Act of 1954⁹⁰ empowering the President to control the export of technical data violated its first amendment rights.⁹¹ The Ninth Circuit recognized defendant's "colorable claim that the First Amendment furnishes a degree of protection for its dissemination of technological information."⁹² Yet the court held that a broad statutory reading, which construed the Act as prohibiting the interchange of scientific and technological information when that information is without any substantial military application, "is neither necessary nor proper."⁹³ Instead, the court construed the statute narrowly, as prohibiting only technical data which "relate[s] in a significant fashion to some item on the Munitions List."⁹⁴ Since the court found that the federal government was empowered to regulate the international arms traffic and its concomitant flow of information,⁹⁵ it held that, as construed, the Act did not violate defendant's free speech rights.⁹⁶

Similarly, the court held that the licensing provisions of the Security Act were not an unconstitutional prior restraint on defendant's speech.⁹⁷ The court also rejected defendant's argument that, under the first amendment, the government may not prohibit the export of defendant's technology because it is widely

⁸⁹ *Id.* at 520.

⁹⁰ 22 U.S.C. § 1934(1970) (repealed 1976) (current version at 22 U.S.C. § 2778 (1982)) [hereinafter cited as Security Act].

⁹¹ *Edler*, 579 F.2d at 516.

⁹² *Id.* The government has argued that such non-military, scientific and technological information may properly be restricted under the EAA. Moyer & Mabry, *supra* note 79, at 121 n.733. For example, the Commerce Department required scientists conducting a forum at which advanced computer technology would be exchanged to obtain a validated license from the Office of Export Administration. *Id.* Noting that foreign citizens were in attendance, the Department characterized the exchange of computer information as the export of technical data. *Id.* Recently, the Department of Defense (DOD) prohibited unclassified but militarily sensitive technical papers from being presented in an open forum. Electronic News, Apr. 18, 1985, at 18, col. 1. The DOD allowed the papers to be presented in a closed forum in which all attendees agreed not to transfer or disclose the information to foreign sources. *Id.* According to DOD officials, all future technical and professional meetings in the U.S. that feature militarily sensitive papers will only be open to attendees who sign Export Control DOD Technical Data Agreement Form No. 2345.

One commentator argued that placing export controls upon a scientific forum was a prior restraint without sufficient procedures for judicial review. See Note, *The Export Administration Act's Technical Data Regulations: Do They Violate the First Amendment?*, 11 GA. J. INT'L & COMP. L. 563, 571 (1981). No party has challenged the EAA's technical data regulations on constitutional grounds. For a discussion of the government's possible defense to such a suit, see Moyer & Mabry, *supra* note 78, at 124-26. See also Ellicott, *Trends in Export Regulation*, 38 BUS. LAW. 533, 540-42 (1983); Cheh, *Government Control of Private Ideas — Striking a Balance Between Scientific Freedom and National Security*, 23 JURIMETRICS J. 1 (1982); Greenstein, *National Security Controls on Scientific Information*, 23 JURIMETRICS J. 50 (1982).

⁹³ *Edler*, 579 F.2d at 520.

⁹⁴ *Id.*

⁹⁵ *Id.* at 521.

⁹⁶ *Id.*

⁹⁷ *Id.* at 521-22.

distributed in the United States.⁹⁸ The court held that, given the national interest in restricting the flow of military information, public availability of the data was not a constitutionally recognized defense.⁹⁹

Recently, a U.S. corporation challenged the EAA's antiboycott provisions on first amendment grounds. In *Briggs & Stratton Corp. v. Baldrige*,¹⁰⁰ an exporter argued that the disclosure of one's business relationships with Israel in response to an Arab government's questionnaire was fully protected by the first amendment.¹⁰¹

III. *BRIGGS & STRATTON CORP. v. BALDRIDGE*

A. *Facts*

The Briggs & Stratton Corporation is a manufacturer of engine components for use in the end products of other manufacturers.¹⁰² Briggs' primary contact with the Arab world is through these end product manufacturers who sell their own goods worldwide.¹⁰³

In 1977, the Syrian government denied a Syrian distributor a license to import spare parts for Briggs engines.¹⁰⁴ The license was refused because Briggs' name appeared on a blacklist.¹⁰⁵ The distributor wrote Briggs, enclosing a letter from the Syrian Economical Department¹⁰⁶ which asked Briggs seven questions about

⁹⁸ *Id.* at 522.

⁹⁹ *Id.*

¹⁰⁰ *Briggs & Stratton*, 539 F. Supp. at 1307.

¹⁰¹ Brief in Support of Plaintiff's Motion for Summary Judgement at 25, *Briggs & Stratton Corp.*, 539 F. Supp. 1307 (E.D. Wis. 1982).

¹⁰² Briggs & Stratton is the world's largest manufacturer of engines for manufacturers of powered equipment and locks for manufacturers of automobiles, trucks and other vehicles. BRIGGS & STRATTON CORPORATION, 1984 ANNUAL REPORT 16 (1984). Engines and parts provided 92 percent of Briggs' sales in fiscal year 1984, 14 percent of which were export sales. *Id.* Export sales in fiscal year 1984 amounted to \$95,708,000. Form 10-K, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, 2 (1984). The corporation estimates that sales to persons who export engines with Briggs components to Arab League member-states were over \$15 million in the fiscal year ending June 30, 1980. *Briggs & Stratton*, 539 F. Supp. at 1311.

Brigg's manufacturing plants are located in Wisconsin, Georgia, and West Germany. ANNUAL REPORT at 25. Overseas sales offices are maintained in West Germany, Norway, and New Zealand. *Id.* at 16. Principal export markets are developed countries with major lawn and garden equipment industries and developing countries requiring powered equipment for agricultural and marine applications. *Id.*

¹⁰³ Thus, Briggs would normally be brought within the Arab boycott at the tertiary level as component supplier to an end product manufacturer who sells goods to an Arab League nation. See *supra* note 23. Here, however, Briggs was brought within the boycott as a supplier to a Syrian distributor of replacement parts for Briggs engines. See *Briggs & Stratton*, 539 F. Supp. at 1310. In order to obtain a license to import Briggs parts, the distributor was asked by the Syrian government to submit a questionnaire to Briggs to determine whether Briggs had any business relationships with Israel. *Id.*

¹⁰⁴ *Briggs & Stratton*, 539 F. Supp. at 1310.

¹⁰⁵ *Id.*

¹⁰⁶ Syria's Ministry of Economy and Foreign Trade. Brief in Support of Plaintiff's Motion for Summary Judgement at 9, *Briggs & Stratton v. Baldrige*, 539 F. Supp. 1307 (E.D. Wisc. 1982).

its business relationships with Israel.¹⁰⁷ On November 10, 1977, Briggs answered all seven questions in the negative.¹⁰⁸ A year later, Syria denied a license to another Syrian importer of Briggs products.¹⁰⁹ The importer attributed the denial to the Director of the Israel Boycott Office¹¹⁰ who had advised the Syrian "Economical Department" to ask the importer to resubmit Briggs' answers "duly legalized" by an Arab diplomatic mission.¹¹¹ In a letter dated December 31, 1978, the Syrian importer asked Briggs "to ratify your declaration . . . from an Arab Diplomatic Mission . . ."¹¹² This request for ratification was consistent with a requirement under the General Principles for Boycott of Israel.¹¹³

Subsequent to its failure to return an authenticated questionnaire, Briggs was blacklisted.¹¹⁴ The corporation maintained that the blacklisting occurred as a result of its failure to answer the questionnaire as requested.¹¹⁵ This result

¹⁰⁷ *Id.* Answers to the seven questions would help the Syrians determine whether to blacklist Briggs.

¹⁰⁸ The text of Briggs' reply (with questions as translated) is as follows:

TO WHOM IT MAY CONCERN:

The following questions have been presented by our customer [the Syrian distributor]. We list these questions with their answers, below:

1. Has the company now or in the past main branch factories or combining factories in Israel?

Answer: No.

2. Has the company now or in the past general offices in Israel for its regional or international works?

Answer: No.

3. Has it grant now or in the past the right of utilizing its name or trade marks or patents to persons or establishments or Israel works inside or outside Israel?

Answer: No.

4. Does it share in or own now or in the past shares in Israel works or establishments inside or outside Israel?

Answer: No.

5. Does it now or did it offer in the past any technical assistance to any Israeli work or establishment?

Answer: No.

6. Does it represent now or did it represent in the past any Israel establishment or work inside or outside Israel?

Answer: No.

7. What are the companies which it shares in or with, their nationality and the size or rate of this share?

Answer: No other companies are involved.

Brief And Appendix Of Plaintiffs-Appellants, Briggs & Stratton Corp. and Michael Hamilton, App. at 34, *Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915 (7th Cir. 1984).

¹⁰⁹ *Id.* at App. p. 35.

¹¹⁰ *Id.*

¹¹¹ *Id.* at App. p. 36.

¹¹² *Id.* at App. p. 35.

¹¹³ GENERAL PRINCIPLES FOR BOYCOTT OF ISRAEL, *supra* note 29, at 21 ("If the compan[y] . . . desire[s] . . . to resume dealing with the Arab countries, . . . [it] they must affirm [the documents'] validity before a notary public . . . following which it must have the documents confirmed by any Arab consulate or embassy").

¹¹⁴ *Briggs & Stratton*, 539 F. Supp. at 1311. Briggs was blacklisted by Syria, Saudi Arabia, Bahrain, Oman, and Kuwait. *Id.*

¹¹⁵ *Id.*

would have been consistent with the Arab League's General Principles which identify the refusal to respond as a basis for blacklisting a firm.¹¹⁶ The Commerce Department advised Briggs that any resubmission responsive to the Syrian request would have contravened the regulations.¹¹⁷ The Department stated that if it learned of such a contravention, it would seek to impose one or more of the penalties provided under the Act.¹¹⁸

Briggs subsequently filed suit, challenging the constitutionality of the regulations. The corporation argued that the regulations violated its first amendment right to free speech,¹¹⁹ fifth amendment right to due process,¹²⁰ and ninth amendment right to fundamental rights.¹²¹ The district court granted the Commerce Department's motion for summary judgment.¹²² Briggs moved for reconsideration shortly thereafter, but this motion was denied.¹²³ An appeal was heard by the Court of Appeals for the Seventh Circuit, which affirmed the district court's opinion.¹²⁴ Briggs' subsequent petition for a writ of certiorari to the Supreme Court was denied.¹²⁵

B. *Arguments and Holdings*

Before the district court, Briggs argued that its proposed act — answering a request for information from a Syrian distributor — was “a straightforward act of commercial speech” entitled to first amendment protection.¹²⁶ Briggs then argued that restrictions upon commercial speech must be measured by a test announced by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.¹²⁷ In that case, the Court stated that:

¹¹⁶ GENERAL PRINCIPLES, *supra* note 29, at 9.

¹¹⁷ *Briggs & Stratton*, 539 F. Supp. at 1311.

¹¹⁸ *Id.* at 1311–12.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1316–17. Briggs argued that the prohibition against responding to boycott questionnaires was irrational because the boycotters would simply obtain the requested information from other sources and would buy a similar product from another manufacturer. Thus, Briggs argued, the regulations were not reasonably related to the purposes of the legislation. *Id.* For a discussion of the EAA's underlying purpose, see text accompanying notes 210–15.

¹²¹ *Id.* at 1317. Briggs argued that its right to engage in international trade for profit was protected by the ninth amendment, which has been interpreted to protect certain fundamental rights. See *Griswold v. Connecticut*, 381 U.S. 479, 486–99 (1965) (Goldberg, J., concurring) (arguing that certain fundamental rights not specifically enumerated were within penumbras of the specific guarantees of the Bill of Rights, with their constitutional authority in the Ninth Amendment).

¹²² *Briggs & Stratton*, 539 F. Supp. at 1320.

¹²³ *Briggs & Stratton*, 544 F. Supp. at 668.

¹²⁴ *Briggs & Stratton*, 728 F.2d. at 918.

¹²⁵ *Briggs & Stratton*, 728 F.2d at 915, *cert. denied* 105 S.Ct. 106 (1984).

¹²⁶ Brief in Support of Plaintiff's Motion for Summary Judgment at 25–26, *Briggs & Stratton v. Baldrige*, 539 F. Supp. 1307 (E.D. Wis. 1982).

¹²⁷ *Id.* at 26.

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.¹²⁸

Briggs argued that, according to *Central Hudson*, the Commerce Department regulations prohibiting its proposed communication violated its first amendment right to free speech.

The district court held, however, that the regulations did not violate Briggs' first amendment rights.¹²⁹ The court first noted that commercial speech was not entitled to full first amendment protection.¹³⁰ In applying the *Central Hudson* test, the court held that the state interest behind the antiboycott regulations was substantial, and that this interest was advanced by preventing the flow of information to boycotters.¹³¹ The court also held that the regulations were not more restrictive than necessary, and met the requirements of *Central Hudson*.¹³²

Briggs moved for reconsideration, arguing that the court had failed to rule on whether its conventional speech rights had been violated.¹³³ The court held that it was unnecessary to resolve this issue.¹³⁴ The court reasoned that it did not resolve this issue in the previous case because Briggs had argued that the relevant issue was commercial speech.¹³⁵ The court held that, even if the conventional speech issue were germane, it would "find no constitutional intrusion."¹³⁶

Briggs appealed to the Seventh Circuit, arguing that its proposed answers to the boycott questions should be considered conventional speech and entitled to the full measure of protection afforded by the first amendment.¹³⁷ Briggs characterized its speech as primarily concerned with promoting the truth about its

¹²⁸ 447 U.S. 557, 564 (1980).

¹²⁹ *Briggs & Stratton*, 539 F. Supp. at 1319.

¹³⁰ *Id.* at 1318.

¹³¹ *Id.* at 1319.

¹³² *Id.*

¹³³ *Briggs & Stratton*, 544 F. Supp. at 668.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Briggs & Stratton*, 728 F.2d at 916.

business relations and influencing a foreign government's political decisions.¹³⁸ Briggs also argued that the mere presence of economic motivation was insufficient to characterize its proposed communication as commercial.¹³⁹ The Seventh Circuit held, however, that Briggs' communication was properly defined as commercial speech.¹⁴⁰ The court found that Briggs' primary concern was to maintain an advantageous commercial relationship, and that this placed its speech in the commercial category.¹⁴¹

IV. ANALYSIS OF THE *BRIGGS* DECISIONS

A. *The Characterization of Speech as Commercial or Conventional*

Generally, the first amendment prohibits the government from restricting expression "because of its message, its ideas, its subject matter, or its content."¹⁴² For example, in *Police Department of the City of Chicago v. Mosley*,¹⁴³ the Supreme Court struck down an ordinance which prohibited all picketing in the vicinity of a school, except for labor union picketing.¹⁴⁴ The Court held that the state law was not content neutral.¹⁴⁵ Professor Tribe, noting the Court's holding in *Mosley*, commented that "[a]ny government action aimed at communicative impact is presumptively at odds with the First Amendment."¹⁴⁶ Tribe also noted that the Supreme Court has held unconstitutional government regulation aimed at ideas and information, unless the message poses a clear and present danger, constitutes a defamatory falsehood, or is otherwise unprotected.¹⁴⁷ Tribe cited *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁴⁸ and *Linmark Associates, Inc. v. Township of Willingboro*¹⁴⁹ as "communicative impact" cases which should be judged according to this standard.¹⁵⁰

¹³⁸ *Id.* at 917.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 918.

¹⁴¹ *Id.* at 917.

¹⁴² *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 92-93.

¹⁴⁵ *Id.* at 99.

¹⁴⁶ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* at 581 (1978).

¹⁴⁷ *Id.* at 582.

¹⁴⁸ 425 U.S. 748 (1976) (statute prohibiting dissemination of drug price information violates first amendment).

¹⁴⁹ 431 U.S. 85 (1977) (ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs violates first amendment).

¹⁵⁰ Commenting on *Linmark*, Tribe observed:

[l]ike the ban on prescription drug price information held unconstitutional in *Virginia Board of Pharmacy*, this was a content-based prohibition on speech; like the ban in *Virginia Board of Pharmacy*, this one was not demonstrably necessary to achieve a compelling objective in no other manner; and, like the ban in *Virginia Board*, this one suffered from the independently fatal flaw of seeking its objective through 'restricting the free flow of truthful information.'

Id. at 654, (quoting *Linmark*, 431 U.S. at 95 (1977)).

Another commentator has noted the Court's cautious treatment of content based speech restrictions.¹⁵¹ Stone has described content based restrictions as governmental action "that on its face expressly accords differential treatment to the expression of certain specified messages, ideas, or information."¹⁵² Stone cited as familiar examples *Linmark* and two cases where laws or injunctions prohibited the disclosure of certain sorts of information.¹⁵³

In practice, content based restrictions on speech have been sustained only in the most extraordinary circumstances.¹⁵⁴ Nevertheless, the Supreme Court has held that content-based regulation of "commercial" speech poses fewer problems "[i]n light of the greater potential for deception or confusion in the context of certain advertising messages"¹⁵⁵ Contrary to the analyses of Tribe and Stone, the Court has characterized *Virginia Board* and *Linmark* as "commercial speech cases,"¹⁵⁶ and has held that as such, they do not deserve the level of protection suggested by these commentators. Thus, a threshold issue in the *Briggs* case was whether Briggs' proposed communication is "commercial" speech and deserves the lower level of protection afforded by the *Central Hudson* test.

In light of the Supreme Court's most recent commercial speech decision, *Bolger v. Youngs Drug Products Corp.*,¹⁵⁷ it appears that the lower courts mischar-

¹⁵¹ Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 82 (1978).

¹⁵² *Id.* at 81 n.3.

¹⁵³ *Id.*

¹⁵⁴ For cases sustaining content-based restrictions of "fully protected" expression, see *Parker v. Levy*, 417 U.S. 733 (1974); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), *reh'g denied*, 439 U.S. 883 (1978); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Jones v. North Carolina Prisoners' Labor Union Inc.*, 433 U.S. 119 (1977). For earlier cases see *Feiner v. New York*, 340 U.S. 315 (1951); *Whitney v. California*, 274 U.S. 357 (1927); *Schenk v. U.S.*, 249 U.S. 47 (1919); see Stone, *supra* note 151, at 82-83. Professor Stone notes that the Court has sustained restrictions on expression of obscenity, false statements of fact, and fighting words, "those special and limited categories . . . that the Court has found to be of such low value in terms of the historical, philosophical and political purposes of the amendment as to be entitled to less than full constitutional protection." *Id.* at 82.

¹⁵⁵ *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983).

¹⁵⁶ See *Virginia Board*, 425 U.S. at 760; *Linmark*, 431 U.S. at 91.

¹⁵⁷ 463 U.S. at 60 (1983). In *Bolger*, a manufacturer and distributor of contraceptives challenged a federal statute prohibiting unsolicited mailing of contraceptive advertisements. Youngs wanted to mail three types of materials to the public: flyers promoting many products, including prophylactics, available at a drug store; flyers exclusively or substantially promoting prophylactics; and informational pamphlets describing the desirability and availability of prophylactics generally or Youngs' products specifically. One of the informational pamphlets provided detailed descriptions of Trojan-brand condoms manufactured by Youngs. The second informational pamphlet stated at the bottom of the last page that "the pamphlet has been contributed as a public service by Youngs, the distributor of Trojan-brand products prophylactics." *Id.* at 62-63 n.4. The plaintiff corporation argued that its proposed mailings were "fully protected" speech, and that the regulations were therefore an impermissible content-based restriction. *Id.* at 65-66. The Supreme Court held, however, that all of Youngs' pamphlets were "entitled to the qualified but nonetheless substantial protection accorded to commercial speech." *Id.* at 68.

acterized Briggs' communication as commercial.¹⁵⁸ In *Bolger*, the Court described the core notion of commercial speech as that which does "no more than propose a commercial transaction."¹⁵⁹ The Court also held that simply because pamphlets are advertisements "does not compel the conclusion that they are commercial speech."¹⁶⁰ The Court observed that "reference to a specific product does not by itself render the pamphlets commercial speech."¹⁶¹ Furthermore, the Court found that economic motivation is "insufficient by itself to turn the materials into commercial speech."¹⁶² The Court concluded that the combination of Youngs' transaction proposal, advertisement, reference to a specific product, and economic motivation provided strong support for the lower court's characterization of Youngs' pamphlets as commercial speech.¹⁶³

Unlike Youngs' pamphlets, Briggs' proposed communication does not propose a commercial transaction.¹⁶⁴ Furthermore, Briggs' reply to the Syrian government does not make any specific reference to its products or services.¹⁶⁵ Briggs' answers also do not advertise any price or product information.¹⁶⁶ Thus, Briggs' communication does not fall within the Supreme Court's most recent definition of commercial speech.

Yet eight months after the Court's *Bolger* decision, the Seventh Circuit held Briggs' speech to be commercial.¹⁶⁷ This demonstrates that lower courts remain confused about the precise meaning of commercial speech.¹⁶⁸ A careful exam-

¹⁵⁸ Compare text of Briggs' communication *supra* note 108 with Youngs' informational pamphlets *supra* note 157.

¹⁵⁹ *Bolger*, 430 U.S. at 66, (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* The Court also stressed that it "did not mean to suggest that each of the characteristics must be present in order for speech to be commercial." *Id.* at 67 n.14. The Court "express[ed] no opinion as to whether reference to any particular product or service is a necessary element of commercial speech." *Id.*

¹⁶⁴ See *supra* note 108. Cf. *Bolger*, *supra* note 157. See also *Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit at 10, Trane Co. v. Baldrige*, 728 F.2d 915 (7th Cir. 1984). Note that this argument was raised in the Trane Company's Petition and was adopted by Briggs in its separate Petition. *Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit at i, Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915 (7th Cir. 1984).

¹⁶⁵ See *supra* note 108.

¹⁶⁶ *Id.*

¹⁶⁷ See *Briggs & Stratton*, 728 F.2d at 915. The *Briggs* case was decided February 24, 1984, eight months after *Bolger* was decided on June 24, 1983.

¹⁶⁸ Numerous commentators have noted that uncertainty pervades the commercial speech area. See, e.g., J. NOWAK, R. ROTUNDA, AND J. YOUNG, *CONSTITUTIONAL LAW*, 927-28 (2d ed. 1983) (noting the Supreme Court's difficulty over the years in defining commercial speech); Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L. F. 1080, 1101 (noting "the fruitless and unclear distinction between commercial and noncommercial speech"); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 656 (1978) (noting the "obviously troublesome distinction . . . between talk for profit, and talk

ination of commercial speech precedent, however, suggests that Briggs' communication falls outside the definition of commercial speech and, as a commercial actor's conventional speech, deserves full first amendment protection.

Most, if not all, of the Supreme Court's commercial speech cases have concerned advertising.¹⁶⁹ One commentator has equated commercial speech with commercial advertising,¹⁷⁰ dividing commercial speech cases into five separate categories: "[challenges against] regulations of false or deceptive advertising,¹⁷¹ regulations of offensive advertising,¹⁷² prohibitions of commercial advertising in certain forums,¹⁷³ prohibitions of price advertising for particular products or services,¹⁷⁴ and prohibitions of all advertising for particular products or services."¹⁷⁵ This commentator has also noted four related issues where factors for

for other purposes"). *But see* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 105 n.46 (1968) (noting that "[u]p to the present, the problem of differentiating between commercial and other communication has not in practice proved to be a serious one"). For an example of the uncertainty in the courts *compare* *Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1140 (3d Cir. 1982), *cert. denied*, 456 U.S. 975 (1982) ("[t]he Supreme Court has confined the category of 'commercial speech' to cases involving 'purely commercial advertising'") (quoting *Pittsburgh Press*, 413 U.S. at 384) *with* *SEC v. Lowe*, 725 F.2d 892, 900 (2d Cir. 1984) ("Unlike the Third Circuit in *Ad World* . . . we do not believe that the Supreme Court has limited commercial speech solely to product or service advertising"), *aff'd on other grounds*, ___U.S. ___ (June 10, 1985).

¹⁶⁹ See *Briggs & Stratton*, 539 F. Supp. at 1318, (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (advertisements on billboards); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 553 (1980) (advertisements promoting consumption of electricity); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (advertisement of legal services); *Carey v. Population Services International*, 431 U.S. 678 (1977) (advertisements of contraceptives); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (posting of real estate "For Sale" and "Sold" signs); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (prescription drug price advertising); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (advertisements of abortion services). See also *Lowe*, 725 F.2d at 904 (Briant, J., dissenting) ("[t]he concept of commercial speech has now been confined to naked advertising and closely related methods of commercial solicitation"); *Ad World*, 672 F.2d at 1140 (noting the Supreme Court has confined commercial speech cases to those involving advertising). *But see* *Lowe*, 725 F.2d at 900 (holding that the Court has not limited commercial speech cases solely to advertising).

¹⁷⁰ Comment, *First Amendment Protection For Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 n.1 (1976) ("Commercial advertising, or 'commercial speech,' cases have recently been prominent in the Supreme Court's docket.") [hereinafter cited as Comment, *First Amendment Protection for Commercial Speech*].

¹⁷¹ *Id.* at n.2, (citing *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976); *FTC v. National Comm'n on Egg Nutrition*, 517 F.2d 485, 489 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976)).

¹⁷² *Id.* (citing *State v. Cardwell*, 539 P.2d 169, 22 Or. App. 242 (1975)).

¹⁷³ *Id.* (citing *Howard v. State Dep't of Highways*, 478 F.2d 581 (10th Cir. 1973) (regulation of placement of commercial billboards)).

¹⁷⁴ *Id.* (citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (prescription drug price advertising); *Terminal-Hudson Elecs., Inc. v. Dep't of Consumer Affairs*, 407 F. Supp. 1075 (C.D. Cal. 1976), *vacated*, 426 U.S. 916 (1976) (advertising prices and places to purchase corrective eyeglasses)).

¹⁷⁵ *Id.* (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975) (abortion advertisements); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (job advertisements in sex-designated columns)).

analyzing advertising cases also apply.¹⁷⁶ Thus, according to this commentator, Briggs' speech is correctly classified as commercial speech only if it can be characterized as a form of advertising, or as communication raising a related issue appropriate for commercial speech analysis.

Briggs' one-word answers to the boycott questionnaire do not appear to advertise a product or service.¹⁷⁷ Briggs' speech also does not seem to fall within any of the previously defined related issues.¹⁷⁸ Recently, however, the Second Circuit found commercial speech analysis appropriate for a fifth related issue. In *SEC v. Lowe*,¹⁷⁹ the majority held an investment advisor's newsletter to be commercial speech.¹⁸⁰ The court justified enjoining publication of the newsletter by characterizing the advisor's activities as a profession, noting his criminal history, and concluding that his publications were "potentially deceptive commercial speech."¹⁸¹

¹⁷⁶ Comment, *First Amendment Protection For Commercial Advertising*, *supra* note 170, at 206 n.15. The four related issues are: "the first amendment implications of governmental regulation of securities sales and promotion; the first amendment standard applicable in assessing governmental regulation of speech related to antitrust or unfair trade practices; the first amendment status of business credit reports; [and] the first amendment protection of credit reports on private individuals." *Id.* (citations omitted).

¹⁷⁷ See *supra* note 108.

¹⁷⁸ The first related issue deals with first amendment protection for a corporate press report. See, e.g., *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1306 (2d Cir. 1971) (court characterizing a corporate press report as being in the same category as corporate registration statements and prospectuses). In *Briggs*, the letter sent to the Syrian distributor was a private communication, not intended for the public. See *supra* note 108.

The third and fourth related issues deal with first amendment protection for credit reports. See, e.g., *Wortham v. Dun & Bradstreet, Inc.*, 399 F. Supp. 633, 639 (S.D. Tex. 1975) (court held a mercantile reporting agency's credit reports were not entitled to any federal first amendment protection) (In *Wortham*, the agency maintained national offices and distributed credit reports to paid subscribers throughout the country); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976) (court held consumer credit reports were commercial speech under the Supreme Court's *Bigelow* decision). Unlike the commercial actors in these cases, Briggs is not in the business of distributing information, and its communication was not published for sale. See *supra* notes 102 and 108. At the very least, Briggs' speech was not issued for the commercial reasons identified by the *Wortham* court.

The second related issue deals with first amendment protection for a speaker involved in unfair trade practices. In *Holiday Magic, Inc. v. Warren*, 357 F. Supp. 20 (E.D. Wis. 1973), *vacated*, 497 F.2d 687 (7th Cir. 1974), the plaintiff was promoting an illegal pyramid distribution scheme. Plaintiff argued that, as mere promotion, it was entitled to full first amendment protection. *Id.* at 24. However, the court held that the plaintiff did more than merely advocate the scheme, but also invited participation, organized, advertised, and implemented the prohibited activity. *Id.* at 24-26. Similarly, Briggs was seeking first amendment protection for an illegal trade practice (furnishing information about its business relationships with a friendly boycotted country to a boycotter, prohibited by the EAA). However, unlike the plaintiff in *Holiday Magic*, Briggs' speech was not "solicitation designed to obtain . . . immediate financial participation." *Holiday Magic*, 357 F. Supp. at 26. Briggs' letter does not solicit the Syrian distributor or the Syrian government, it merely responds to a request to identify itself. See *supra* note 108.

¹⁷⁹ 725 F.2d 892 (2d Cir. 1984), *aff'd on other grounds*, —U.S. — (June 10, 1985).

¹⁸⁰ *Id.* at 901.

¹⁸¹ *Id.* at 900-01.

Many suits analyzed as commercial speech cases have involved professions and the possible deception of the public.¹⁸² Yet in *Briggs*, the speaker was not a professional,¹⁸³ and its letter was not in a position to deceive the U.S. public.¹⁸⁴ Briggs' communication was not aimed at U.S. consumers, but at a foreign sovereign.¹⁸⁵ Thus, Briggs' expression does not fall within the related issue raised in *Lowe*.

The Seventh Circuit in *Briggs* did not characterize Briggs' speech as advertising.¹⁸⁶ The court did not find that Briggs' speech fell within any established related issue.¹⁸⁷ Instead, the court issued a broad holding that communication which pertains to commercial transactions is commercial speech.¹⁸⁸ While the Supreme Court held in *Bolger* that the essence of commercial speech was that it only proposed a commercial transaction,¹⁸⁹ the Seventh Circuit in *Briggs* ruled that "[t]he hallmark of commercial speech is that it pertains to commercial transactions, whether those proposed through product advertising . . . or implicated in some other manner."¹⁹⁰

Under the Seventh Circuit's broad definition of commercial speech, any activity which pertains to or implicates a commercial transaction deserves a lower level of first amendment protection. Since a commercial actor's speech is usually referable to some type of commercial transaction, such actors would never receive the higher level of protection afforded conventional speech. According to the Seventh Circuit, a commercial actor's economic interests dwarf any accompanying interest in promoting the truth about its business activities.¹⁹¹ This broad formulation is at odds with Supreme Court decisions granting full first amendment protection to persons whose expression is merely related to their commercial activity.¹⁹² Briggs argued in its Petition for Writ of Certiorari that

¹⁸² See, e.g., *Virginia Board*, 425 U.S. 748 (pharmacists); *Bates*, 433 U.S. 350 (lawyers); *Friedman v. Rogers*, 440 U.S. 1 (1979) (optometrists). Yet Briggs was not involved in a profession, and was not in a position to deceive the public. See *supra* notes 102 and 108. Its communication was aimed at a sovereign government, not U.S. consumers. See *supra* note 108.

¹⁸³ See *supra* note 102.

¹⁸⁴ Briggs' communication did not involve American citizens. See *supra* notes 104-13 and accompanying text.

¹⁸⁵ *Id.*

¹⁸⁶ See *Briggs & Stratton*, 728 F.2d at 915-18.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 917.

¹⁸⁹ *Bolger*, 463 U.S. at 66, (citing *Pittsburgh Press*, 413 U.S. at 385 (1973)).

¹⁹⁰ *Briggs & Stratton*, 728 F.2d at 917-18.

¹⁹¹ See *Briggs & Stratton*, 728 F.2d at 917, where the court rejected Briggs' argument that its interest in answering the questionnaire was to promote the truth about its business relationships.

¹⁹² "Commercial gain is no doubt the primary purpose of many involved in labor disputes and of innumerable authors, journalists, dramatists and others who earn their livelihood through expression that is unquestionably entitled to First Amendment protection." *Holiday Magic*, 357 F. Supp. at 25, (citing *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Smith v. California*, 361 U.S. 147 (1959); *Cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)).

a broad spectrum of speech would be denied constitutional protection under the Seventh Circuit's holding.¹⁹³

B. *The Constitutional Standard for Government Restriction of Commercial Speech*

Assuming that Briggs' communication was commercial speech, the next issue raised by *Briggs* is whether the district court correctly applied the *Central Hudson* commercial speech standard. Before applying this test, the district court in *Briggs* examined pre-*Central Hudson* commercial speech cases. The court's review of these past Supreme Court decisions was pronounced.¹⁹⁴ While a review of prior decisions is often useful in distilling appropriate legal principles, in *Briggs* it was unnecessary; the Supreme Court had already devised a specific test for determining the constitutionality of government restraints on commercial speech.¹⁹⁵ The district court did not criticize the *Central Hudson* test for omitting or distorting prior precedent. Thus, the court's consideration of pre-*Central Hudson* decisions appears to have been unnecessary.

The district court's discussion of pre-*Central Hudson* precedent creates the impression that Briggs' claim is weak. For example, the court referred to a single footnote from a pre-*Central Hudson* case which recognized the "relative novelty of First Amendment protection for such speech."¹⁹⁶ The court also included a pre-*Central Hudson* warning that courts "act with caution in confronting First Amendment challenges to economic legislation that serves legitimate regulatory interests."¹⁹⁷ The court deduced that this warning must be heeded because of the context in which Briggs' claim arose.¹⁹⁸ Here, the district court suggests that Briggs' claim is out of place because it challenges a statute which only bars the flow of information concerning business relationships with a boycotted country, not the flow of price and product information to purchasers of Briggs products.¹⁹⁹

¹⁹³ Petition For A Writ Of Certiorari To The U.S. Court Of Appeals For The Seventh Circuit, at 8, *Trane Company v. Baldrige*, 728 F.2d 915 (1984). Briggs argued: "Examples of speech which the government might then suppress include protests of contractors to the boycott of the Soviet pipeline, comments of grain producers about restrictions on grain exports, [and] contributions of manufacturers to the tariff and free-trade debate . . ." *Id.*

¹⁹⁴ *Briggs & Stratton*, 539 F. Supp. at 1317-19. The opinion contains five paragraphs on pre-*Central Hudson* decisions and five invoking and applying the *Central Hudson* test. *Cf. Trane*, 552 F. Supp. 1378 (W.D. Wis. 1983), where the court devoted nine paragraphs to its *Central Hudson* inquiry and none to prior cases.

¹⁹⁵ *See Trane*, 552 F. Supp. 1378 (W.D. Wis. 1983), where the court held plaintiff's answers to a boycott questionnaire to be commercial speech without any comment on pre-*Central Hudson* precedent.

¹⁹⁶ *Briggs & Stratton*, 539 F. Supp. at 1318, (quoting *Friedman*, 440 U.S. 1, 10-11 n.9).

¹⁹⁷ *Id.*

¹⁹⁸ *Briggs & Stratton*, 539 F. Supp. at 1318.

¹⁹⁹ *Id.* The court seemed to hold that a commercial speech claim is only appropriate in the latter context. *See id.*

These prefatory remarks detract from what should be a focused, rigorous application of the *Central Hudson* test. Nothing in *Central Hudson* states that relative novelty should be part of a court's reason for decision. Furthermore, the court failed to follow a Supreme Court precedent that one who restricts speech has the burden of justifying it.²⁰⁰ The court's decision to act with caution when confronted with a first amendment challenge appears to shift this burden to the party seeking first amendment protection. Further, one can argue that the *Central Hudson* test accurately reflects the amount of caution the Supreme Court deemed appropriate. Finally, the court's finding that Briggs' claim is out of place is irrelevant to the *Central Hudson* inquiry; as long as the communication is neither misleading nor related to unlawful activity, it falls within first amendment protection.²⁰¹

Ultimately, the district court's commentary on pre-*Central Hudson* decisions affected its application of the *Central Hudson* test to Briggs' claim. For example, the district court did not address any of the issues presented by the first part of the *Central Hudson* test. Initially, the test requires the court to determine if the communication is misleading or related to unlawful activity and therefore undeserving of commercial speech protection.²⁰² The district court issued only the unresponsive finding that if Briggs' proposed communication was "a subject only marginally affected with First Amendment concerns," then it could be subject to regulation.²⁰³ This finding does not address the first element of the *Central Hudson* test. The court did not examine whether Briggs' proposed communication was misleading or related to an unlawful activity. Rather, it continued to address concerns raised in its prefatory remarks: the marginal applicability of the First Amendment to Briggs' speech, and the legitimacy of state regulation of such conduct.²⁰⁴

The district court directly addressed the second part of the *Central Hudson* test, which calls for an inquiry into the substantiality of the government's interest. The court held that the state's interest was substantial.²⁰⁵ Yet the court failed to examine and define carefully the governmental interest at stake.²⁰⁶ Thus, the court's holding of substantiality should be questioned.

²⁰⁰ *Bolger*, 463 U.S. at 71.

²⁰¹ See *Central Hudson*, 447 U.S. at 564.

²⁰² *Id.*

²⁰³ *Briggs & Stratton*, 539 F. Supp. at 1319, (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 459 (1978)).

²⁰⁴ *Id.* at 1318-19.

²⁰⁵ *Id.* at 1319.

²⁰⁶ But cf. *Dresser*, 549 F. Supp. at 110, where the district court carefully analyzed the government's interest. The court described U.S. regulations on the export of goods and technology to the Soviet Union as "part of a major foreign policy exercise." *Id.* The court found that the purpose behind the foreign policy action was to effectuate the U.S. response to events in Poland declared unacceptable by President Reagan. *Id.* The court held that the United States had a "grave interest" in enforcing these

The district court began by noting that delicate foreign policy questions were involved.²⁰⁷ Standing alone, however, it is doubtful that the mere existence of foreign policy questions justifies governmental speech restrictions.²⁰⁸ In its attempt to identify a specific foreign policy goal of the government, the court quoted from the Senate Report, noting "the interest of the government in forestalling attempts by foreign governments to 'embroil American citizens in their battle against others by forcing them to participate in actions which are repugnant to American values and traditions.'"²⁰⁹

The government's interest, as expressed in the Senate Report, is vague and undefined. The statement that the government has an interest in preventing U.S. persons from being forced to take actions "repugnant to American values and traditions"²¹⁰ invites further inquiry. First, one may ask whether, in fact, any U.S. person has been forced or coerced into compliance with the Arab boycott. Many firms have chosen to preserve their business relationships with Israel despite losing a significant amount of Arab business.²¹¹ Further, many firms have been able to continue doing business with Arab nations despite continued business ties to Israel.²¹² In *Briggs*, the parties stipulated that Briggs intends to trade with persons in Israel in the future and to conduct its business without regard to the Arab League's General Principles.²¹³ In sum, the district

regulations "which are, in [the government's] view, essential to the accomplishment of important foreign policy objectives." *Id.* (citation omitted). Further, the court held that plaintiff's requested relief would inure "to the potentially serious detriment of the United States." *Id.* The court concluded that such relief was not in the public interest, and that plaintiff's rights could be protected within the administrative process without interfering with U.S. foreign policy concerns. *Id.*

²⁰⁷ *Briggs & Stratton*, 539 F. Supp. at 1319.

²⁰⁸ *Cf. Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("[S]imply because a statute deals with foreign relations [does not mean that Congress] can grant the Executive totally unrestricted freedom of choice."). See also L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 252-53 (1972), commenting that no "particular exercise of foreign affairs power [is] exempt from limitations in favor of individual rights." *Id.* at 253. Further, Henkin comments that the first amendment freedoms, in addition to being free from congressional abridgement, "are equally safe from infringement by treaty, Executive agreement or action, or court order." *Id.* at 254. Henkin notes that this proposition is generally assumed despite the absence of a "clear holding by the Supreme Court, and no discussion of the issue as it relates to foreign affairs." *Id.* at 486 n.7.

²⁰⁹ *Briggs & Stratton*, 539 F. Supp. at 1319, (quoting S. Rep. No. 104, 94th Cong., 1st Sess. 21 (1977)).

²¹⁰ *Id.*

²¹¹ See A. LOWENFELD, *supra* note 2, at 319-21. For example, Ford Motor Company was barred from making sales to any of the boycotting nations after choosing to build an assembly plant in Israel. *Id.* at 319. RCA declined to terminate a distribution arrangement in Israel and lost \$9 million in business with the Arab world. *Id.* at 320.

²¹² See Williams, *supra* note 22, at 821. For example, the Arab League allows members to buy military equipment from the same U.S. companies that provide weapons to Israel. *Id.* In addition, international hotel chains, other public service companies, tourist related firms, pharmaceutical companies, and manufacturers of unavailable spare parts maintain trade with the Arab world despite being blacklisted. *Id.*

²¹³ Brief In Support of Plaintiffs Motion For Summary Judgment at 12, *Briggs & Stratton Corp. v. Baldrige*, 539 F. Supp. 1307 (E.D. Wis. 1982) (Stipulation No. 21). Briggs' statement is understandable

court failed to show that coercion exists and that the government has a substantial interest in curtailing it.

Absent coercion, one may ask what U.S. ideals are in danger. The district court failed to define these ideals with any particularity. In seeking the EAA's underlying U.S. tradition or value, one might examine the EAA's statutory language. The EAA's declaration of policy states that "[i]t is the policy of the United States to oppose . . . boycotts . . . imposed by foreign countries against other countries friendly to the United States"²¹⁴ This statutory policy of opposition includes requiring "United States persons . . . to refuse to take actions, including furnishing information . . . which have the effect of furthering or supporting the . . . boycotts"²¹⁵ Thus, The EAA's language seems to support one governmental interest: preventing U.S. persons from becoming involved in boycotts against nations friendly to the United States.

In *Briggs*, the friendly nation is Israel, and a U.S. tradition of support for Israel appears to exist.²¹⁶ Yet one court has ruled that a U.S. tradition of support for one group of people was outweighed by other governmental interests.²¹⁷ Furthermore, one commentator has argued that the substantiality of the government's interest in restricting speech "depends on the gravity of the harm the state is seeking to avert and the likelihood of its occurrence."²¹⁸ For example, prohibiting the transfer of information concerning a destructive weapon to a terrorist group during wartime would be a substantial government interest, while prohibiting the transfer of freely available data having peaceful applica-

because trade with Israel does not always result in loss of Arab business. See Williams, *supra* note 22, at 821. See also *supra* note 30.

²¹⁴ The Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503, codified at 50 U.S.C. § 2402(5)(A) (1982).

²¹⁵ *Id.* at § 2402(5)(B).

²¹⁶ See 13 Weekly Comp. Pres. Docs. 898 (1977) for President Carter's remarks on signing the Export Administration Amendments of 1977 into law ("My concern about foreign boycotts, stemmed, of course, from our special relationship with Israel, as well as from the economic, military and security needs of both our countries.").

²¹⁷ See, e.g., *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1977), denying Eskimo's request for an injunction against government interference with their whale hunting, despite a U.S. trust obligation recognizing Eskimo whaling rights established by statute since 1884, Congressional intent to preserve the U.S. obligation, and Department of Interior officials' statements that the trust obligations required an objection. *Id.* at 956, 953, 955 n.11. Here, the court held that these governmental interests were outweighed by the government's interest in observing the International Whaling Commission's decision in July, 1977, eliminating the Eskimo's subsistence hunting exemption. *Id.* at 952, 956 n.13. The court held that U.S. objection to the Commission's action would jeopardize the U.S. government's attempt to conserve whales under the proposed renegotiation of the International Whaling Convention. *Id.* at 956 n.13.

²¹⁸ Alexander, *Preserving High Technology Secrets: National Security Controls On University Research & Teaching*, 15 LAW & POL'Y INT'L BUS. 173, 205 (1983) (citing *Dennis v. U.S.*, 341 U.S. 494, 510 (1951)). This standard is usually applied in conventional speech analysis, though apparently not adopted by the Supreme Court in commercial speech cases. See *supra* note 147. In his article, Alexander deals with freedom of speech in the transfer of technical data in the university setting. See Alexander, *supra*.

tions would not.²¹⁹ The commentator noted that "[t]he category of least harmful information would include data transfers with foreign policy implications."²²⁰ Another commentator has argued for a sliding scale approach, commenting that the EAA presents the weakest case for government export controls because much of the restricted goods and data have broad civilian uses which do not threaten national security.²²¹ In *Briggs*, the court did not find that if Briggs were permitted to answer the questionnaire, U.S. national security would be jeopardized.²²² The court did not hold that allowing Briggs to communicate with its Syrian distributor was likely to cause harm to Israel.²²³

The district court tried to bolster its reasoning by weighing the government's interest with the marginal applicability of the first amendment to Briggs' claim. Yet the conclusion that the government's interest "outweigh[s] the marginal applicability of the first amendment"²²⁴ is inappropriate. The applicability of the first amendment is supposed to be measured only by the first element of the *Central Hudson* test.²²⁵ If the expression is truthful and concerns lawful activity, it falls within the amendment's constitutional protection.²²⁶

The district court's balancing approach resembles the commercial speech test announced in 1975 in *Bigelow v. Virginia*.²²⁷ In *Bigelow*, the Supreme Court held that the government's power to restrict commercial speech containing "factual material of clear 'public interest'" depended upon a weighing of the speech's

²¹⁹ *Id.* at 206.

²²⁰ *Id.* at 207. *But see Dresser*, 549 F. Supp. at 110 (noting the government's grave interest in prohibiting exports of goods and technology to the Soviet Union).

²²¹ See Greenstein, *National Security Controls on Scientific Information*, 23 JURIMETRICS J. 50, 82-83 (1982), *quoted in* Moyer & Mabry, *supra* note 79, at 123 n.741. For the shortcomings of export restrictions as a foreign policy tool generally, see Donovan, *The Export Administration Act of 1979: Refining U.S. Export Control Machinery*, 4 B.C. INT'L & COMP. L. REV. 77, 91 (1981); Comment, *The Export Administration Act of 1979: Latest Statutory Resolution of the "Right To Export" Versus National and Foreign Policy Controls*, 19 COLUM. J. TRANSNAT'L L. 255, 293-97 (1981).

²²² *Cf. Haig v. Agee*, 453 U.S. 280, 308 (1981), where the Court held petitioner's speech "jeopardized the security of the U.S. . . . [and created] serious problems for American foreign relations and foreign policy." *Id.* In *Haig*, Philip Agee, a former CIA official, went abroad and repeatedly disclosed intelligence operations and names of intelligence personnel. *Id.* at 284-85. The Court held that the Passport Act of 1926, authorizing the revocation of Agee's passport — resting in part on the content of his speech — did not violate Agee's first amendment rights. *Id.* at 308.

²²³ Contrarily, both parties stipulated that Briggs intended to trade with Israel in the future and to disregard the Arab boycott. See *supra* note 30. *Cf. Dresser*, 549 F. Supp. at 110, where the district court explicitly stated that permitting Dresser to ship restricted goods would "serve to benefit them . . . to the potentially serious detriment of the United States." *Id.*

²²⁴ *Briggs & Stratton*, 539 F. Supp. at 1319.

²²⁵ See *Central Hudson*, 447 U.S. at 564.

²²⁶ *Id.*

²²⁷ 421 U.S. 809, 822, 826 (1975). Bigelow was the managing editor of a Virginia newspaper. The paper displayed advertisements of a for-profit New York abortion referral service. Both abortions and for-profit medical referral services were illegal in Virginia, but legal in New York. Bigelow was convicted for violating a statute making it illegal to "encourage or prompt the procuring of an abortion." *Id.* at 812-13.

first amendment value against the government's police power interest.²²⁸ Yet this approach was abandoned by the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.²²⁹ The district court's use of a balancing test provides additional evidence that factors other than *Central Hudson* affected its decision. In sum, one can argue that the Seventh Circuit should not have affirmed the district court's opinion without some inquiry into the substantiality of the government's interest.

The court's failure to identify a specific foreign policy goal may have resulted from a fear of operating outside its judicial competence.²³⁰ The idea that certain legal questions are beyond a court's competence and therefore nonjusticiable is contained in the political question doctrine.²³¹ Yet courts have had difficulty in precisely defining which types of cases present nonjusticiable political questions. In *Baker v. Carr*,²³² the Supreme Court held that any case involving a political question exhibits one of six characteristics:

(a) a textually demonstrable constitutional commitment to a coordinate political department; b) a lack of judicially discoverable and manageable standards for resolving it; c) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; d) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; e) an unusual need for unquestioning adherence to a political decision already made; or f) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²³³

²²⁸ *Id.*

²²⁹ Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 726-30 (1982).

²³⁰ See *Briggs & Stratton*, 539 F. Supp. at 1319 ("The state interest . . . involv[es] delicate foreign policy questions . . ."). When the Supreme Court has addressed the issue of justiciability, it has used similar language. See, e.g., *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) ("[T]he very delicate, plenary and exclusive power of the President . . . in the field of foreign relations."); See also *C. & S. Air Lines v. Waterman Corp.*, 333 U.S. 103 (1948). In this case, the Court stated:

[T]he very nature of executive decisions as to foreign policy is political, not judicial They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id. at 111.

²³¹ In its broadest formulation, the doctrine suggests that certain subject matter is inappropriate for judicial consideration. Nowak, *CONSTITUTIONAL LAW* 107 (1983). However, Professor Tribe has commented that the political question doctrine is in a state of confusion, containing strands of at least three different theories. Tribe, *AMERICAN CONSTITUTIONAL LAW* 7 n.1 (1978).

²³² 369 U.S. 186 (1962).

²³³ *Id.* at 217.

A more recent Supreme Court decision appeared to reduce *Baker's* six factors to three.²³⁴

The *Briggs* case arguably calls into question many of the *Baker* factors. Yet the confused state of the doctrine makes it difficult to say if the district court should have refrained from reviewing *Briggs*. For example, an important dictum in *Baker* noted that not every political case or controversy is beyond judicial comprehension.²³⁵ Furthermore, Professor Scharpf has commented that where individual rights are at stake, the doctrine will not be applied.²³⁶ Another commentator has argued that the divergency of political question doctrine interpretations means that lower court judges are free to interpret the doctrine as they wish.²³⁷

The district court did not address whether the foreign policy concerns raised by the government were substantial enough to prevent review of the case. The court did find, however, that these concerns were substantial enough to qualify as a substantial government interest. Yet the court did not define the point at which a foreign policy interest, sufficiently substantial for *Central Hudson* purposes, crosses the threshold and becomes nonjusticiable. In sum, the court's analysis of substantiality suffers from reliance upon the Senate Report's vague language, and a failure to identify a specific foreign policy interest.

The court's analysis of the last two *Central Hudson* factors was affected by its analysis of the other two factors. The third *Central Hudson* factor requires that the restriction directly advance the state interest involved.²³⁸ The regulation may not be sustained if it provides "ineffective or remote support for the government's purpose."²³⁹ As the court observed, the regulations directly advance the interest in "prevent[ing] American companies from being used as agents of the boycotting countries and . . . in keeping Americans out of the boycott struggle."²⁴⁰ The success of the Commerce Department's Office of Antiboycott Compliance likely meets the *Central Hudson* criteria of providing more than ineffective or remote support for these governmental purposes.²⁴¹ These

²³⁴ *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring) (plurality opinion).

²³⁵ 369 U.S. at 211.

²³⁶ Scharpf, *Judicial Review And The Political Question: A Functional Analysis*, 75 YALE L.J. 583, 584 (1966).

²³⁷ Gordon, *American Courts, International Law, and 'Political Questions' Which Touch International Relations*, 14 INT'L LAW. 297, 315 (1980) ("[L]ower court judges are safe in the knowledge that their construction . . . is unlikely to conflict with a clear holding by the Supreme Court . . .") *Id.*

²³⁸ *Central Hudson*, 447 U.S. 564.

²³⁹ *Id.*

²⁴⁰ *Briggs & Stratton*, 539 F. Supp. at 1319.

²⁴¹ EXPORT ADMIN. ANNUAL REPORT, *supra* note 76. 290 investigations were completed by the OAC during fiscal year 1983, compared with 124 during fiscal year 1982. *Id.* at 73. In 53 cases, the OAC reached settlements and imposed fines totalling \$1,378,750, compared with 43 settlements and the imposition of fines totalling \$548,750 in fiscal year 1982. *Id.*

purposes are only relevant, however, if they qualify as a substantial government interest. If the government's only substantial interest is support of Israel, the court must inquire whether the regulations preventing Briggs from responding to a boycott questionnaire effectively supports Israel.

Moreover, the efficacy of the regulations in preventing information from flowing to boycotters is doubtful. The parties in *Briggs* argued that some of the information called for in the questionnaire was publicly available from other sources.²⁴² For example, information regarding the location of Briggs' plants and general offices can be gleaned from its Annual Report.²⁴³ Questions regarding its trademarks, patents, and ownership of property can be procured from various government agencies. The ability of boycotters to obtain desired information in spite of the regulations undercuts the court's argument that the regulations directly advance the interest in stopping the flow of information to Arab governments.

Finally, the court addressed the fourth *Central Hudson* factor, inquiring whether the government's interest could be served by a more limited restriction on commercial speech.²⁴⁴ If so, "the excessive restrictions cannot survive."²⁴⁵ Here, the district court argued that if the regulations were narrowed to prohibit only valuable information and information not publicly available, it would be "a difficult, if not impossible regulatory task" which would end up "frustrating the governmental interest."²⁴⁶

The court's analysis of the fourth factor, however, is incomplete. It is the government's burden to show a more limited restriction on speech is impracticable or unavailable.²⁴⁷ In *Central Hudson*, the Court struck down a state regulation which prohibited an electric utility from advertising to promote the use of electricity.²⁴⁸ The Court held that the regulation suppressed speech "that in no way impair[ed] the State's interest in energy conservation"²⁴⁹ The Court suggested that less restrictive means of furthering the state's energy policy existed. One such means would require that advertisements include information about the relative efficiency and expense of the offered service.²⁵⁰

In *Briggs*, however, the district court did not inquire whether the Commerce Department had shown that no less restrictive alternatives existed. Instead, the

²⁴² See Brief In Support of Plaintiffs' Motion For Summary Judgment at 32, *Briggs & Stratton*, 539 F. Supp. at 1307.

²⁴³ See ANNUAL REPORT, *supra* note 102, at 25.

²⁴⁴ *Briggs & Stratton*, 539 F. Supp. at 1319.

²⁴⁵ *Central Hudson*, 447 U.S. at 564.

²⁴⁶ *Briggs & Stratton*, 539 F. Supp. at 1319.

²⁴⁷ See *supra* note 200.

²⁴⁸ See *Central Hudson*, 447 U.S. at 557.

²⁴⁹ *Id.* at 570.

²⁵⁰ *Id.* at 571.

court merely suggested that one alternative — narrowing the scope of the regulations — would be difficult. The court did not consider whether the government could oppose the Arab boycott in ways that would leave a U.S. firm free to communicate with a boycotting nation. One could argue that the government's interest could be better served by means that did not restrict a commercial actor's free speech at all. For example, the U.S. government could refuse to trade with various Arab countries. Such trade restrictions would be an in-kind response to the Arab boycott of Israel, a clear show of support for Israel, and would preserve a two hundred year tradition of controlling U.S. exports in peacetime.²⁵¹ More importantly, the foreign policy would not entail a restriction on free speech. While politicians may not consider this form of less restrictive alternative appropriate, courts should account for such alternatives in deciding the constitutionality of speech restrictions. In *Briggs*, however, the district court failed to examine these types of less restrictive alternatives.

V. CONCLUSION

Briggs' petition for writ of certiorari presented the Supreme Court with the opportunity to define precisely "commercial speech." The Court could have addressed the unique question of whether conventional speech, arising in a commercial context and primarily motivated by economic self-interest, deserved a lower level of first amendment protection. Unlike nearly every previous Supreme Court case, Briggs' proposed communication did not involve advertising. Further, Briggs' speech did not promote a product or service or propose a commercial transaction, factors present in most, if not all, previous cases. Finally, Briggs' communication did not appear to raise any related issues appropriate for commercial speech analysis established by courts or commentators.

Briggs' petition also presented the Court with the opportunity to review the lower courts' holdings. For example, the Court might have inquired whether the Seventh Circuit's holding was correct that the hallmark of commercial speech is that it merely pertains to commercial transactions. Since the Court had held eight months earlier that the core notion of commercial speech was expression which did no more than propose a commercial transaction, such a review was appropriate. In addition, the Court might have inquired whether the district

²⁵¹ Moyer & Mabry, *supra* note 79, at 4 n.8. The commentators cited the colonies' boycotts of British goods carrying special taxes. *Id.* An alternative to a U.S. boycott of Arab goods would be a policy of denying export licenses for non-communicative U.S. goods. In the past seven years, the U.S. has controlled its own exports on ten different occasions to express opposition to other countries' policies. *Id.* at 4–5. Examples of such restrictions include: shipments of wheat, corn, stuffed Misha bears, teeshirts, blue jeans and frozen chickens to the Soviet Union in response to the Soviet invasion of Afghanistan; exports of crime control equipment to Uganda in response to human rights violations; and exports of certain aircraft to Iraq, South Yemen, Libya, and Syria in response to their support for terrorism. *Id.* at 5–7 nn.13–23.

court correctly applied the *Central Hudson* test to Briggs' communication. In light of the district court's significant use of pre-*Central Hudson* precedent, and its cursory examination of the government's interest, such an inquiry would have been valuable.

Finally, the *Briggs* case presented the Court with the opportunity to discuss broader commercial speech issues. For example, the Court might have addressed whether the *Central Hudson* test was meant for all types of commercial speech. Perhaps the *Central Hudson* test is best reserved for commercial speech involving advertising and promotion of commercial sales and transactions. If so, the Court might have discussed whether a different standard is required for communication merely arising in a commercial context, and created a new standard for "secondary" commercial speech. Further, the Court might have discussed the types of governmental interests that qualify as substantial, and whether implication of a foreign policy is sufficient in itself, without examination, to outweigh an individual's commercial speech interest.

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